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PLANNING DIVISION**

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CITY COUNCIL STAFF REPORT

Meeting: May 1, 2018

Subject

City of Cupertino Below Market Rate (BMR) Housing Program Study Session

Recommended Action

Hold a Study Session and Receive an Information Report and Oral Presentation on the City's Below Market Rate Housing Program.

Background

The City's 2014-2022 Housing Element is a comprehensive eight-year plan to address the housing needs in Cupertino. During the planning process to prepare the Housing Element, City officials, staff, and the public discussed strategies to increase the supply of affordable housing in Cupertino. As adopted by the City Council in 2014, the Housing Element includes a "Residential Housing Mitigation Program" that requires certain residential development projects to include a percentage of their total units as below-market rate units that are affordable to moderate-income and lower-income households.

Such a requirement is commonly referred to as an "inclusionary requirement;" in Cupertino, the City's inclusionary requirements are implemented through the Below Market Rate (BMR) Housing Program required by Chapter 19.172 of the Cupertino Municipal Code (BMR Ordinance) and the Below Market Rate Housing Mitigation Program Procedural Manual (Housing Mitigation Manual).

The remainder of this staff report summarizes the existing BMR Housing Program's requirements and provides an overview of the legal framework that governs inclusionary policies to inform the City Council's discussion of options regarding BMR Housing Program requirements going forward.

Existing BMR Housing Program Requirements

Because the Housing Element is a component of the City's General Plan, it sets the highest level of policy direction for the City. Any implementing ordinance, such as the BMR

Ordinance, and regulations, such as the Housing Mitigation Manual, must be consistent with the policies and proposals set forth by the Housing Element.

Housing Element

The Housing Element is the City's primary policy document regarding the development, rehabilitation, and preservation of housing for all economic segments of the population. In accordance with the City's Housing Element, all new residential and/or non-residential developments are required to help mitigate project-related impacts on affordable housing needs. Specifically, Strategy HE-2.3.2 requires for-sale residential developments with seven or more units to reserve fifteen percent (15%) of their total units as BMR units (without specifying an income level). Rental residential developments with seven or more units are required to reserve fifteen percent (15%) of their total units as BMR units affordable to low-income and very-low income households or pay a Housing Mitigation Fee. Smaller residential projects may either provide one BMR unit or pay a Housing Mitigation Fee.

BMR Ordinance

To implement the Housing Element, Section 19.172.020.A of the BMR Ordinance requires developers of housing projects to comply with the Housing Element's requirements. Section 19.172.020.B and 19.172.030 authorize the adoption of rules and regulations to administer the specific details of the BMR Housing Program. Although Section 19.172.020.B of the BMR Ordinance says the City's objective is to obtain on-site affordable units, it also permits off-site units, land donation, or payment of Housing Mitigation Fees subject to the Housing Mitigation Manual's requirements.

Housing Mitigation Manual

The City's Housing Mitigation Manual (most recently amended by Resolution 15-037 on May 5, 2015) includes such rules and regulations. The Housing Mitigation Manual restates the Housing Element's general requirements for on-site affordable housing production, but it includes more specific requirements for affordability levels by income. The table below provides a summary of the affordability requirements.

Affordability of BMR Units (15% of development total)			
Ownership BMR Units		Rental BMR Units	
% of Median-Income Units	% of Moderate-Income Units	% of Very-Low Income Units	% of Low-Income Units
50%	50%	60%	40%

For purposes of the BMR Housing Program, the City uses household income limits established by the California Department of Housing and Community Development (HCD) that are based on adjustments to the median income in Santa Clara County. The table below summarizes the incomes associated with the various affordability requirements.

2017 Household Income Limits		
Income Category	Approximate Percent of Area Median Income*	Income Limit for 4-Person Household
Very Low	Up to 50%	\$59,700
Low	Up to 80%	\$84,900
Median	Up to 100%	\$113,300
Moderate	Up to 120%	\$135,950

*HCD makes various adjustments to very-low and low-income limits, which do not precisely equal 50% and 80% of the median.

The Housing Mitigation Manual does not include a requirement that any BMR units be provided as affordable only to extremely low-income (ELI) households making 30% of the Area Median Income (AMI); however, ELI households are eligible to reside in BMR units reserved for very low-income and low-income households if they can afford the rent.

In addition to on-site BMR requirements, the Housing Mitigation Manual gives developers the option of requesting the Council to approve an alternative means of compliance, provided that the alternative gives the City affordable housing that is equivalent to the applicable BMR requirement. Applicants may request to: provide on-site rental BMR housing where for-sale is required; purchase off-site units to be dedicated and/or rehabilitated as BMR units; develop off-site BMR units; or donate land for the development of BMR units. Residential developments with six or fewer units may pay the Housing Mitigation fee instead of producing on-site BMR units. The Housing Mitigation fee is also applied to commercial development and fractional units required for residential developments with seven units or more. Such fees are placed in the City's BMR Affordable Housing Fund (AHF).

BMR housing is subject to recorded covenants that require the units be occupied at prices/rents that are affordable to households at the requisite income levels for a period of 99 years.

The City's existing BMR rental program consists of 142 units available to extremely-, very-low, and low-income households. The City's existing BMR ownership program consists of 120 units available to median- and moderate-income households. BMR renters and owners are monitored annually for compliance with program guidelines.

Other Mechanisms to Address Housing Needs

In addition to the City's BMR Housing Program, the City can provide incentives to help private entities meet other housing needs in the community. For example, affordable housing developers can leverage contributions from the City's BMR AHF or other local funding programs to apply for Low Income Tax Credits and mortgage revenue bonds.

By using multiple funding sources, it is possible to raise money to develop subsidized housing at deeper levels of affordability than the City typically requires; the additional funds can also help to provide housing in combination with services for populations with special needs, such as veterans or people with disabilities.

In November 2016, Santa Clara County voters approved Measure A- the \$950 million affordable housing bond intended to assist with the creation of approximately 4,800 new affordable housing units. Measure A provides another tool, in addition to the City's BMR Housing Program, to provide affordable housing for vulnerable populations including veterans, seniors, the disabled, low and moderate-income individuals or families, foster youth, victims of abuse, the homeless, and individuals suffering from mental health or substance abuse illnesses. Measure A funding will enhance the County's ability to achieve its housing priorities which include increasing the supply of housing that is affordable to ELI households in the City. In 2017, Measure A funded six (6) units of permanent supportive housing at The Veranda, the low-income senior housing development just starting construction in Cupertino.

Legal Framework

For residential projects, the City's police power provides authority to require a percentage of new residential projects be reserved as affordable housing, subject to certain limitations discussed below.

In its 2015 decision *California Building Industry Ass'n v. City of San José (CBIA)*, the California Supreme Court determined that inclusionary requirements for residential projects are land use provisions, similar to rent and price controls. Because land use and price control authority comes from a city's general police power, residential inclusionary requirements that are designed to further the public health, safety, and welfare can be adopted without being justified by a nexus study so long as the requirements are not "confiscatory," i.e., the requirements cannot deny a property owner the opportunity to earn a fair and reasonable return on its property. To date, efforts to overturn the *CBIA* case at the United States Supreme Court have failed. Therefore, a nexus study is not currently required for residential inclusionary requirements; however, an economic feasibility study can be used to demonstrate that such requirements are not confiscatory.

The *Palmer/Sixth Street Properties L.P. v. City of Los Angeles (Palmer)* case was decided in 2009, and for a time, *Palmer* precluded California cities from requiring long term rent restrictions or inclusionary requirements on rental units. On September 29, 2017, Governor Brown signed AB 1505 to restore cities' and counties' ability to require on-site affordable units within rental projects, and the law became effective on January 1, 2018. Under AB 1505, cities can impose inclusionary requirements on rental residential developments provided that: (1) the requirements are imposed in the zoning ordinance; (2) if more than 15 percent of rental units are required to be affordable to low-income households, HCD may require that the requirement be justified by an economic

feasibility study under certain circumstances; and (3) alternatives to on-site compliance are allowed in the ordinance.

The BMR Ordinance is codified in Title 19 of the Municipal Code, which is the City's zoning ordinance. The BMR Ordinance was in place prior to AB 1505, and its provisions provide alternative means of compliance with its on-site production requirement under the Housing Mitigation Manual; therefore, the City can enforce its BMR Housing Program requirements against for-sale and rental residential projects.

Discussion

If the City desires to modify its BMR Housing Program, it has several options. Changes to the Housing Mitigation Manual may be adopted by Resolution, and the City Council can modify its BMR Ordinance. Unless it also amends the Housing Element, which would require HCD approval, changes to the BMR Ordinance or the Housing Mitigation Manual would need to be consistent with the policies included in the Housing Element. For example, the Housing Element does not specify an income range requirement applied to for-sale residential development. Therefore, the City could amend the Housing Mitigation Manual to adjust the percentages of moderate- and median-income housing required (or even add a new affordability category, such as "workforce housing") and still be consistent with the Housing Element. Similarly, the City likely could require rental residential housing be reserved for extremely-low income households, provided that the requirement is not confiscatory, as such housing would also be affordable to very-low and low-income households as required by the Housing Element.

In addition, if the City were to amend its BMR Housing Program to require more than fifteen percent (15%) of rental units be reserved for low-income households, HCD could require the City to prepare an economic feasibility study demonstrating that the requirements do not make market rate residential development infeasible if the City fails to meet at least seventy-five percent (75%) of its share of the regional housing need for the above-moderate income category for five (5) years or more or if it does not submit its annual housing element report for at least two consecutive years.

Even if HCD does not require an economic feasibility study, such a study can be useful to inform the City's policy-making efforts and to ensure that its requirements are not overly burdensome. To meet the applicable legal standard for inclusionary policies, the City's requirements must not be so high as to be confiscatory.

Finally, the City may also want to consider the effect that the BMR Housing Program has on its ability to meet its Regional Housing Needs Allocation (RHNA). For purposes of complying with SB 35, the "no net loss" provisions of SB 166, and affordability requirements in future housing element cycles, the City has an incentive to require actual production of units affordable to low-income households or below. By contrast, affordable "workforce housing" above the moderate-income level is not recognized in SB 35, SB 166, or housing element law, and so does not give the City credit for producing any affordable housing.

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