



## COMMUNITY DEVELOPMENT DEPARTMENT

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### CITY COUNCIL STAFF REPORT

Meeting: September 20, 2016

#### **Subject**

Appeal of Ms. Kimberly Sandstrom Regarding Eligibility to Purchase a Below Market Rate (BMR) Unit

#### **Recommended Action**

Approve the draft resolution regarding the appeal of Ms. Kimberly Sandstrom and affirming the recommendation of the Housing Commission regarding the eligibility of Ms. Sandstrom to purchase a BMR unit.

#### **Introduction**

Under 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"), which was approved by the City Council. The City contracts with West Valley Community Services ("WVCS") to manage the BMR Program, including the determination of eligibility of potential homebuyers.

Kimberly Sandstrom has appealed the finding by WVCS that she did not qualify to purchase a moderate income level BMR unit in the City because her annual gross income exceeded the maximum allowable income for a two-person household at a moderate income level in Santa Clara County. On August 11, 2016 the Housing Commission recommended to the City Council that it find that Ms. Sandstrom was ineligible to purchase a BMR home because, based on her application, her income exceeded the established income limit. (See Exhibit C.)

## **Background**

In January 2016 a BMR unit became available for sale. Ms. Sandstrom was highest on the waiting list established by WVCS for purchase of the unit, with the appropriate household size and income. However, when her income documentation was reviewed by WVCS, her income was found to exceed the established income limit.

She completed three levels of WVCS' internal grievance process, each of which affirmed the initial finding that her income exceeded the established income limit. In addition, while the WVCS grievance process was under way, she attended a City Council meeting and three City Housing Commission meetings under open time, during which she objected to the finding of her ineligibility to purchase the BMR Unit, and she submitted a packet to the City Council on March 15 containing materials regarding the determination of her income. Following that appearance, the City requested outside counsel to review the income determination. They concluded that her income exceeded the established income limit to qualify for a BMR unit.

The WVCS grievance procedures at the time normally would have a fourth level of review, to the WVCS Board of Directors. Ms. Sandstrom provided the City with a copy of that appeal, which revealed that the BMR unit at issue had been sold to a WVCS employee. In light of the potential conflict of interest, the City requested that WVCS recuse itself such that the next level of appeal would be before the Housing Commission, which was intended to be the next stage of the appeal process in any case. WVCS agreed to recuse itself, and Ms. Sandstrom was informed that her appeal would move forward in front of the Housing Commission, which would make a recommendation to the City Council for a final decision.

On June 23, 2016, the Housing Commission heard Ms. Sandstrom's appeal. The Housing Commission continued its decision on the appeal until the August 11th meeting to allow for more time to properly respond to her questions and to research how other local jurisdictions calculate income.

On August 11, 2016, the Housing Commission heard the continuation of Ms. Sandstrom's appeal. After considering all evidence presented, the Housing Commission approved Resolution 16-06 by a 3-1 vote to recommend to the City Council that the City Council affirm the determination that Kimberly Sandstrom was ineligible to purchase the BMR home because her income exceeded the established income limit. The Commission also recommended that she be allowed to retain her current position on the BMR waiting list administered by WVCS. PowerPoints and other documentation provided by Ms. Sandstrom are attached as Exhibit G.

The City Council's decision is the final level of review, subject to reconsideration.

### **Calculation of Maximum Income**

The procedures governing the City's administration of the BMR Program are contained in Section 2.4 of the BMR Manual, based on the United States Department of Housing and Urban Development ("HUD") regulations contained in 24 CFR 5.609(b), delineates the process used to determine an applicant's annual gross income. In addition to "salary and other wages", annual gross income includes "bonuses and other compensation", in accordance with 24 CFR 5.609(b). Section 2.4 of the BMR Manual is attached as Exhibit D.

The BMR Program uses income limits published by the California Department of Housing and Community Development. For a two-person household at a moderate income level in Santa Clara County, the income limit was \$102,050 at the time she applied. (Income limits were updated by the California Department of Housing and Community Development in May 2016. The current limit is \$102,800.) Ms. Sandstrom applied for the BMR unit as a two-person household. Therefore, for Ms. Sandstrom to have been eligible to purchase the BMR unit, her income could not exceed \$102,050.

Section 2.4.1 of the BMR Manual states that, to verify the applicant's sources of income, the City may request signed copies of federal tax returns for the most recent three years, W2 forms for most recent two years, and/or copies of the last three consecutive payroll stubs or other verification of employment. In Ms. Sandstrom's case, WVCS used her last three consecutive payroll stubs, which listed regular and bonus income, to determine her income eligibility. However, the bonus income at issue and discussed below would also have been shown on her W2 form and 2015 tax return, which may not have been available when she applied in January 2016.

### *Calculation of Income*

The three payroll stubs provided by Ms. Sandstrom display gross wages in the amount of \$3,692.80 paid biweekly. Therefore, to determine her gross annual wages, \$3,692.80 is multiplied by 26 pay periods for a total of \$96,012.80 per year. Since bonuses are also included in the calculation, as provided in the BMR Manual and the regulations adopted by HUD and contained in 24 CFR 5.609(b), the 2015 bonus pay would be added in the total amount of \$7,635.34, which consisted of various types of bonuses. The total of Ms. Sandstrom's annual gross wages plus the total bonuses received was \$103,648.14, which exceeded the January 2016 income limit of \$102,050 for a two-person household at a

moderate income level in Santa Clara County. Therefore, Ms. Sandstrom's annual gross income was over the maximum permitted to be entitled to purchase the BMR Unit.

To summarize:

Gross income:	$\$3,692.80 \times 26$ (pay periods) = \$ 96,012.80
Bonus (per 24 CFR 5.609(b):	<u>7,635.34</u>
Total:	\$103,648.14

INCOME LIMIT:	\$102,050.00
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The crux of Ms. Sandstrom's argument regarding her income eligibility is that the determination should be forward-looking under 24 CFR 5.609(a)(2), which states that annual income includes all amounts which "[a]re anticipated to be received from a source outside the family during the 12-month period following admission or annual reexamination effective date." The City's BMR Manual at the time of her application excluded subsection (a) from its definition of annual income; it only referenced subsections (b) and (c). The Manual explicitly states that income is determined through past evidence of income (i.e. tax returns, W2 forms, and paystubs) and, as provided by 24 CFR 5.609(b), bonuses received during the years covered by those documents are part of the income calculation.

However, using subsection (a) of this statute does not change the calculation. The income calculation is forward-looking, whether using subsection (a) or only subsections (b) and (c), in that the calculation uses past income data to project future income. This form of forward-looking projection using documentation of past income is uniformly used in both federal and local housing programs, as discussed below. In general, this use of past income is not adjusted unless there is firm documentation available to reflect changes in future income, such as a major life change since the last year (e.g., job loss, demotion, or promotion, retirement, or disability).

The issue in this appeal is solely the extent to which past bonuses should be used to calculate current income. Ms. Sandstrom has provided evidence of a lower mid-year bonus in 2016 than she received in 2015 and evidence of her company's declining stock prices to show that her total bonuses will substantially decline this year.

However, stock prices can fluctuate greatly in any given year, and performance during the preceding few months is not an indication of future stock performance. In addition, the stock price for her company was higher at the beginning of 2016 than it was at the beginning of 2013 when she received \$8,000 in performance bonuses. As shown in her

presentations given at the June 23rd and August 11th Housing Commission meetings, Ms. Sandstrom's total bonuses have fluctuated over the past three years, but actually increased in 2015. Her bonuses in 2013 totaled \$8,100; in 2014 totaled \$6,150; and in 2015 totaled \$7,635.34. The average of the past three years' bonuses is \$7,295. Given bonus fluctuations in past years, it would be speculative to estimate the totality of potential yearly bonuses based on one mid-year bonus and her company's limited financial information available for the year at the time she made her application in January. Using the average bonus from the last 3 years, her income would still exceed the BMR limit. \$7,295 (the average bonus) plus \$96,012.80 (her base salary) equals \$103,307.80, which exceeds the then income limit of \$102,050 for a two-person household at a moderate income level in Santa Clara County.

#### *Income Calculations Used in Other Jurisdictions*

The income calculations used by the City are consistent with those used in other local jurisdictions. To research income calculations used in other jurisdictions, the City reviewed the BMR programs in other jurisdictions and those administered by BMR program consultants, including the City of Sunnyvale, Alameda County, the City of Emeryville, Palo Alto Housing Corporation, and Housing Trust Silicon Valley. Ms. Sandstrom had asked the City to consider using the City of Sunnyvale's policies.

Sunnyvale's standards for calculating income are essentially the same as Cupertino's. Sunnyvale follows the Technical Guide for Determining Income and Allowances for the HOME Program (a guide published by HUD) (the "HOME Guide") and 24 CFR 5.609 (referred to as the "Part 5" method), the same statute used by the City for its income calculations, to determine gross household income of their applicants. Under Part 5 and the HOME Guide, bonuses are explicitly included as income. The HOME Guide explains in its section entitled "Anticipating Income" that to calculate an applicant's income, the public agency "must project a household's income in the future. To do so, a 'snapshot' of the household's current circumstances is used to project future income. In general, a [public agency] should assume that today's circumstances will continue for the next 12 months, unless there is verifiable evidence to the contrary." This is entirely consistent with the City's method of calculating income. The City uses an applicant household's current earnings from the past year to project the household's future income. Further, the HOME Guide goes on to specify that "[t]his method should be used even when it is not clear that the type of income received currently will continue in the coming year." For Section 24 CFR 5.609 and the entire excerpt from the HOME Guide, please see Exhibits E and F to this staff report.

Other jurisdictions, including those that use Neighborhood Stabilization Program homebuyer funds, also use the HOME Guide to calculate applicant incomes for their programs.

The Housing Commission made a recommendation at the August 11th meeting that the City adopt the use of the HOME Guide for its BMR Manual and, for further clarity and conformity with other jurisdictions, incorporate the entire 24 CFR 5.609 provisions in the Manual, including subpart(a). Though it does not change the method of income calculation, adoption of the HOME Guide would provide further clarity for applicants and WVCS and provides helpful examples of income calculations. It is important that WVCS and the City have clear guidance as to how to calculate income. Given the critical housing shortage in Cupertino, and varying incomes in the "gig economy", it can be expected that the issue of projecting income forward will arise repeatedly. The HOME Guide provides the best guidance available.

The Council agenda item regarding BMR Manual revisions incorporates these changes.

### **Conflict of Interest Issues and Investigation**

As described earlier in this report, after Ms. Sandstrom was found to be over income, the BMR unit was sold to a WVCS employee. Ms. Sandstrom alleged that this sale violated State conflict of interest laws (Section 1090 and the Political Reform Act) and has asked that the sale be reversed.

Regardless of Ms. Sandstrom's income calculation, it is important that the City's BMR program be fairly administered. As a result, the City contracted with outside counsel to conduct a formal conflict of interest investigation. A summary of that investigation is attached as Exhibit A. The investigation has concluded that there is no evidence that a preference was given to the WVCS employee, who was the next qualified applicant on the waiting list with the appropriate household size and income and whose income was calculated consistent with the BMR Manual. The investigation also concluded that there was no violation of State conflict of interest laws.

Nonetheless, the City was concerned about the appearance of a conflict when WVCS reviews the application of its own employee. Consequently, on August 2, 2016 the City Council approved changes to the BMR Manual that require that if any employee of any consultant involved with City housing programs is on the waiting list, all review and evaluation of the employee's application must be performed by the City. Additionally, the City was concerned that the former lengthy appeal process could not be completed before the BMR unit needed to be sold. In the future, any appeal will be heard first by the

Executive Director of WVCS, or by the Director of Community Development if a WVCS employee is involved, with a final second level appeal decided by the City Council. The BMR unit will not be sold before the appeal is completed.

### **Conclusions and Recommendation**

Staff recognizes how close Ms. Sandstrom was to income qualifying for a BMR unit and that she might well qualify at a future time. In addition, her appeal could not be completed prior to the sale of the BMR unit. In recognition of these factors, the Housing Commission recommended that Ms. Sandstrom maintain her current priority for a two-bedroom unit on the BMR Program waiting list when new and continuing waiting list applications are accepted in October.

### **Sustainability Impact**

None.

### **Fiscal Impact**

None.

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Approved for Submission by: David Brandt, City Manager

### **Attachments:**

- A. Summary of Conflict of Interest Investigation
- B. City Council Resolution No. 16-07
- C. Housing Commission Resolution No. 16-06, a Resolution of the Housing Commission of the City of Cupertino Regarding the Appeal of Ms. Kimberly Sandstrom
- D. BMR Administrative Manual (excerpts regarding income calculation)
- E. Referenced Regulations (24 CFR 5.609)
- F. Technical Guide for Determining Income and Allowances for the HOME Program (excerpts regarding income calculations)
- G. Letters of Appeal and Decisions and Other Documentation Provided by Kimberly Sandstrom