

Transmitted via email: citycouncil@cupertino.org

Honorable Mayor Darcy Paul and Cupertino Councilmembers
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014

Dear Mayor Paul, Vice Mayor Sinks, and Councilmembers Vaidhyanathan, Chang, and Scharf,

Subject: City of Cupertino BMR Housing Program Study Session, May 1, 2018

On behalf of West Valley Community Services and SV@Home and our members, we express our appreciation for the City's initiative in revisiting its Below Market Rate (BMR) ordinance and providing the opportunity for feedback on what is a critical component of any city's affordable housing toolkit. That being said, to address the City's housing crisis, Cupertino will need multiple tools in its toolbox to ease housing affordability for its existing and future workers and residents. To that end, we recommend that the City continue to refine its BMR ordinance while simultaneously adopting a broader, more holistic approach to affordable housing.

With the passage of AB 1505 last fall, SV@Home has been working with jurisdictions to resurrect or create inclusionary ordinances that reflect best practices and result in increased availability of affordable homes. Attached is SV@Home's best practices document for inclusionary ordinances for your reference.

Refinements to the BMR Ordinance. We're pleased to see that Cupertino's BMR ordinance already calls for a 15 percent set aside for new rental and ownership residential developments and that it offers a suite of alternative compliance methods for meeting the affordability requirements. To ensure that the policy delivers the intended results, we respectfully recommend the following changes to respond to the diversity of affordable housing needs, including the need for extremely low-income, very low-, low-, and moderate-income homes.

- **Rental, income targeting.** Require that affordable units provided on-site have restricted rents that average 80 percent of the area median income (AMI);
- **Ownership, income targeting.** Require that affordable units provided on-site have restricted rents that average out at 120 percent AMI;
- **Off-site alternatives.** We support allowing off-site alternatives, whether land dedication, paying an in-lieu fee, or partnering with a nonprofit on stand-alone affordable housing. For these alternative options, we suggest setting the requirement at 20 percent to incentivize the development of integrated units on site.

Other Actions to Increase Housing Affordability. We also respectfully recommend that the City adopt a holistic approach to planning, creating, and preserving housing for extremely low-income, very low-, low-, and moderate-income families by undertaking the following policies and actions:

- Increase the number of homes allowed, with a minimum of 20% affordable, on the Vallco and Oaks development sites
- Ease regulatory barriers for accessory dwelling units (enclosed are SV@Home's recommendations from December 2017)
- Identify current publicly owned surplus or underutilized sites that can be developed for affordable homes and/or acquire land for the purposes of stand-alone affordable housing development

The depth and scale of the housing crisis requires all communities-- including Cupertino-- to act expediently and boldly. We are encouraged by today's conversation and hope that you to take swift action on the BMR ordinance and expand on current opportunities available in the City.

We appreciate your efforts to increase affordable housing options, and look forward to working with you as you implement your housing program.

Sincerely,
Pilar Lorenzana, Deputy Director, SV@Home
Josh Selo, Executive Director, West Valley Community Services

cc
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Inclusionary Housing in Santa Clara County: Aligning Local Policies toward a Countywide Affordable Housing Strategy

Inclusionary Housing: An Introduction

Inclusionary housing policies require or encourage developers to set aside a certain percentage of housing units in newly constructed or rehabilitated projects for low- and moderate-income residents. By creating mixed-income developments, people from different socio-economic backgrounds are given the opportunity to access the same services and amenities, furthering equity and inclusion, and addressing federal fair housing obligations.

For a number of years, inclusionary housing was only legal for for-sale housing in California due to the [Palmer Sixth Street Properties v Los Angeles](#) court case. This changed effective January 1, 2018 when new law created by AB 1505 went into effect. AB 1505 expressly supersedes the *Palmer* decision by authorizing the legislative body of any city or county to adopt ordinances requiring that, as a condition of developing rental housing units, the development include a certain percentage of rental units affordable to moderate- income, lower-income, very low-income, or extremely low-income households.

In February 2016, the US Supreme Court declined to review a challenge brought by the California Building Industry Association, which questioned the validity of local inclusionary ordinances for for-sale housing. This decision removed any questions over the ability for local government to adopt and implement inclusionary ordinances for for-sale housing.

Legal and Legislative Requirements

AB 1505 authorizes communities to adopt rental inclusionary requirements by *ordinance*. An ordinance should be adopted to implement inclusionary requirements contained in general plans, housing elements, or other policy documents.

Existing rental inclusionary ordinances that were not amended after *Palmer* can be implemented after January 1, 2018 as long as they include provisions for alternative means of compliance.

No nexus study is required to justify a rental inclusionary requirement. In the 2015 California Supreme Court decision *California Building Industry Ass'n v. City of San Jose (CBIA)*, it determined that inclusionary requirements were “land use provisions similar to rent and price controls and met constitutional requirements so long as not ‘confiscatory’ and designed to further the public health, safety, and welfare.”¹

If a rental inclusionary ordinance was adopted prior to September 15, 2017, no economic feasibility study is required to justify a rental inclusionary requirement, regardless of the required set-aside percentage. If the ordinance was adopted or amended after September 15, 2017 to require affordable rental housing, a feasibility study would not be required if the set-aside percentage required is 15 percent or less. However, if the ordinance requires a higher inclusionary requirement, or if affordability

¹ Goldfarb and Lipman

restrictions are deeper (targeting extremely low- income or very low-income households), a jurisdiction may choose to prepare a feasibility study.

The State Department of Housing and Community Development has the authority to require that an economic feasibility study be provided for any inclusionary ordinance that was adopted after September 15, 2017 if the ordinance requires that more than 15% of the homes be affordable, but only in two circumstances: (1) if the jurisdiction has failed to meet at least 75% of its RHNA need in the above moderate income category for five or more years, or (2) if the jurisdiction has not submitted its annual housing element report for two consecutive years. If HCD should find that the study is insufficient, the jurisdiction would only be able to require 15% affordability until it could prove through an economic feasibility study that additional affordability was feasible.

CASA-- the Committee to House the Bay Area-- is currently considering potential inclusionary housing requirements for the 9-County Bay Area. Recommendations from CASA are not expected until late 2018 or early 2019.

SV@Home's Recommendations:

Local jurisdictions must make many choices when designing an inclusionary housing ordinance. As these choices are made, it is important to ensure that the inclusionary requirements are both feasible for developers and support achievement of affordable housing goals. To the extent that all 16 Santa Clara County jurisdictions adopt similar requirements, it will provide more certainty to the development community working in the South Bay.

SV@Home encourages all Santa Clara County jurisdictions to consider SV@Home's recommendations as a way to align local policy goals with a broader countywide inclusionary housing strategy.

Criterion	Recommendation	Rationale
Set-Aside Percentage	Adopt a minimum 15% onsite inclusionary housing onsite requirement for both for-sale and rental housing. If an Alternative Compliance Option is selected (see below) then this percentage should be increased to a minimum of 20%	<p>Creating a consistent 15% requirement across the county provides predictability for developers as well as a level playing field for cities. The cities of Campbell, Cupertino, Palo Alto, Santa Clara, and San Jose have set 15% affordability as their inclusionary requirement.</p> <p>The recommended set-aside percentage is increased to 20% to incentivize the development of integrated on-site affordable units.</p>
Project Size Threshold	<p>Apply the inclusionary requirements to projects of ten or more units.</p> <p>Do not apply to ADUs.</p> <p>For projects that are smaller than ten units, require that developers pay a fee if the units exceed 1,200 square feet. The fee can increase for larger units.</p>	<p>It is important to offer "missing middle" opportunities, and requiring inclusionary percentages for smaller developments can discourage developers from pursuing small infill development like row houses, stacked flats, duplexes and fourplexes which tend to be more naturally affordable, and therefore affordable to teachers, nurses, construction workers, and others.</p> <p>At the same time, it is recognized that some developments that are small are offered at luxury prices and not naturally affordable. Santa Cruz and San Mateo Counties have</p>

Criterion	Recommendation	Rationale
		<p>adopted inclusionary ordinances that tier fees according to unit size.</p> <p>No fees should apply to ADUs, a building type that should be encouraged with fewer fees, not new and additional fees.</p>
Income Restrictions— Rental	Average 80% of Area Median Income (AMI)	This allows a developer to provide units for a variety of income levels.
Income Restrictions— Owner	Average 120% of Area Median Income (AMI)	This allows a developer to provide units for a variety of income levels.
Term of Affordability -- Rental	Place affordability restrictions on rental homes for a minimum of 55 years	This ensures that the homes are available for an extended period, and is consistent with other State and federal affordable housing programs.
Term of Affordability -- Owner	Place affordability restrictions on for sale homes for a minimum of 45 years	This ensures that the homes are available for an extended period, and is consistent with other State and federal affordable housing programs. (Note: these restrictions can be removed upon an equity share sale)
Resale Restrictions— Owner	Implement an equity share provision that allows the original buyer of an affordable unit to sell the unit at market rate and share in the equity appreciation	This allows homeowners to acquire equity, making it possible for them to purchase a new home when they need to move. It also allows the local agency to re-invest its share in a new first-time homebuyer family who can purchase a new home anywhere in the jurisdiction.
Home Amenities	Affordable homes are indistinguishable from market rate homes and are integrated into the development	This is a best practice that ensures that lower- and moderate-income households have access to the same amenities as market-rate households.
Alternative Compliance Options	<p>Provide a variety of alternative options for compliance:</p> <ul style="list-style-type: none"> - Build Onsite - Offsite construction - Credit trading/transfer - Housing Preservation credits - In lieu fee - Land dedication - Acquisition/Rehabilitation - Combination 	<p>Recognizes that not all developments are the same, and provides both the developer and the City with flexibility to respond, particularly when a different option would result in more affordability. Additionally, in some circumstances, payment of an in-lieu fee or another compliance option may be preferable, as in the case of a multi-million dollar home subdivision.</p> <p>According to AB 1505, all rental inclusionary ordinances must include alternative means of compliance, however jurisdictions have broad discretion over the alternative means provided.</p>

Criterion	Recommendation	Rationale
Incentives	Provide a robust suite of incentives to developers that should include: <ul style="list-style-type: none"> - Density bonus - Reduction in parking spaces - Changes to setbacks, height requirements, and other zoning variances - Expedited review - Fee or tax exemptions - Financial support 	Provides developers the opportunity to achieve cost savings that can offset the cost of providing the affordable units.
Timeframe and Grandfathering	While an ordinance should go into effect in 30 days, provide an adequate timeframe for the market to adjust when adopting new inclusionary requirements. Our recommendation is to grandfather those projects that Establish requirements that ensure that any project that is grandfathered continues to move forward through the development process.	This is a best practice that recognizes that the development process is long, and that many developers have invested time and resources into projects that are already in the development pipeline. Requiring that the developments that receive grandfather status meet key requirements for progress ensures that those requesting an exemption are verifiably in the development process.
Incentives	Adopt incentives that offset the cost to the developer of providing the affordable units. This can include reduced parking, reduction in fees, reduced setbacks, increased height, and fast track permitting.	Recognizes that there is a cost to providing the inclusionary units.

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TRANSMITTED VIA EMAIL

December 18, 2017

Honorable Mayor Paul and Members of the City Council
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014

Dear Mayor Paul, Vice Mayor Sinks, and Councilmembers Chang, Scharf, and Vaidhyanathan:

**Re: December 19, 2017 City Council Agenda Item 17 —
Consider an ordinance to amend regulations in Title 19, Zoning of the
Municipal Code with regard to Accessory Dwelling Units**

On behalf of our members, we thank you for considering amendments to the City of Cupertino's Accessory Dwelling Unit (ADU) Ordinance in order to comply with State legislation adopted in 2016 and 2017. We support the staff recommendations, but we also urge the Council to consider further revisions to allow and encourage more Cupertino homeowners to consider building ADUs.

The amendments adopted by the Council in November 2016 were an important first step. However, in order to fully leverage ADUs as a policy solution, Cupertino must take additional steps to encourage homeowners to build them. SV@Home encourages the City of Cupertino to consider the following policy changes that would allow the City to unlock the potential of ADUs:

- **Reduce the minimum lot size requirement for ADUs.** Cupertino has one of the highest minimum lot size requirements in Santa Clara County – 10,000 square feet for a detached ADU. This is an enormous barrier that automatically bars many, if not most, of the City's single family lots from eligibility. By comparison, Palo Alto recently reduced its minimum lot size to 5,000 square feet, and Mountain View eliminated its minimum lot size requirement entirely. A separate minimum lot size requirement, in addition to the existing zoning requirements, creates an additional constraint that could exclude a significant number of homeowners from the opportunity to build an ADU. We strongly recommend that the City of Cupertino reduce or eliminate its extremely high minimum lot size requirement.
- **Broadly legalize existing ADUs that can meet basic building, health, and safety standards even if they are non-compliant with current planning codes.** A legalization program for such units would encourage owners to come forward and

- bring their units into compliance with building and safety codes, while keeping current tenants from being permanently displaced. ADUs that are safe for occupants and neighbors should be allowed to come into compliance with building and safety codes and be legally occupied, without facing any penalties.
- **Reduce fees associated with ADU construction.** Fees can add tens of thousands of dollars to the cost of creating ADUs, especially those that treat an ADU like a new use rather than an accessory to a single family home. Reducing financial burden for homeowners through reduced fees or a fee-waiver program can make ADUs more affordable. As an example, the City of Mountain View significantly reduced its Park Land Dedication In-Lieu Fee for ADUs, recognizing that an ADU will likely have fewer occupants than the average single family home.
- Finally, we recommend that the City of Cupertino dedicate resources toward the creation of a **robust Accessory Dwelling Unit program** that provides resources and guidance to homeowners who are interested in creating secondary dwelling units on their property. The City of Santa Cruz’s Accessory Dwelling Unit (ADU) Program, combined with its flexible ADU ordinance, demonstrates the positive impact of this combined approach; between 2003 and 2015, the City has built nearly 350 secondary dwelling units.

ADUs can provide a rapid means of providing missing-middle housing within the existing fabric of Cupertino’s single family neighborhoods. Among the City’s homeowners are retirees looking for a way to age in place, working families who could benefit from an additional source of income to help pay for their mortgage, and parents with older children who have moved back home and otherwise would not be able to afford a home in Silicon Valley. For these individuals and the many moderate-income renters who struggle to find housing in this area, ADUs can provide a broader range of affordable housing options that allow them to live near their family and/or place of work.

We thank you for considering these recommendations. As interest in ADUs grows among residents and other jurisdictions across the County, we hope to serve as resource to the City for information regarding ADU policy best practices. Please let us know how we can support your efforts to address Cupertino’s housing affordability challenges.

Sincerely,



Pilar Lorenzana
Deputy Director

Cc

Aarti Shrivastava, Assistant City Manager & Director of Community Development

Piu Ghosh, Principal Planner

Andrae Wara-Macapinlac, Senior District Representative, Office of Senator Bob Wieckowski

Senator Bob Wieckowski, California Senate District 10