



**DEPARTMENT OF COMMUNITY DEVELOPMENT**

CITY HALL

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**CITY COUNCIL STAFF REPORT**

Meeting: February 7, 2017

Subject

Petition for Reconsideration regarding the City Council decision of December 6, 2016, denying Petitioner Kimberly Sandstrom's appeal of the determination that she is ineligible to purchase a Below Market Rate (BMR) unit

Recommended Action

Staff recommends that the City Council:

1. Consider the Petition for Reconsideration (Attachment B-1) and deny it for its failure to meet the requirements of Cupertino Municipal Code (CMC) Section 2.08.096 and adopt the Draft Resolution (Attachment A-1); or, in the alternative;
2. Conduct a hearing to reconsider its decision of December 6, 2016 based upon the new evidence and grounds proffered by Petitioner, if Council determines that the Petition meets the requirements of Cupertino Municipal Code section 2.08.096, and affirm its decision denying Petitioner's appeal.

Discussion

A petition for reconsideration involves two steps. First, the Council makes an initial procedural determination as to whether or not grounds for reconsideration exist. In the event Council determines that such grounds exist, as defined in Cupertino Municipal Code section 2.08.096, then Council may conduct a hearing to reconsider the substantive merits of Petitioner's appeal.

In this case, Petitioner has not provided sufficient grounds for Council to reconsider her appeal. Throughout every stage of her appeal, Petitioner asserts the same facts as presented here: (1) that there was a conflict of interest and the person who ultimately purchased the unit was not eligible to purchase it, and (2) that her income did not exceed the maximum allowable income to be eligible to purchase a Below Market Rate (BMR) unit. Petitioner now further states that she should have had unlimited time to make her presentation before Council. Petitioner received a full and fair hearing before the Housing Commission and City Council. Accordingly, there is no basis for reconsideration.

Significantly, even if Council were to reconsider its decision, it should be noted that Petitioner's annual income exceeded the maximum level eligible to purchase a BMR unit.

### ***Background***

The following is a summary of the events that occurred regarding this applicant leading up to the reconsideration request:

February 11, 2016	Petitioner was determined to be over income for Below Market Rate housing and a disqualification letter was issued by West Valley Community Services (WVCS).
February-May, 2016	Petitioner participates in West Valley Community Services' internal grievance procedure, each of which affirmed the initial finding that income exceeded the established income limit.
March 15, 2016	The City requested outside counsel to review the income determination and they concluded that Petitioner's income exceeded the established income limit to qualify for a BMR unit.
May 3, 2016	Petitioner alleges that WVCS has a conflict of interest in the sale of the unit.
May 6, 2016	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.
June 23, 2016	The Housing Commission hears the appeal of Petitioner's appeal regarding eligibility to purchase BMR unit. Item continued.
August 11, 2016	The Housing Commission adopted Resolution No. 16-07 recommending that the City Council affirm the determination that Petitioner was ineligible to purchase a BMR unit because her income exceeds the established income limit, as calculated consistent with the BMR Manual in effect at the time of the determination of her income. In addition, because the appeal procedures then in place did not allow Petitioner to complete her appeal before the affected BMR unit was sold, the Housing Commission recommended that the City Council permit Petitioner to retain her current position on the BMR waiting list. (3-1 vote, Chu absent)
September 20, 2016	The City Council conducted a hearing and received evidence on Petitioner's appeal. Petitioner presented evidence that: (1) her income was improperly calculated; (2) that there was a conflict of interest between WVCS and Ms. Ma, and the sale was unfair; and (3) she did not receive proper due process. The matter was continued to October 4, 2016, to allow Council additional time to review and consider all evidence, including Petitioner's presentation, and further dialog

	between staff and appellant. (The matter was continued twice more until December 6, 2016.)
December 6, 2016	At the continued hearing, the City Council adopted Resolution No. 16-101 denying the appeal of Petitioner and affirming the recommendation of the Housing Commission regarding the eligibility of Petitioner to purchase a BMR unit. (5-0 vote)
January 13, 2017	Petitioner provides an "Amended Reconsideration Petition" with additional grounds, Clerk properly rejects amended petition as untimely.

### ***Basis for Reconsideration***

Cupertino Municipal Code, Section 2.08.096, provides that a petition for reconsideration must be brought within ten days of the mailing of decision and "shall specify in detail each and every ground for reconsideration." Failure of a petition to specify any particular ground or grounds for reconsideration precludes that particular omitted ground or grounds from being raised or litigated in a subsequent judicial proceeding.

Section 2.08.096(B) provides five grounds for reconsideration. Petitioner alleges three of them, which are emphasized in bold below:

1. An offer of new relevant evidence which, in the exercise of reasonable diligence, could not have been produced at any earlier city hearing.
2. **An offer of relevant evidence which was improperly excluded at any prior city hearing.**
3. Proof of facts which demonstrate that the City Council proceeded without, or in excess of its, jurisdiction.
4. **Proof of facts which demonstrate that the City Council failed to provide a fair hearing.**
5. **Proof of facts which demonstrate that the City Council abused its discretion by:**
  - a. **Not preceding in a manner required by law; and/or**
  - b. Rendering a decision which was not supported by findings of fact; and/or
  - c. **Rendering a decision in which the findings of fact were not supported by the evidence.**

As discussed in detail below, none of the grounds in Petitioner's petition supports reconsideration. Therefore, staff recommends the Petition be denied and Council adopt the findings as set forth in detail in the Resolution, and as summarized below.

**City finding on Municipal Code Section 2.08.096(b)(2): No relevant evidence was improperly excluded from any hearing.** The Petitioner has failed to offered *relevant* evidence that was improperly excluded at any prior City meeting, nor was any evidence excluded by the City Council.

Petition	Response
<p>A. The Petitioner states that evidence of the transformation and development of the relationship between Ms. Nguyen and Ms. Ma was disallowed from presentation on August 11, 2016, by the Housing Commission Chair, Harvey Barnett. Mr. Barnett required the Petitioner to advance to the closing slides instead of showing the evidence of WVCS employee relationship to the Housing Commission.</p> <p>B. The Petitioner states that the evidence was provided to the City Clerk but not reattached to staff report to the City Council. The City Clerk failed to include the evidence in the relevant documents attached to the Appeal as an Agenda item at City Council meetings.</p>	<p>A. Petitioner does not present any “relevant” evidence that was excluded from any hearing. The sole issue before the City Council is whether Petitioner’s income exceeded BMR limits. The Housing Commission Chair properly excluded Petitioner’s slides which were snapshots of Facebook pages of WVCS employees and their families (parents and children) and personal details about Ms. Ma’s family. Petitioner presented her allegation regarding the conflict of interest to the Council.</p> <p>B. The Housing Commission Chair properly excluded Petitioner’s slides which were snapshots of Facebook pages of WVCS employees and their families (parents and children) and personal details about Ms. Ma’s family. Petitioner’s entire presentation submitted to City Council on September 20, 2016, was included as Exhibit “H” at the continued hearing of December 6, 2016.</p>

**City finding on Municipal Code Section 2.08.096(b)(4): The City provided fair hearings.** The Petitioner has not provided any proof of facts which demonstrate that the City Council failed to provide a fair hearing.

Petition	Response
<p>A. The Mayor limited presentation time to the City Council on September 20, 2016, after the matter was postponed on September 6, 2016. A total of twenty minutes was granted but more time was requested but denied. The evidence cited above in section 2 had to be removed from the presentation. The Mayor frequently has provided much more time to individuals regarding matters much less pivotal to residents' quality of life in Cupertino. The fair and unbiased operation of the City's Below Market Rate Housing Program is a serious matter. Anyone who appeals a determination made by consultants of the City or City Staff regarding participation in the BMR program should be afforded sufficient time to present all evidence in support of their appeal.</p>	<p>A. Council provided a fair hearing. Petitioner was given a total of 20 minutes for her oral presentation, and her entire power point presentation was provided and available to Council.</p>

**City finding on Municipal Code Section 2.08.096(b)(5):** The City proceeded in a manner required by law, its decision was supported by findings of fact, and the decision was supported by the facts. The Petitioner has not provided any proof of facts that demonstrate the Council abused its discretion by not proceeding in a manner required by law, the Council's decision and its findings were fully supported by the evidence.

Petition	Response
<p>A. <i>Explain facts and how those facts demonstrate abuse of discretion related to items (a):</i> The Petitioner notes that Michelle Ma and the Petitioner had essentially equivalent salary of about \$96,000 per year. She also notes that Ms. Ma's household income was about \$99,550 or \$2,500 below the limit of \$102,050. She further states that this determination by Goldfarb &amp; Lipman was greater than the household income determined by WVCS. She notes that the City Council is required by Section 2.6 of Policy and Procedures Manual for Administering Deed Restricted Affordable</p>	<p>A. Petitioner's position is that Ms. Ma's income was miscalculated. This allegation is not only irrelevant, it also does not support a claim that the City did not proceed in a manner required by law for Petitioner's appeal. Moreover, Ms. Ma's income calculation was reviewed by the City's outside Counsel, and it was determined she qualified for the unit.</p>

<p>Housing Units to take action when a purchaser intentionally makes false statements or misrepresents facts in order to appear eligible. Furthermore, Marissa Ma is not Michelle Ma's dependent. Determining their household income should include an examination of Marissa's cost of living and the source for covering these costs. Because the source is not Marissa, nor Michelle, the source is outside the household and must be included in the household income.</p> <p><b><i>B. Explain facts and how those facts demonstrate abuse of discretion related to items (c):</i></b> The City Council affirmed the Housing Commission's recommendation to find the Petitioner's family ineligible to purchase the BMR unit because it upheld the statement by Ms. Venkatraman that the Petitioner's income was \$103,648.14, and therefore over the limit. However the facts presented by the Petitioner on September 20, 2016 show this is not income. Nor was it anticipated to be income, based on the evidence provided at the time of application. Pursuant to paragraph C of section 2.08.096, the Petitioner requests that the City refund all of the reconsideration fee. The reconsideration is not related to any income producing opportunity. Rather it is related to protecting my rights as an applicant to a City program for safe and affordable housing in Cupertino.</p>	<p>B. The evidence presented to the Housing Commission and the City Council, fully support the City Council's finding that Petitioner was not eligible to purchase a BMR unit. The Council's finding was based upon, among other things the Housing and Urban Development (HUD) standards in the City's Below Market Rate manual, a review of the paychecks, and bonus income.</p>
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### **Conclusion:**

Based on the above findings, staff recommends that the City Council deny the Petition for Reconsideration and uphold the December 6, 2016 City Council decision. Council should conduct a hearing to reconsider its decision of December 6, 2016 based upon the new evidence and grounds provided by Petitioner, if Council determines that the Petition meets the requirements in Cupertino Municipal Code Section 2.08.096. However, none of the evidence presented, even if considered changes the outcome previously reached by WVCS, outside Counsel, the Housing Commission, and this Council, that Petitioner's income, as calculated under the BMR manual provisions in

existence at the time, exceeded the amount for her to be eligible to purchase the unit. Therefore, if reconsideration is granted, staff recommends that Council affirm its December 6, 2016 decision.

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Prepared by: Kerri Heusler, Senior Housing Planner

Reviewed by: Benjamin Fu, Assistant Director of Community Development  
Aarti Shrivastava, Assistant City Manager

Approved for Submission by: David Brandt, City Manager

Attachments:

Staff Report February 9, 2017

- A-1. Draft City Council Resolution No. 17-XX
- B-1. Reconsideration Petition filed by Kimberly Sandstrom received December 19, 2016
- C-1. Approved City Council Resolution No. 16-101 (Subject of Reconsideration)
- D-1. Housing Commission Meeting Minutes of June 23, 2016
- E-1. Housing Commission Meeting Minutes of August 11, 2016
- F-1. Approved Housing Commission Resolution No. 16-07
- G-1 City Council Staff Report from underlying Appeal and its attachments A-H
  - A. Summary of Conflict of Interest Investigation
  - B. Draft City Council Resolution No. 16-101
  - C. Housing Commission Resolution 16-07 (Resolution No. reassigned)
  - D. Excerpts from BMR Manual Regarding Income Calculation
  - E. Referenced Regulations (24 CFR 5.609)
  - F. Technical Guide for Determining Income
  - G. Attachments and Other Documents Provided by Appellant
  - H. Sandstrom presentation