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memorandum
attorney-client communication

To

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From

Erik Ramakrishnan

RE

Options for Increasing Supply of ELI Housing

This memorandum is in response to your recent request for a list of options for increasing the supply of housing for extremely low-income ("ELI") households in Cupertino, including ideas for targeting housing for individuals with developmental disabilities.[1]

As discussed in Part I below, appropriate incentives may make it feasible for developers to supply ELI inclusionary units. Requiring or incentivizing landlords to set aside a certain number of low- or very low-income ("VLI") units for tenants holding housing vouchers would also benefit ELI households. Alternatively, by prioritizing payment of in lieu fees over providing inclusionary units, the City could generate funds to leverage affordable housing development in Cupertino that targets ELI households. In lieu fees could be supplemented locally with funds generated by voter approved bond or tax measures, or by tax increment financing subject to the formation of an affordable housing authority.

Part II discusses targeting housing for individuals with developmental disabilities and begins with a discussion of fair housing and related issues that arise in this context. The Section 811 Rental Assistance program is also discussed.

I. Increasing Supply of ELI Housing Generally

Incentives for Inclusionary ELI Housing. ELI households typically cannot afford the routine costs of home ownership, such as homeowners association fees, maintenance, and property taxes. For this reason, we recommend that inclusionary housing requirements targeting ELI households be limited to rental housing. The challenge with

[1] An ELI household is a household with a total household income of not more than thirty percent (30%) of area median income, adjusted for family size. By way of example, the 2019 upper income limit in Santa Clara County to qualify as an ELI household is $30,750 ($14.78 full time) for single-member households and $43,900 ($21.11 full time) for four-member households.

meeting the need for inclusionary ELI rental housing is that, based upon economic analyses prepared for the City by Strategic Economics, providing inclusionary rental housing in general in Cupertino is not economically feasible because of high costs of land and construction; providing affordable housing to the lowest income category is particularly infeasible.

This problem is not unique to Cupertino, and in our experience local ordinances typically do not require rental housing providers to restrict units for ELI households. One example of an inclusionary requirement with which we are aware is Los Angeles's Measure JJJ, which requires rental housing providers either to pay an in lieu fee or to restrict units for lower income households, including five percent (5%) of units for ELI households, whenever a project requires a general plan or zoning amendment that increases residential density more than thirty-five percent (35%) over existing density or allows residential uses where not previously allowed. Presumably the increased rate of return from upzoning the property makes it viable for developers to provide housing to ELI households under the circumstances where Measure JJJ applies.

In addition to mandating either the production of inclusionary units or the payment of in lieu fees as a condition of upzoning, Measure JJJ incentivizes the production of affordable housing units, including ELI units, by authorizing the city's planning director to adopt guidelines establishing enhanced density bonuses in transit oriented areas within one-half mile of a "major transit stop," as defined by Public Resources Code Section 21155.[2] The currently adopted guidelines establish density bonuses of between fifty and eighty percent (50-80%) depending upon distance from the major transit stop in question and targeted levels of affordability. For example, for properties closest to a major transit stop, developers can receive the maximum bonus of eighty percent (80%) either by restricting eleven percent (11%) of units for ELI households, fifteen percent (15%) of units for VLI households, or twenty-five percent (25%) of units for low-income households. The program appears to be successful. Through June 2019 there were 19,928 units total proposed in transit priority areas affected by Measure JJJ, including 3,863 affordable units. Of the affordable units, slightly more than half of the units are proposed to be affordable to ELI households.

Measure JJJ's requirements may or may not prove economically feasible in Cupertino due to higher land costs and lower average densities than in Los Angeles. The City would need to evaluate feasibility if it has an interest in adopting a similar approach.

Restricting Units for Households with Section 8 Housing Vouchers. Leveraging Section 8 housing vouchers is another option available to the City to increase the supply of ELI housing. The Section 8 program is funded by the federal government through the Department of Housing and Urban Development ("HUD"), and is administered

[2] See https://planning.lacity.org/plans-policies/transit-oriented-communities-incentive-program, last accessed Nov. 14, 2019.

locally by individual housing authorities. The program provides rental subsidies for ELI households. A tenant under the program typically pays not more than thirty percent (30%) of household income as rent, and the remaining monthly rental charge, up to a maximum "fair market rent" as determined by HUD, is paid directly to the tenant's landlord by the local housing authority. Vouchers may be assigned either to an individual housing development (i.e., Project Based Vouchers) or to an individual tenant (i.e., Housing Choice Vouchers). Project Based Vouchers provide an ongoing source of revenue that an affordable housing provider can use to leverage financing to construct or rehabilitate a housing project, whereas Housing Choice Vouchers enable tenants holding those vouchers to choose for themselves where to live. Historically market rate landlords have been reticent to lease to Housing Choice Voucher holders; however, effective January 1, 2020, landlords will no longer be allowed to discriminate against Section 8 voucher holders.[3]

One option to increase the supply of rental housing available to ELI households in Cupertino is to require owners of inclusionary rental units to reserve some percentage of those units for Section 8 voucher holders. City of Berkeley Municipal Code Section 22.20.065.C provides a relevant example. That ordinance imposes a housing impact fee on new rental housing development projects in the city, which developers can avoid by restricting twenty percent (20%) of the units in a new rental housing project for low-income households. Half of those units must be restricted for VLI households, and of the VLI units, forty percent (40%) must be made available for holders of Section 8 vouchers, and another forty percent (40%) must be made available for holders of local vouchers through the city's Shelter + Care program. Because a household must be an ELI household to qualify for Section 8 vouchers, Berkeley's ordinance creates a subsidized supply of housing for ELI households. At the same time, because housing vouchers take the form of rental subsidies, landlords are not limited to charging ELI rents, thereby helping to make it feasible to lease to ELI households.

Prioritizing In Lieu Fees. One way that cities increase the supply of rental housing for ELI households is to prioritize payment of in lieu fees over the provision of inclusionary housing by establishing in lieu fees at less than the cost to provide inclusionary units. This ensures that more money will flow into a city's affordable housing fund, and has two advantages, albeit at a cost to the goal of inclusion. First, city funds can be used by developers to leverage financing from other sources necessary to make ELI housing possible. Second, ELI households will often benefit from onsite supportive services, which are easier to provide to residents of an affordable housing development than to residents of inclusionary units.

A preference for in lieu fees over inclusionary units need not be an all or nothing proposition. The City can take a hybrid approach. For example, Fremont Municipal Code Section 18.155.030(a) allows developers of for-sale housing to meet their

[3] See Stats. 2019, ch. 600, amending Gov. Code, § 12927, subd. (i).

obligation to provide housing for moderate-income households either by providing deed restricted inclusionary units or by paying in lieu fees; however, to meet their obligation to provide housing for lower income households, all developers of for-sale housing must pay impact fees. Similarly, Cupertino could structure its affordable housing program to require payment of an impact fee for ELI housing, while retaining the choice to construct inclusionary units for other income categories or to pay impact fees.

Affordable Housing Authorities and Other Local Revenue Sources. To leverage more ELI housing units, Cupertino is not limited to relying on in lieu fees. Voluntary contributions, for example from local technology companies, could supplement City funds. With voter approval, the City could also impose new special taxes, including parcel taxes or transactions and use taxes, to fund housing, and could generate funds through sale of general obligation bonds. By forming an affordable housing authority, the City could also take advantage of tax increment financing to fund affordable housing projects.

An affordable housing authority is an agency created by a city or county pursuant to Government Code Section 62250, et seq.[4] The agency's boundaries must be coextensive with the city or county that created it, but it has its own governing board. The city or county that forms the affordable housing authority may commit all or some part of its future tax increment revenue to the authority, and may also commit Bradley-Burns and transaction and use tax revenue.[5] Any local taxing entity other than a school district may likewise commit all or a portion of its tax increment revenue to the authority. Up to five percent (5%) of the revenues committed may fund administrative costs, and the remainder must be used to develop or rehabilitate affordable housing units pursuant to a long-term plan approved by the authority's governing body. The authority may borrow against future revenues without a vote of the people.

II. Targeting Housing for Individuals with Developmental Disabilities

Fair Housing Issues and the Lanterman Act. One of the City's goals is not only to create more housing opportunities for ELI households generally, but specifically to target ELI units to adults with developmental disabilities. State and federal fair housing laws, as well as the state's Lanterman Act, pose challenges to accomplishing this goal. Fair housing laws generally prohibit segregating people with disabilities and providing housing to people with a particular disability to the exclusion of people with other types of disabilities. Exceptions can be made where a housing development will provide

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[4] Care should be taken to distinguish between housing authorities and *affordable* housing authorities. The former are locally activated agencies with authority to implement Section 8 and other housing programs. The latter are agencies formed by cities or counties to leverage tax increment financing.

[5] Bradley-Burns sales tax is the one percent (1%) portion of statewide sales tax that is paid to the local city or county where the point of sale is deemed to have occurred.

specialized housing with supportive services geared toward a particular population, provided a strong showing can be made that there is an unmet need for such housing.

The Lanterman Act governs the provision of services to individuals with developmental disabilities. It requires that services to persons with developmental disabilities, including the provision of housing, be delivered in the least restrictive environment to avoid segregating and institutionalizing people. It is therefore advisable to provide housing to people with developmental disabilities in projects with a mix of supportive and non-supportive units. Providing a range of affordability levels together with a mix of supportive and non-supportive units can also create opportunities for adults with developmental disabilities to live in the same housing developments as members of their families, thereby allowing for both independence and family support.

Section 811 Rental Assistance and Other Sources of Funding. The same general principles described in Part I apply to creating ELI housing opportunities for adults with developmental disabilities. There may, however, be unique sources of funds to meet the needs of this population. For example, various nonprofits, including regional centers, may be able to provide funding and supportive services. The Section 811 Rental Assistance program may also provide a source of funding to make supportive ELI housing for persons with developmental disabilities feasible. The Section 811 program is a cooperative federal and state program that provides project-based vouchers to rental housing providers to subsidize the rents of tenants on Medicaid who have disabilities and who have resided recently in long-term health facilities or who are at risk of being institutionalized. As a project-based voucher, the subsidy is tied to a housing development rather than to an individual voucher holder, and can provide a stable, long-term source of funding that a housing developer can rely upon to provide supportive housing opportunities for persons with disabilities.

III. Conclusion

Options to increase the supply of ELI housing include providing incentives for developers to provide ELI inclusionary units, whether through increased density or other concessions or through waiver of impact fees. Requiring owners of new inclusionary rental units to restrict a certain percentage of units for Section 8 voucher holders could also make more housing available in Cupertino for ELI households. Prioritizing payment of in lieu fees over providing inclusionary units would generate a local source of funds that could be used by affordable housing providers to leverage other financing necessary to make ELI housing possible. The City could supplement in lieu fees with other sources of funds, including tax increment financing by forming an affordable housing authority.

The same approaches can be used to target housing for individuals with developmental disabilities, although fair housing laws and the Lanterman Act pose challenges to accomplishing this goal. Those challenges are not insurmountable, and there are sources of funding uniquely suited to meeting the needs of adults with developmental and other disabilities, including the Section 811 Rental Assistance program.

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