



## COMMUNITY DEVELOPMENT DEPARTMENT

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### PLANNING COMMISSION STAFF REPORT

Meeting: September 14, 2021

#### **Subject**

Consider amendments to Cupertino Municipal Code Sections 19.56.030 (Table 19.56.030), 19.56.030F, 19.56.040, and Table 19.56.040A and the addition of Section 19.56.080 (Density Bonus Ordinance) to allow density bonuses and other incentives as provided by state law and also to add a subsection in Section 19.56.040 providing additional incentives for affordable housing and a new Section 19.56.080 providing that the Density Bonus Ordinance will be interpreted consistent with state density bonus law. (Application No: MCA-2021-003; Applicant: City of Cupertino; Location: Citywide.)

#### **Recommended Action**

That the Planning Commission adopt the draft resolution (Attachment 1) recommending that the City Council:

1. Find the actions exempt from CEQA; and
2. Adopt amendments to Cupertino Municipal Code Sections 19.56.030 (Table 19.56.030) 19.56.030F, and Table 19.56.040A to allow for density bonuses and other incentives as provided by state law; and to add a new Section 19.56.080 providing that the Density Bonus Ordinance will be interpreted consistent with state density bonus law.

*Note that the language providing additional incentives is not being proposed at this time.*

#### **Discussion**

##### *Background*

Under Government Code Section 65915, a housing development is eligible for a density bonus based on the percentage of very low, low, or moderate-income units provided in the development. The City's FY2019/2020 Work Program includes an item to incentivize affordable housing production, in part by updating the City's density bonus ordinance.

In the 2020 legislative session, AB 2345 was adopted, which increased the maximum density bonus for projects that are not 100 percent affordable from 35 percent to 50 percent in exchange for a 4 to 5 percent increase in affordability (Government Code §

65915(f).<sup>1</sup>) However, the statute provided that if the City were to adopt its own "housing program" or ordinance, or both, to incentivize the development of affordable housing by allowing bonuses that exceed 35 percent, the City could enforce its own program and ordinance rather than the bonus program and the incentives and concession requirements imposed by AB 2345. (§ 65915(s).)

On December 15, 2020, the City Council, by Resolution No. 20-141, adopted a housing program to allow density bonuses up to 40 percent and initiated a zoning code amendment to incorporate those changes into the City's density bonus ordinance. The housing program adopted by the City Council allows increased density for the same proportional increases in affordability as did § 65915 (Density Bonus Law) before AB 2345 was enacted: 2.5 percent for every 1 percent increase in very low-income units; 1.5 percent increase for every 1 percent increase in low-income units, and 1 percent increase for every 1 percent increase in moderate-income units, up to a 40 percent maximum density bonus.

These zoning changes were presented to the Planning Commission and the City Council in early 2021. The Planning Commission reviewed the proposed changes at its February 23, 2021 regular meeting and adopted Resolution No. 6919 by a 4-1 vote (Kapil – no) recommending that the Council adopt the proposed changes. The Council considered the proposed changes and agreed that the proposed amendments would implement the December 2020 Council-adopted housing program. The Council introduced Ordinance No. 21- 2226 on April 20, 2021 and adopted the amendments on May 4, 2021.

At the meeting on April 20, 2021, the City Council also requested that staff consider presenting additional ordinance amendments to allow increased density bonuses of up to 50 percent for higher levels of affordability and review other incentives to develop affordable housing. The Department of Housing and Community Development (HCD) by letter dated May 3, 2021 (Attachment 2) also expressed concern that the adopted program and ordinance did not create a “program” and provided insufficient incentives. Due to an error in communications, the letter was not provided to the Council, public, or planning staff in advance of the ordinance adoption.

The proposed amendments were previously discussed by the Planning Commission on August 10, 2021 at its regular meeting. A motion to approve the proposed amendments failed on a 2-2-1 (Kapil absent) vote. Prior to the vote, the Commission requested information regarding incentives and waivers that developers have requested and received in neighboring jurisdictions.

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<sup>1</sup> All further references are to the Government Code.

*Proposed Amendments*

To amend the City's Density Bonus program, staff recommends that that proportional increases in affordability conform to those required by AB 2345. This would allow a 2.5 percent bonus for a 1 percent increase in very-low income units, 1.5 percent bonus for 1 percent increase in low income units and 1 percent bonus for 1 percent increase in moderate-income units, up to a maximum density bonus of 35 percent. For increases in affordability exceeding 11 percent very low income, 20 percent low income, or 40 percent moderate income, an additional 3.75 percent bonus would be allowed for each 1 percent increase in affordability. The ordinance would also reference changes made in state density bonus law that allow bonuses of either 80 percent or an unlimited amount for 100 percent affordable projects. The zoning code would be amended by editing current Table 19.56.030 in the zoning ordinance as follows.

**Table 19.56.030: Density Bonus Calculations**

Income Level of unit	Proportion of Total Affordable Dwelling Units	Maximum Density Bonus
Very Low Income	5%	20%
	6% - <del>12</del> <u>11</u> % <sup>(1)</sup>	22.5% - <del>37.5</del> <u>35</u> %
	<u>12% - 14%</u> <sup>(2)</sup>	<u>38.75% - 46.25%</u>
	<del>13</del> <u>15</u> % or more	<del>40</del> <u>50</u> %
Low Income	10%	20%
	11% - <del>22</del> <u>20</u> % <sup>(23)</sup>	21.5% - <del>38</del> <u>35</u> %
	<u>21% - 23%</u> <sup>(4)</sup>	<u>38.75% - 46.25%</u>
	<del>23</del> <u>24</u> % or more	<del>40</del> <u>50</u> %
Moderate Income (Common interest developments)	10%	5%
	11% - <del>44</del> <u>40</u> % <sup>(35)</sup>	6% - <del>39</del> <u>35</u> %
	<u>41% - 43%</u> <sup>(6)</sup>	<u>38.75% - 46.25%</u>
	<del>45</del> <u>44</u> % or above	<del>40</del> <u>50</u> %
<b><u>Affordable Housing Development</u></b>	<b><u>100%</u><sup>(7)</sup></b>	<b><u>80% or as specified in Government Code Section 65915</u></b>

<sup>(1)</sup> For each 1% increase over 5% of the target units, the density bonus shall be increased by 2.5%, up to a maximum of ~~40~~35%.

<sup>(2)</sup> **For each 1% increase over 11% of the target units, the density bonus shall be increased by 3.75%, up to a maximum of 50%.**

<sup>(23)</sup> For each 1% increase over 10% of the target units, the density bonus shall be increased by 1.5%, up to a maximum of ~~40~~35%.

- (4) For each 1% increase over 20% of the target units, the density bonus shall be increased by 3.75%, up to a maximum of 50%.
- <sup>(35)</sup> For each 1% increase over 10% of the target units, the density bonus shall be increased by 1%, up to a maximum of ~~40~~35%.
- (6) For each 1% increase over 40% of the target units, the density bonus shall be increased by 3.75%, up to a maximum of 50%.
- (7) Must meet the requirements of Government Code Section 65915(b)(1)(G) or successor provision.

Other conforming changes would be made in Section 19.56.030F to show a maximum density bonus of 50 percent for projects that are not 100 percent affordable.

Table 19.56.040A would similarly be updated to reflect the changes made by AB 2345 and additional incentives available for 100 percent affordable projects, as follows:

**Table 19.56.040A: Incentives or Concessions Calculations:**

Unit Type	Percent of Affordable Units	Number of Incentives/Concessions
Very Low Income Units	5% or greater	1
	10% or greater	2
	15% or greater	3
Low Income Units	10% or greater	1
	<del>20</del> <u>17</u> % or greater	2
	<del>30</del> <u>24</u> % or greater	3
Moderate Income Units	10% or greater	1
	20% or greater	2
	30% or greater	3
<b><u>Affordable Housing Development</u></b>	<b><u>100%*</u></b>	<b><u>4</u></b>

**\*Must meet the requirements of Government Code Section 65915(b)(1)(G) or successor provision.**

Finally, because state density bonus law (Government Code Section 65915 et seq.) is amended by the Legislature nearly every year (additional amendments are proposed this year), making it difficult to keep the City’s ordinance up to date, a provision is proposed to be added as Section 19.56.080 stating that the ordinance will be interpreted to be consistent with state density bonus law, as follows:

**If any portion of this Chapter 19.56 conflicts with State Density Bonus Law (Government Code Section 65915 et seq.) or other applicable state law, state law shall supersede this Chapter. Any ambiguities in this section shall be interpreted to be consistent with State Density Bonus Law. All code references in this Chapter include all successor provisions.**

For instance, although the City's ordinance currently does not include the bonuses and incentives available for 100 percent affordable housing projects, the City would have followed state law in allowing 80 percent or larger bonuses for these projects. The purpose of this provision is to clarify that that is the City's policy.

*Changes between the draft ordinance language presented on August 10 and September 14:* The previously proposed new subsection D in Section 19.56.040 has been removed from the draft section due to the concerns previously expressed by the Planning Commission. This section was previously proposed to codify certain additional incentives that the City currently offers to incentivize the development of affordable housing. These incentives are already addressed in the City's policy documents.

#### *Analysis*

The purpose of the City's housing and density bonus programs is to incentivize the development of affordable housing within the City. The Hausrath Economics Group (HEG) confirmed that program adopted by the City Council in December and by ordinance in May would incentivize the development of affordable housing. That program also conformed with the recommendations of the California Rural Legal Assistance Foundation and the Western Center on Law & Poverty provided during hearings on AB 2345, when they advocated for maintaining the density for affordability ratio following the same pattern as density bonus law prior to the passage of AB 2345. All but one of the developers of Cupertino's housing element sites have applied for density bonuses using the incentives provided prior to the passage of AB 2345, including the developers of Vallco, Marina, Veranda, and Westport. The City has consistently approved these density bonus projects.

The City also continues to offer a host of incentives to incentivize affordable housing within the City. (See Attachment 3.) Many of the affordable housing incentives are implemented through other parts of the Municipal Code (flexible zoning standards through the Planned Development Zoning District Ordinance, Below Market Rate (BMR) Housing Program through Chapter 19.172 of the Municipal Code and associated administration and other manuals) or General Plan programs.

Despite these incentives, HCD has continued to assert that the City's current density bonus program does not comply with AB 2345. Based on the analysis by HEG and the experience of the City of San Diego, which previously adopted the AB 2345 program,

developers are most likely to use the program by providing very low income housing. For this type of housing proposal, the AB 2345 maximum bonus of 50 percent for 15 percent very low income units is not much different from the City's existing density-for-affordability ratio which would require 17 percent very low income units for a 50 percent density bonus.

The Commission was hesitant to adopt this ordinance amendment and wished to review the list of proposed and approved waivers and incentives in density bonus projects from neighboring jurisdictions. This list has been prepared by the City Manager's office and attached as Attachment 4 for the Planning Commission's review. Information was requested from the cities of Campbell, Los Altos, Saratoga, Sunnyvale, Mountain View, Palo Alto and Santa Clara. Information received has been presented in the attachment. The bulk of the incentives and waivers are related to increases in height, floor area ratio and lot coverage, and reductions in setbacks from property line and/or between buildings on site, parking standards and common and/or private open spaces.

Adoption of the proposed ordinance amendments will advance the Affordable Housing Strategies item on the Council's FY 20/21 Work Program and conform to the City Council's direction to increase the maximum bonus to 50 percent. In addition, as part of the Affordable Housing Strategies item on the Council's FY20/21 Work Program, the staff will explore further amendments to the density bonus ordinance to incentivize the production of more affordable units than required by density bonus law and the City's affordable housing ordinance, which requires 15 percent of rental units and 20 percent of for-sale units to be affordable. The staff will also consider additional amendments to the City's density bonus ordinance to ensure that it reflects the latest amendments to state density bonus law.

### **Sustainability Impact**

No sustainability impact.

### **Fiscal Impact**

No fiscal impact.

### **California Environmental Quality Act (CEQA)**

It is not possible to predict which properties in the City, if any, may be proposed to be developed with an increased density bonus, given market conditions, building types desired, and developers' individual decisions whether or not to request bonuses; nor whether any increased development or density will result from the proposed changes, whether any development or density will result that would not already have occurred under the existing Municipal Code, nor whether any possible significant environmental impacts peculiar to the adoption of the proposed zoning code amendments would

occur. Therefore, the proposed code amendments: (1) will not result in any direct or reasonably foreseeable indirect physical change in the environment (CEQA Guidelines Section 15060(c)) and so (2) do not constitute a project under CEQA (CEQA Guidelines Section 15378).

Further, the City has been informed by the California Department of Housing and Community Development (HCD) that its existing density bonus ordinance must be modified to be consistent with AB 2345, and the ordinance amendments reflect HCD's interpretation of the requirements of state law. The proposed zoning amendments do not permit any bonuses, incentives, or waivers other than those provided by State law. The amendments can therefore be seen with certainty based on review of the facts to have no possible significant effect on the environment (CEQA Guidelines Section 15061(b)(3)). These amendments do not authorize the development of housing on any site where housing is not already permitted under the City's existing codes, and any housing development project with a density bonus component must be reviewed under CEQA.

### **Conclusion**

Staff recommends the Planning Commission adopt the draft Resolution, recommending that the City Council adopt the proposed amendments to the City's density bonus ordinance to incentivize the development of affordable housing by allowing for density bonuses and other incentives as provided by state law, providing additional City incentives for affordable housing, and providing that the City's ordinance will be interpreted consistent with state density bonus law.

### **Next Steps**

The Planning Commission's recommendation is tentatively intended to be presented to the City Council on October 5, 2021 with a second reading on October 19, 2021.

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### **Prepared by:**

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**Reviewed and Approved for Submission by:** Benjamin Fu, Director of Community Development

### **Attachments:**

- 1 – Draft Planning Commission Resolution and Ordinance
- 2 – Letter dated May 3, 2021 from Department of Housing and Community Development
- 3 - City Incentives for Affordable Housing
- 4 – List of Waivers and Incentives from adjacent jurisdictions