



COMMUNITY DEVELOPMENT DEPARTMENT

CITY HALL

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HOUSING COMMISSION STAFF REPORT

Meeting: August 11, 2016

Subject

Proposed Amendments to Policy and Procedures Manual for Administering Deed-Restricted Affordable Housing Units.

Recommended Action

Staff recommends that the Housing Commission review the proposed amendments and adopt Resolution No. 16 - ___, recommending that the City Council adopt the proposed amendments to the Policy and Procedures Manual shown in Attachment B to this report.

Description

Pursuant to Chapter 19.172 of the Cupertino Municipal Code, the City administers a Below Market Rate Housing Program (the "BMR Program") to provide housing affordable to a broad range of households with varying income levels within the City. The City administers the BMR Program using the guidelines included in the *Policy and Procedures Manual for Administering Deed Restricted Affordable Housing Units* (the "BMR Manual"). The City contracts with West Valley Community Services ("WVCS") to manage the BMR Program, including the determination of eligibility of potential homebuyers.

The City has become aware of various issues regarding the calculation of income of applicants to the BMR Program. In addition, in the course of an appeal from a BMR Program applicant, several policy changes were suggested to the Housing Commission. The City Council has also asked that the Commission consider modifications to the preferences policy. Consequently, staff recommends that the BMR Manual be amended as described in this report. The specific proposed amendments are shown in Attachment B to this report.

On August 2, 2016, the City Council approved changes to the BMR Manual regarding appeal procedures and conflict of interest policies recommended by the Housing

Commission at its June 23rd meeting, with the exception of one change to the appeal process. Instead of the appeal being decided by a hearing officer at the second level, the City Council will hear the second level appeal itself. Those previously approved changes are incorporated into the BMR Manual attached as Attachment B to this report.

Recommended Changes to BMR Manual

Method of Calculating Income

The proposed changes to the method of calculating income are discussed in detail in the staff report regarding the appeal of Ms. Kimberly Sandstrom. Exhibit B shows the precise proposed changes.

Waiting List

BMR Program applicants apply once a year during the month of October. WVCS currently reshuffles its waiting list of BMR Program applicants after the application period ends. This can result in those who have been on the waiting list for years receiving no priority and ending up at the bottom of the waiting list, while those who have just applied may go to the top of the list. Neither City staff nor WVCS staff are aware of the policy justification for this approach, which is unusual. The City and WVCS already require those on the list to reapply each year to ensure that the list remains current.

Consequently, staff recommends that WVCS freeze the current waiting list in its present order and not reshuffle the waiting list within each priority category going forward. This would allow those who are on the waiting list to work their way up the list if they are on the list for a significant period of time. Each applicant will have to reapply each year to remain on the waiting list. If the applicant is already on the list and reapplies, the applicant may keep their position on the waiting list (provided the applicant continues to be eligible for the BMR Program and their priority points remain unchanged). Applicants who are no longer income eligible or who do not reapply will be removed from the waiting list each year. If an applicant loses any priority points since the last year's application, that applicant will be assigned to the next appropriate priority group and will receive a waiting list number within that priority group based on their date of their initial application. If there are other applicants on the list in the lower priority group who initially applied during the same year, the applicant who lost the priority point(s) will be placed below the person who was already in that priority group during the previous year.

WVCS will then conduct a lottery for the new applicants. New applicants will be added to the bottom of the list of the priority group for which they are eligible, after applicants

who were on the list in previous years and continue to qualify. The lottery will be performed for the new applicants within each priority group to randomly assign each applicant a waitlist number. For example, a new applicant who qualifies for three priority points will be placed into the lottery with the other new applicants who qualify for three priority points and all of the new applicants will be placed in the order generated by the lottery below those who were already on the list within that priority group who continue to be eligible.

In addition, to track the applicants who potentially fall under the revised conflict of interest provisions adopted by the City Council, staff recommends that WVCS track each applicant's employer and position as a component of the waiting list.

Preference Policy

Currently, the BMR Program provides one point for applicants who live in the City and two points for applicants who work in the City. Applicants who both live and work in the City have the highest priority.

The City Council has suggested that the BMR Program provide an additional preference to city employees and to public school teachers who work in the City. Staff would recommend that this additional preference be expanded to include all public employees who work in the City of Cupertino. Eligible applicants would include income-eligible police officers, firefighters, teachers, and others who work for school districts, the City, or any other public agency located in the City. Expanding the eligibility for the preference would better comply with fair housing laws by not limiting the preference to certain occupations.

The preference would be accomplished by providing one additional preference point to applicants who meet these criteria. All applicants who work for public agencies in the City would then have three points, equivalent to current applicants who both live and work in the City. If an applicant both works for a public agency in the City and lives in the City, the applicant would have the highest priority.

Marketing of BMR Program

It was suggested that the City of Sunnyvale does a commendable job of marketing its BMR program to the public by holding open house presentations to introduce the program and listing information about available properties on its website. Additionally, the policies and codes that apply to the program are available on Sunnyvale's website. Proper marketing of BMR units is important and thus staff recommends that the City work with WVCS to improve the public's access to information about the City's BMR Program, in particular by including the Manual on the City's website.

Policy Changes Not Recommended

The following additional policy changes have been recommended to the Housing Commission. Given the increasingly contentious nature of housing determinations, staff does not recommend adoption because they raise serious legal issues. Although some agencies have adopted some of these policies, if challenged in an appeal in Cupertino, they could not be upheld.

Age-Related Priority Points

It was suggested that the City adopt priority points for age over 40, as the City does for applicants who live and/or work in the City.

Age-related priority points would violate state planning and zoning and fair housing laws. The City's BMR Program is adopted through its zoning ordinance; Government Code Section 65008(a)(1)(A) prohibits discrimination in planning and zoning based on age. Furthermore, the California Fair Employment and Housing Act (FEHA) (Cal. Gov't Code § 12955) prohibits discrimination on the basis of familial status, defined as families with children or pregnant women; and the federal Fair Housing Act (FHA) (Title VIII of the Civil Rights Act of 1968) similarly prohibits discrimination against families with children, including pregnant women. Housing constructed and maintained for seniors over age 55 is the only exception to this prohibition. Providing priority points based on age over 40 in housing not designed for seniors would discriminate against families with children and most pregnant women.

Head of Household

It was suggested that the City adopt a policy requiring that one adult member of the household act as the primary applicant for a BMR unit, even when the applicant household is made up of a couple.

It is unclear what would be the purpose of such a policy. Credit must be provided equally to co-applicants. Adopting this policy would have no substantive change because co-applicants are jointly and severally liable, regardless of who is listed as the "head of household". The City cannot require one applicant to assume all responsibility for the other applicant. Consequently, staff does not recommend adopting this policy.

Evidence of Six-Month Household Membership and City Residency

It was suggested that the City adopt a policy requiring the members of a household applying for a BMR unit to provide documentation to prove that the members of the household have lived together in the same home for at least six months prior to their

application and also that, if claiming City residency priority, that they have lived together in the City for at least six months.

“Durational preferences” such as this one – preferences requiring residency in an area for a certain period of time to be eligible for benefits -- are interpreted by the courts as violating the constitutional right to travel and so are strictly scrutinized by courts. HUD does not allow such preferences in federally subsidized housing. To survive challenges to a residency requirement based on the right to travel, the City would have to demonstrate a "compelling" purpose for the residency requirement and would have to demonstrate further that the residency requirement is "narrowly tailored" to advance that purpose. There is no evidence demonstrating a compelling purpose for this requirement, especially since the City gives a greater preference to those who work in the City.

Additionally, in *Santa Barbara v. Adamson*, the California Supreme Court held that local governments’ restricting who can or cannot live in the same household violates a person's right to privacy under Article 1, Section 1 of the California Constitution. (*Santa Barbara v. Adamson* (1980) 27 Cal.3d 123.) Requiring a certain household composition for a certain period of time might well violate the right to privacy as well as the right to travel.

The Housing Commission’s recommendations will be forwarded to the City Council for review and decision. Conforming changes must be made in the exhibits attached to the Manual. If the Housing Commission recommends approval of these proposed amendments, the conforming changes will be made prior to the Council hearing.

Sustainability Impact

None

Fiscal Impact

None

Reviewed by: Benjamin Fu, Assistant Director of Community Development

Approved for submission by: Aarti Shrivastava, Assistant City Manager

Attachments:

A – Draft Resolution No. 16 - ____.

B – Proposed Amendments to BMR Administrative Manual

C – BMR Administrative Manual redlines

Attachment A

RESOLUTION NO. 16-

**A RESOLUTION OF THE HOUSING COMMISSION OF THE CITY OF
CUPERTINO RECOMMENDING ADOPTION OF AMENDMENTS TO THE
POLICY AND PROCEDURES MANUAL FOR ADMINISTERING DEED
RESTRICTED AFFORDABLE HOUSING UNITS**

WHEREAS, the City of Cupertino (the "City") has since 1993 implemented an Office and Industrial Housing Mitigation Program and a Residential Housing Mitigation Program, described in the Housing Element of the General Plan, requiring the payment of housing mitigation fees by non-residential development and residential projects with six units or less, and requiring the provision of affordable housing in developments with seven units or more (the "Housing Mitigation Program"); and

WHEREAS, the Policy and Procedures Manual for Administering Deed Restricted Affordable Housing Units serves as the day-to-day operational manual for both City staff and its Below Market-Rate (BMR) program administrator for BMR units generated by the City's Housing Mitigation Program; and

WHEREAS, from time to time the Policy and Procedures Manual for Administering Deed Restricted Affordable Housing units is to be updated for clarity, to ensure consistency in review of applications, and to ensure compliance with state law; and

WHEREAS, the amendments to the Policy and Procedures Manual for Administering Deed Restricted Affordable Housing units are not a project because the adoption of the amendments to the Manual is an administrative activity that will not result in direct or indirect physical changes in the environment (Section 15378(b)(5)).

THEREFORE, BE IT RESOLVED that, based on the facts, exhibits, staff report, testimony, and other evidence submitted in this matter, the Housing Commission recommends that the City Council approve the amendments to the Policy and Procedures Manual for Administering Deed Restricted Affordable Housing Units as attached to this resolution and directs staff to make conforming changes in the exhibits to the Manual as required.

PASSED AND ADOPTED this 11th day of August 2016 at a regular meeting of the Housing Commission of the City of Cupertino by the following roll call vote:

Vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

ATTEST:

APPROVED:

Aarti Shrivastava, Assistant City Manager
Commission

Harvey Barnett, Chair, Housing