City of Palo Alto (ID # 3347)

Planning & Transportation Commission Staff Report

Report Type: Meeting Date: 1/9/2013

Summary Title: Density Bonus Ordinance

Title: Review and Recommendation to City Council to Adopt New Chapter 18.15 (Residential Density Bonus) to Title 18 (Zoning) of the Palo Alto Municipal Code to Implement Government Code Section 65915

From: Tim Wong, Senior Planner

Lead Department: Planning and Community Environment

Recommendation

Staff recommends that the Planning and Transportation Commission (PTC) review and recommend to City Council to Adopt New Chapter 18.15 (Residential Density Bonus) to Title 18 (Zoning) of the Palo Alto Municipal Code to Implement Government Code Section 65915

Background

The State Density Bonus Law (Section 65915 of the Government Code) was first adopted in 1979. The law allows developers who offer affordable units in their developments a density bonus above what the zoning ordinance would typically allow. Originally, developers received a density bonus of 25% if they met the density bonus requirements.

In 2004, the State Legislature passed SB 1818, which significantly amended Section 65915 of the Government Code. The significant changes to the law, effective on January 1, 2005, included:

- A higher maximum market-rate unit density bonus of 35% for a lower percentage of affordable units provided;
- A sliding scale of market-rate density bonus percentages from 20%-35% depending on the percentage of affordable units provided;
- Provision for up to three (3) development concessions or incentives, depending on the percentage of affordable units provided;

- Granting the developer a density bonus if they donate land for very low income housing; and
- Required jurisdictions to implement Density Bonus law through local codes.

In the past, the City has applied the Density Bonus law on an ad hoc basis to both market rate and affordable developments. Palo Alto Family Apartments, located at 801 Alma Street and developed by Eden Housing, is a 50 unit affordable rental development. Eden requested concessions to encroach into the required setbacks, exceed the maximum floor area ratio (FAR) and to not provide private useable open space. The development at 195 Page Mill Road also requested concessions to allow residential uses in the General Manufacturing (GM) zoning district and to exceed the maximum FAR in return for providing 17 affordable housing units (20% of the total units).

The 2007-2014 Draft Housing Element Update includes a draft program (Program 3.1.10) requiring that a density bonus ordinance be adopted that is consistent with Government Code 65915. Staff anticipates that density bonus will be an important tool to help the City accommodate its Regional Housing Needs Allocation (RHNA) numbers.

On October 19, 2011, the PTC conducted a study session regarding Government Code Section 65915 and the SB 1818 amendments. The purpose of the study session was to provide staff with direction for the preparation of the City's draft ordinance. The discussion was focused primarily on allowable concessions and an evaluation of the reasonableness of the requested concession(s). Staff provided the density bonus ordinances from the City of San Mateo and City of Santa Monica as reference for PTC review. The ordinances from those jurisdictions were chosen based on their differing approaches to granting concessions for proposed developments. The City of Santa Monica's ordinance was more detailed in its requirements in granting concessions. The Santa Monica code also placed quantified limits on the types of concessions offered. In addition, if the developer did not choose one of the concessions on the menu, a noticed public hearing was required to review the concession(s) proposed by the developer. The City of San Mateo's ordinance contained broader concessions with no quantified thresholds or limitations on the City's acceptance.

PTC Study Session

At the October 19 meeting, common themes voiced by the PTC members related to height limits, the relationship between the City's Below Market Rate (BMR) program requirements and density bonus concessions and financial documentation submittal.

1. A concern was raised that a developer, with the use of the concession(s), could circumvent height limits and/or other zoning requirements without the City's ability to review the impacts. Staff responded that the City could deny the concession request if the concession was not needed to produce the affordable housing.

2. Another concern was eligibility for a concession through the City's BMR requirement. The City's BMR ordinance requires a developer set aside 15% of the units in the development as affordable units. By providing the required 15%, the developer also met the eligibility requirements to request one concession. Therefore, the developer would receive a concession by meeting a City requirement. There was discussion of requiring the developer to meet the BMR requirements and any additional affordable housing units beyond the required 15% would be eligible for density bonus. While the law is still not clear whether a local BMR requirement automatically triggers a Density Bonus, staff believes a reasonable interpretation of State law is that a charter city can impose BMR requirements on a development without triggering density bonus. Therefore the draft ordinance has been revised to require the applicant to fulfill their BMR requirements prior to receiving Density Bonus credit.

3. Request for Financial Documentation. The PTC discussed the possibility of requesting financial documentation as evidence for the necessity of the concession request. However, the PTC, as a land use advisory board, was unsure if it could request financial documentation. Staff has researched other jurisdictions and determined that it is appropriate to request such information, at least when requests are made to exceed the minimum thresholds outlined.

The PTC directed staff to prepare a City draft ordinance similar to the style of the Santa Monica ordinance and their menu of concessions.

Summary of Key Issues

The draft density bonus ordinance has been prepared using the City of Santa Monica ordinance as a model. The comments by the PTC have been integrated into the draft ordinance.

<u>Draft Density Bonus Ordinance</u>

Staff worked with the City Attorney in preparing the draft density bonus ordinance. Some of the more relevant sections of the ordinance include:

1. Implementation (Sec. 18.15.030) –

- The ordinance applies when the development includes five or more residential units;
- Developers can request up to a maximum density bonus of 35% depending on the number of affordable units and the level of affordability, and
- Affordable units provided through the City BMR program are not applied toward Density Bonus eligibility.

2. Development Standards (Sec. 18.15.040) –
   - The required units are to be built on-site and shall be generally equivalent in size, fixtures and finishes to the market rate units;
   - The affordability term will be 59 years for rental and for ownership units in accordance with the City's BMR program, and
   - Includes the option for offsite development of the affordable units.

3. Development Concessions and Incentives (Sec. 18.15.050) –
   - A menu of the concessions was created for both residential and commercial projects, listing the more commonly requested concessions of setbacks, floor area ratio (FAR) and height limit. These concessions would be granted without additional review;
   - Any concession not on the menu of concessions would require additional review and approval by the Approval Authority. The Approval Authority is determined by the underlying discretionary permit application.
   - Financial information will be requested to document the financial necessity of the concession if the requested concession is not on the menu of concessions;
   - It is not necessary to request a density bonus in order to request concessions, and
   - The City Council has the discretion to allow more generous concessions for developments that are 100% affordable.

4. Waiver/Modification of Development Standards (Sec. 18.15.060)
   - State law also allows the applicant to request a waiver or modification of development standards if such standards would physically preclude the construction of the proposed development at the increased density with the incorporated concessions and incentives. The ordinance requires the applicant to demonstrate that without the waiver or modification, the development standards would physically preclude the construction of the development at the site.

5. Child Care Facilities (Sec. 18.15.070) –
    - Housing developments providing child care facilities may also take advantage of density bonus and concessions.

6. Application Requirements (Sec. 18.15.080) –
    - Outlines the procedure for developers to request density bonus and concessions, and
    - Those concessions requested not listed in Section 18.15.050 would require additional review, including submittal of financial information.

7. Review Procedures (Sec. 18.15.090) –
    - Outlines the process if the developer chooses a concession not on the menu, and
    - As part of the public hearing, the Approval Authority will need to make separate findings for the granting of the concessions.

8. Regulatory Agreement (Section 18.15.100) – All density bonus development will be required to enter into a regulatory agreement.
    - The Agreement will designate the units, affordability term and level of affordability.

Policy Implications

The proposed density bonus ordinance is consistent with the policies and programs in the current and proposed Housing Element. Program H-38 of the current Housing Element calls for the adoption of a revised density bonus program ordinance. Since this was not completed, it remains a program in the Housing Element update.

In the draft Housing Element update, a program stipulating the adoption of a density bonus ordinance (Program 3.1.10) has been transferred from the current Housing Element. The draft ordinance meets the requirements of the program.

Timeline

Subsequent to consideration and recommendation by the Planning and Transportation Commission, the City Council will consider the ordinance at a scheduled and noticed additional public hearing.

Environmental Review

The proposed Ordinance revises the requirements for granting a residential density bonus to comply with revisions to State law enacted by the Legislature through the adoption of Senate Bill 1818. Adoption of the draft density bonus will only codify allowances that developers have been able to use in housing developments since 2005. The revisions modify the criteria and incentives offered to qualifying developments but do not authorize construction not already permitted under the City's existing codes. It is uncertain how many project applicants will seek to utilize the provisions of State law and this Ordinance and where such projects might be located in the City. Further, each individual project will be subject to its own environmental review. Consequently, the attached proposed ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) pursuant to Section 15061(b)(3) of Title 14 of the California Code of Regulations since it can be seen with certainty that there is no possibility the adoption and implementation of this Ordinance may have a significant effect on the environment.

Attachments:

- Attachment_A_ORD_ Residential_ Density_ Bonus_ with_ Menu (PDF)
- Attachment_B_PTC_ExcerptMins_Oct192011 (PDF)

Not Yet Approved

Ordinance No. _____
Ordinance of the Council of the City of Palo Alto Adopting New Chapter 18.15 (Residential Density Bonus) of Title 18 (Zoning) of the Palo Alto Municipal Code to Implement Government Code Section 65915

The Council of the City of Palo Alto does ORDAIN as follows:

SECTION 1. Findings and Recitals. The Council of the City of Palo Alto finds and declares as follows:

A. The State Density Bonus Law (Section 65915 of the Government Code) was first adopted in 1979. The law allows developers who offer affordable units in their developments a density bonus above what the zoning ordinance would typically allow. Originally, developers received a density bonus of 25% if they met the density bonus requirements.

B. In 2004, the State Legislature passed SB 1818, which significantly amended Section 65915 of the Government Code. The significant changes to the law, effective on January 1, 2005, included:

- A higher maximum market-rate unit density bonus of 35% for a lower percentage of affordable units provided;
- A sliding scale of market-rate density bonus percentages from 20%-35% depending on the percentage of affordable units provided;
- Provision for up to three (3) development concessions or incentives, depending on the percentage of affordable units provided;
- Granting the developer a density bonus if they donate land for very low income housing; and
- Required jurisdictions to implement Density Bonus law through local codes.

C. In the past, the City has applied the Density Bonus law on an ad hoc basis to both market rate and affordable developments. Palo Alto Family Apartments, located at 801 Alma Street and developed by Eden Housing, is a 50 unit affordable rental development. Eden requested concessions to encroach into the required setbacks, exceed the maximum floor area ratio (FAR) and to not provide private useable open space. The development at 195 Page Mill Road also requested concessions to allow residential uses in the General Manufacturing (GM) zoning district and to exceed the maximum FAR in return for providing 17 affordable housing units (20% of the total units).

D. The 2007-2014 Draft Housing Element Update includes a draft program (Program 3.1.10) requiring that a density bonus ordinance be adopted that is consistent

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with Government Code 65915. Staff anticipates that density bonus will be an important tool to help the City accommodate its Regional Housing Needs Allocation (RHNA) numbers.

SECTION 2. Chapter 18.15 (Residential Density Bonus) of Title 18 (Zoning) of the Palo Alto Municipal Code is hereby added to read as follows:

Chapter 18.15
Residential Density Bonus

Sections:

18.15.010 Purpose
18.15.020 Definitions
18.15.030 Density Bonuses
18.15.040 Development Standards for Affordable Units
18.15.050 Development Concessions and Incentives
18.15.060 Waiver/Modification of Development Standards
18.15.070 Child Care Facilities
18.15.080 Application Requirements
18.15.090 Review Procedures
18.15.100 Regulatory Agreement

18.15.010 Purpose

The purpose of this chapter is to:

(a) Comply with the state density bonus law under California Government Code section 65919.

(b) Establish procedures for implementing state density bonus requirements as set forth in California Government Code Section 65915, as amended.

(c) Facilitate the development of affordable housing consistent with the goals, objectives, and policies of the City's Comprehensive Plan Housing Element.

18.15.020 Definitions

Whenever the following terms are used in this Chapter, they shall have the meaning established by this section:

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(a) **"Affordable Rent"** means monthly rent, including a reasonable allowance for utilities and all fees for housing services, for rental Restricted Affordable Units reserved for Very Low or Lower Income Households, that does not exceed the following:

(i) Very Low Income: 50 percent of the area median income for Santa Clara County, adjusted for presumed household size, multiplied by 30 percent and divided by 12.

(ii) Lower Income: 60 percent of the area median income for Santa Clara County, adjusted for presumed household size, multiplied by 30 percent and divided by 12.

(b) **"Affordable Sales Price"** means the maximum sales price at which Very Low, Lower and Moderate Income Households can qualify for the purchase of Restricted Affordable Units as set forth in the City of Palo Alto's Below Market Rate Housing Program. The sales price shall be considered affordable only if it is based on a reasonable down payment, and monthly housing payments (including interest, principal, mortgage insurance, property taxes and assessments, fire and casualty insurance, homeowners association fees, property maintenance and repairs, and a reasonable allowance for utilities), all as determined by the City, that are equal to or less than:

(i) Very Low Income: 50 percent of the area median income for Santa Clara County, adjusted for presumed household size, multiplied by 30 percent and divided by 12.

(ii) Lower Income: 70 percent of the area median income for Santa Clara County, adjusted for presumed household size, multiplied by 30 percent and divided by 12.

(iii) Moderate Income: 110 percent of the area median income for Santa Clara County, adjusted for presumed household size, multiplied by 30 percent and divided by 12.

(c) **"Applicant"** means any person, firm, partnership, association, joint venture, corporation, or any entity or combination of entities who seeks Development permits or approvals from the City of Palo Alto.

(d) **"Approval Authority"** means the person or body that is authorized to approve a Development as specified in the City of Palo Alto Municipal Code.

(e) **"Below Market Rate Housing Program"** means Chapter 18.14 of the Palo Alto Municipal Code and the Administrative Guidelines for the Below Market Rate Program.

(f) **"Child Care Facility"** means a child day care facility other than a family day care home, including, but not limited to, infant centers, preschools, extended day care facilities, and school age child care centers.

(g) **"Concession or Incentive"** as used interchangeably means such regulatory concessions as specified in Government Code Section 65915(k) to include:

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(i) A reduction of site Development Standards or architectural design requirements which exceed the minimum applicable building standards approved by the State Building Standards Commission pursuant to Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code, including, but not limited to, a reduction in setback, coverage, and/or parking requirements which result in identifiable, financially sufficient and actual cost reductions;

(ii) Allowing mixed use development in conjunction with the proposed residential development, if nonresidential land uses will reduce the cost of the residential project and the nonresidential land uses are compatible with the residential project and existing or planned development in the area where the Development will be located; and

(iii) Other regulatory Concessions proposed by the applicant or the City which result in identifiable financially sufficient, and actual cost reductions.

(h) **"Density Bonus"** means a density increase over the Maximum Residential Density granted pursuant to Government Code Section 65915 and this Ordinance.

(i) **"Density Bonus Units"** means those dwelling units granted pursuant to the provisions of this Chapter which exceed the otherwise Maximum Residential Density for the development site.

(j) **"Development"** means all developments pursuant to a proposal to construct or place five (5) or more additional dwelling units on a lot or contiguous lots including, without limitation, a planned unit development, site plan, subdivision, or conversion of a non-residential building to dwelling units.

(k) **"Development Standard"** means a site or construction condition such as a height limitation, a setback, or a floor-area ratio, that applies to a Development pursuant to any ordinance, general plan element, specific plan, charter, or other City condition, law, policy, resolution, or regulation. A “site and construction condition” is a development regulation or law that specifies the physical development of a site and buildings on the site in a Development.

(l) **"Discretionary Permit"** means any permit issued for the Development which requires the exercise of judgment or deliberation from the Approval Authority, including but not limited to conditional use permits, variances, site plans, design review, planned development permits, general and specific plan approvals and amendments, zoning amendments, and tentative and parcel maps.

(m) **"Lower, Very Low, or Moderate Income”** means annual income of a household that does not exceed the maximum income limits for the income category, as adjusted for household size, applicable to Santa Clara County, as published and periodically

updated by the State Department of Housing and Community Development pursuant to Sections 50079.5, 50105, or 50093 of the California Health and Safety Code.

(n) **"Maximum Residential Density"** means the maximum number of dwelling units permitted in the Development by the City's Comprehensive Plan Land Use Element and Zoning Ordinance at the time of application, excluding the provisions of this Chapter. If the Development is a planned community zone, the Maximum Residential Density shall be determined on the basis of the Comprehensive Plan and the maximum density of the previous zone designation. If the maximum density allowed by the Zoning Ordinance is inconsistent with the density allowed by the Land Use Element of the City's Comprehensive Plan, the Land Use Element density shall prevail.

(o) **"Non-Restricted Unit"** means all dwelling units within a Development excluding the Restricted Affordable Units.

(p) **"Qualifying Mobilehome Park"** means a mobilehome park that limits residency based on age requirements for housing older persons pursuant to Section 798.76 and 799.5 of the Civil Code.

(q) **"Qualifying Resident"** means senior citizens or other persons eligible to reside in a Senior Citizen Housing Development or Qualifying Mobilehome Park.

(r) **"Regulatory Agreement"** means a recorded and legally binding agreement between an applicant and the City to ensure that the requirements of this Chapter are satisfied. The Regulatory Agreement, among other things, shall establish: the number of Restricted Affordable Units, their size, location, terms and conditions of affordability, and production schedule.

(s) **"Restricted Affordable Unit"** means a dwelling unit within a Development which will be available at an Affordable Rent or Affordable Sales Price for sale or rent to Very Low, Lower or Moderate Income households.

(t) **"Senior Citizen Housing Development"** means a Development consistent with the California Fair Employment and Housing Act (Government Code Section 12900 et. seq., including 12955.9 in particular), which has been "designed to meet the physical and social needs of senior citizens," and which otherwise qualifies as "housing for older persons" as that phrase is used in the federal Fair Housing Amendments Act of 1988 (P.L. 100-430) and implementing regulations (24 CFR, part 100, subpart E), and as that phrase is used in California Civil Code Section 51.2 and 51.3.[1]

18.15.030 Density Bonuses

This Section describes the Density Bonuses that will be provided, at the request of an applicant, when that applicant provides Restricted Affordable Units as described below.

(a) The City shall grant a 20 percent (20%) Density Bonus when an applicant for a Development of five (5) or more dwelling units seeks and agrees to construct at least any one of the following in accordance with the requirements of this Section and Government Code Section 65915:

(i) At least 10 percent (10%) of the total dwelling units of the Development as Restricted Affordable Units affordable to Lower Income Households. For each one percent (1%) increase in the percentage of restricted Lower Income units, a Development will receive an additional one and one-half percent (1.5%) density bonus up to thirty-five percent (35%) of the Maximum Residential Density; or

(ii) At least five percent (5%) of the total dwelling units of the Development as Restricted Affordable Units affordable to Very Low Income Households. For each one percent (1%) increase in the percentage of restricted Very Low Income units, a Development will receive an additional two and one-half percent (2.5%) density bonus up to thirty-five percent (35%) of the Maximum Residential Density; or

(iii) A Senior Citizen Housing Development; or

(iv) A Qualifying Mobilehome Park.

(b) The City shall grant a five percent (5%) Density Bonus when an applicant for a Development of five (5) or more additional dwelling units seeks and agrees to construct, in accordance with the requirements of this Section and Government Code Section 65915, at least 10 percent (10%) of the total dwelling units in a common interest development as defined in California Civil Code Section 1351 for Moderate Income Households, provided that all dwelling units in the Development are offered to the public for purchase. For each one percent (1%) increase in the percentage of restricted Moderate Income units, a Development will receive an additional one percent (1%) density bonus up to thirty-five percent (35%) of the Maximum Residential Density.

(c) No additional Density Bonus shall be authorized for a Senior Citizen Development or Qualifying Mobilehome Park beyond the Density Bonus authorized by subsection (a) of this Section.

(d) When calculating the number of permitted Density Bonus Units, any fractions of units shall be rounded to the next highest number. An applicant may elect to receive a Density Bonus that is less than the amount permitted by this Section; however, the City shall not be required to similarly reduce the number

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of Restricted Affordable Units required to be dedicated pursuant to this Section and Government Code Section 65915(b).

(e) Each Development is entitled to only one Density Bonus, which shall be selected by the applicant based on the percentage of Very Low Restricted Affordable Units, Lower Income Restricted Affordable Units, or Moderate Income Restricted Affordable Units, or the Development's status as a Senior Citizen Housing Development or Qualifying Mobilehome Park. Density bonuses from more than one category may not be combined. In no case shall a Development be entitled to a Density Bonus of more than thirty-five percent (35%).

(f) The Density Bonus Units shall not be included when determining the number of Restricted Affordable Units required to qualify for a Density Bonus. When calculating the required number of Restricted Affordable Units, any resulting decimal fraction shall be rounded to the next larger integer.

(g) Any Restricted Affordable Unit provided pursuant to the City's Below Market Rate Housing Program shall not be included when determining the number of Restricted Affordable Units required to qualify for a Density Bonus or other entitlement under this Chapter. In addition, the payment of a housing impact or in lieu fee shall not qualify for a Density Bonus or other entitlement under this Chapter.

(h) Certain other types of development activities are specifically eligible for a Density Bonus pursuant to State law:

(i) A Development may be eligible for a Density Bonus in return for land donation pursuant to the requirements set forth in Government Code Section 65915(g).

(ii) A condominium conversion may be eligible for a Density Bonus or Concession pursuant to the requirements set forth in Government Code Section 65915.5.

(i) Notwithstanding any provision of this Chapter, all Developments must satisfy all applicable requirements of the City's Below Market Rate Housing Program, which may impose requirements for Restricted Affordable Units in addition to those required to receive a Density Bonus or Concessions.

Table 1 summarizes the density bonus provisions described in this Section.

Table 1
Density Bonus Summary Table

Restricted Affordable Units or Category	Minimum Percentage of Restricted Affordable Units	Percentage of Density Bonus Granted	Additional Bonus for Each 1% Increase in Restricted Affordable Units	Percentage of Restricted Units Required for Maximum 35% Density Bonus
Very Low Income	5%	20%	2.50%	11%
Lower Income	10%	20%	1.50%	20%
Moderate Income	10%	5%	1%	40%
Senior Citizen Housing	100%	20%	------	------
Qualifying Mobile Park	100%	20%	------	------

Note: A density bonus may be selected from only one category up to a maximum of 35% of the Maximum Residential Density.

18.15.040 Development Standards for Affordable Units

(a) Restricted Affordable Units shall be constructed concurrently with Non-Restricted Units unless both the City and the applicant agree within the Regulatory Agreement to an alternative schedule for development.

(b) Moderate Income Restricted Affordable Units shall remain restricted and affordable to the designated income group for a minimum period of 59 years (or a longer period of time if required by the construction or mortgage financing assistance program, mortgage insurance program, or rental subsidy program). Very Low and Lower Restricted Affordable Units shall remain restricted and affordable to the designated income group for a period of 30 years for both rental and for-sale units (or a longer period of time if required by a construction or mortgage financing assistance program, mortgage insurance program, or rental subsidy program).

(c) In determining the maximum Affordable Rent or Affordable Sales Price of Restricted Affordable Units, the presumed household size as set forth in the City's Below Market Rate Housing Program shall be used, unless the Development is subject to different assumptions imposed by other governmental regulations.

(d) Restricted Affordable Units shall be built on-site and be dispersed within the Development, except as permitted in subsection (e) of this Section. The number of bedrooms of the Restricted Affordable Units shall be equivalent to the bedroom mix of the Non-Restricted Units in the Development; except that the applicant may include a higher proportion of Restricted Affordable Units with more bedrooms. The design, appearance and general quality of the Restricted Affordable Units shall be compatible with the design of the Non-Restricted Units in the Development. The Development shall comply with all applicable Development Standards, except those which may be modified as provided by this Chapter.

(e) Circumstances may arise in which the City Council finds that the public interest would be served by allowing some or all of the Restricted Affordable Units associated with one Development to be produced and operated at an alternative development site. Where the applicant and the City form such an agreement, the resulting linked developments shall be considered a single Development for purposes of this Chapter. Under these circumstances, the applicant shall be subject to the same requirements established by this Chapter for the Restricted Affordable Units to be provided on the alternative site.

(f) A Regulatory Agreement, as described in Section 18.15.090, shall be made a condition of the Discretionary Permits for all Developments pursuant to this Chapter. The Regulatory Agreement shall be recorded as a restriction on the Development. The Regulatory Agreement shall be consistent with the City's Below Market Rate Housing program guidelines.

18.15.050 Development Concessions and Incentives

This Section includes provisions for providing Concessions or Incentives pursuant to Government Code Section 65915.

(a) **By Right Parking Incentives**. As an alternative to the parking adjustments permitted pursuant to Zoning Ordinance Section 18.52.050, upon request by the applicant, a Development that is eligible for a Density Bonus may provide parking as provided in this subsection (a), consistent with Government Code Section 65915(p), inclusive of handicapped and guest parking:

(i) Zero to one bedroom unit: one on-site parking space;

(ii) Two to three bedroom unit: two on-site parking spaces;

(iii) Four or more bedroom unit: two and one-half parking spaces.

If the total number of spaces required results in a fractional number, it shall be rounded up to the next whole number. For purposes of this subsection, this parking may be provided through tandem parking or uncovered parking, but not through on-street parking.

(b) **Other Incentives and Concessions**. A Development is eligible for other Concessions or Incentives as follows:

(i) One Concession or Incentive for a Development that makes at least ten percent (10%) of the total dwelling units affordable to Lower Income households; or at least five percent (5%) of the total dwelling units affordable to

Very Low Income households; or at least ten percent (10%) of the total dwelling units affordable to Moderate Income households in a common interest development.

(ii) Two Concessions or Incentives for a Development that makes at least twenty percent (20%) of the total dwelling units affordable to Lower Income households; or at least ten percent (10%) of the total dwelling units affordable to Very Low Income households; or at least twenty percent (20%) of the total dwelling units affordable to Moderate Income households in a common interest development.

(iii) Three Concessions or Incentives for a Development that makes at least thirty percent (30%) of the total dwelling units affordable to Lower Income households; or at least fifteen percent (15%) of the total dwelling units affordable to Very Low Income households, or at least thirty percent (30%) of the total dwelling units affordable to Moderate Income households in a common interest development.

Table 2 summarizes the provisions of Concessions or Incentives described in subsection (a).

Table 2
Concessions and Incentives Summary Table

Target Group	**Restricted Affordable Units**		
Very Low Income	5%	10%	15%
Lower Income	10%	20%	30%
Moderate Income (Common Interest Development)	10%	20%	30%
Maximum Incentive(s)/Concession(s)	**1**	**2**	**3**

Notes: 1. Concessions or Concessions may be selected from only one category (very low, lower, or moderate)
2. No concessions or Concessions are available for land donation, or for Senior Citizen Housing Developments and Qualifying Mobilehome Parks that do not contain Restricted Affordable Units.

(c) In submitting a request for Concessions or Incentives, an applicant may request the specific Concessions set forth below. The following Concessions and Incentives are deemed not to have a specific adverse impact as defined in Section 18.15.090 (b)(ii).

(i) Reduced side yard setback requirement if the design is consistent with the design guidelines, where applicable, for the area;

(ii) Reduced front yard setback requirements so long as setback is consistent with the design guidelines, where applicable, for the area;

(iii) Reduced rear yard setback requirements so long as the setback is consistent with the design guidelines, where applicable, for the area;

(iv) A percentage increase in the height limit equal to the Density Bonus percentage for which the Development is eligible if necessary to accommodate the Restricted Affordable Units, with a maximum increase of one foot per Affordable Unit, and no event to exceed fifty (50) feet;

(v) Up to fifty percent (50%) increase in the Floor Area Ratio (FAR) or up to the square footage of the Restricted Affordable Units, whichever is less;

(vi) Reduction in daylight plane requirements;

(vii) Increase in site coverage requirement;

(viii) Reduction in private or public open space; or

(ix) Reductions in required parking consistent with subsection (a) of this Section.

(e) For Developments that propose to construct one hundred percent (100%) of the dwelling units (except a manager's unit) as Restricted Affordable Units that are affordable to Very Low and/or Lower Income households, the Council may grant additional Concessions or Incentives or exceed the limits set forth in (i) to (x) above if the Council finds that such Concessions or Incentives are required to provide for affordable housing costs, as defined in Section 50052.3 of the Health and Safety Code and are in the interest of the public health, safety, or welfare.

(f) Nothing in this Chapter shall be construed to require the provision of direct financial Concessions for the Development, including the provision of publicly owned land by the City or the waiver of fees or dedication requirements.

18.15.060 Waiver/Modification of Development Standards

An applicant may apply for a waiver or modification of Development Standards that will have the effect of physically precluding the construction of a Development at the densities or with the Concessions or Incentives permitted by this Chapter. The developer must demonstrate that Development Standards that are requested to be waived or modified will have the effect of physically precluding the construction of a Development meeting the criteria of subsection (a) of Section 18.15.030 at the densities or with the Concessions or Incentives permitted by this Chapter.

18.15.070 Child Care Facilities

(a) When an applicant proposes to construct a Development that is eligible for a Density Bonus under Section 18.15.030 and includes a child care facility that will be

located on the premises of, as part of, or adjacent to, the Development, the City shall grant either:

(i) An additional density bonus that is an amount of square feet of residential space that is equal to or greater than the square footage of the child care facility; or

(ii) An additional Concession or Incentive that contributes significantly to the economic feasibility of the construction of the child care facility.

(b) The City shall require, as a condition of approving the Development, that the following occur:

(i) The child care facility shall remain in operation for a period of time that is as long as or longer than the period of time during which the Restricted Affordable Units are required to remain affordable pursuant to Section 18.15.040. In the event the childcare operations cease to exist, the Director of Planning and Community Environment may approve an alternative community service use for the child care facility.

(ii) Of the children who attend the child care facility, the children of Very Low, Lower and Moderate Income households shall equal a percentage that is equal to or greater than the percentage of Restricted Affordable Units in the Development that are required for Very Low, Lower and Moderate Income households pursuant to Section 18.15.030.

(c) Notwithstanding subsections (a) and (b) above, the City shall not be required to provide a density bonus or a Concession or Incentive for a child care facility if it finds, based upon substantial evidence, that the community has adequate child care facilities.

18.15.080 Application Requirements

An application for a Density Bonus, Incentive, Concession, waiver, modification or revised parking standard shall be made as follows:

(a) An application for a Density Bonus, Incentive, Concession, waiver, modification or revised parking standard shall be submitted with the first application for a Discretionary Permit for a Development and shall be processed concurrently with those Discretionary Permits. The application shall be on a form prescribed by the City and shall include the following information:

(i) A brief description of the proposed Development, including the total number of dwelling units, Restricted Affordable Units, and Density Bonus Units proposed.

(ii) The zoning and comprehensive plan designations and assessor's parcel number(s) of the project site, and a description of any Density Bonus, Concession or Incentive, waiver or modification, or revised parking standard requested

(iii) A vicinity map and preliminary site plan, drawn to scale, including building footprints, driveway and parking layout.

(iv) If a Concession or Incentive is requested, a brief explanation as to the actual cost reduction achieved through the Concession or Incentive and how the cost reduction allows the applicant to provide the Restricted Affordable Units.

(v) If a waiver or modification is requested, a brief explanation of why the Development Standard would physically preclude the construction of the Development with the Density Bonus, Incentives, and Concessions requested.

(vi) Site plan showing location of market-rate units, Restricted Affordable Units, and Density Bonus units within the proposed Development;

(vii) Level of affordability of the Restricted Affordable Units and proposed method to ensure affordability;

(viii) For Concessions and Incentives that are not included within the menu of Incentives/Concessions set forth in subsection (a) of Section 18.15.050 or in subsection (c) of Section 18.15.050, the application shall include a pro forma providing evidence that the requested Concessions and Incentives result in identifiable, financially sufficient, and actual cost reductions. The cost of reviewing any required pro forma or other financial data, including, but not limited to, the cost to the City of hiring a consultant to review the financial data, shall be borne by the applicant. The pro forma shall include all of the following items:

(A) The actual cost reduction achieved through the Concession;

(B) Evidence that the cost reduction allows the applicant to provide affordable rents or affordable sales prices; and

(C) Other information requested by the Planning Director. The Planning Director may require any pro forma include information regarding capital costs, equity investment, debt service, projected revenues, operating expenses, and such other information as is required to evaluate the pro forma;

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(ix) If a waiver or modification of a Development Standard is requested, the applicant shall provide evidence that the Development Standard for which the waiver is requested will have the effect of physically precluding the construction of the Development with the Density Bonus and Concessions requested;

(x) If a Density Bonus or Concession is requested for a land donation, the application shall show the location of the land to be dedicated, provide proof of site control, and provide evidence that all of the requirements and each of the findings included in Government Code Section 65915(g) can be made;

(xi) If a density bonus or Concession is requested for a child care facility, the application shall show the location and square footage of the child care facilities and provide evidence that all of the requirements and each of the findings included in Government Code Section 65915(h) can be made.

(xii) If a Density Bonus or Concession is requested for a condominium conversion, the applicant shall provide evidence that all of the requirements found in Government Code Section 65915.5 can be met.

(d) In accordance with state law, neither the granting of a Concession, Incentive, waiver, modification, or revised parking standard, nor the granting of a Density Bonus, shall be interpreted, in and of itself, to require a general plan amendment, zoning change, variance, or other discretionary approval.

(e) This Chapter implements State Density Bonus law. Any Density Bonus, Incentive, Concession, revised parking standard, waiver, or modification sought by an Applicant shall be made pursuant to this Chapter and may not be combined with similar requests under State Density Bonus law.

18.15.090 Review Procedures

An application for a Density Bonus, Incentive, Concession, waiver, modification or revised parking standard shall be acted upon by the Approval Authority concurrently with the application for the first Discretionary Permit. The granting of a Density Bonus shall not be deemed approval of the entire Project or approval of any subsequent discretionary permit.

(a) Before approving an application for a Density Bonus, Incentive, Concession, waiver, modification or revised parking standard, the Approval Authority shall make the following findings, as applicable:

(i) The Development is eligible for the Density Bonus and any Concessions, waivers, modifications, or revised parking standards requested.

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(ii) Any requested Concession or Incentive will result in identifiable, financially sufficient, and actual cost reductions based upon the financial analysis and documentation provided. The City finds that the Concessions and Incentives included in Section 18.50.050(c) will result in identifiable, financially sufficient, and actual cost reductions.

(iii) If the Density Bonus is based all or in part on donation of land, a finding that all the requirements included in Government Code Section 65915(g) have been met.

(iv) If the density bonus or Concession is based all or in part on the inclusion of a child care facility, a finding that all the requirements included in Government Code Section 65915(h) have been met.

(v) If the Concession includes mixed-use development, a finding that all the requirements included in Government Code Section 65915(k)(2) have been met.

(vi) If a waiver or modification is requested, a finding that the Development Standards for which the waiver is requested would have the effect of physically precluding the construction of the Development with the Density Bonus and Concessions permitted.

(b) If the findings required by subsection (a) of this Section can be made, the Approval Authority may deny an application for a Concession only if it makes one of the following written findings, supported by substantial evidence:

(i) The Concession is not required to provide for Affordable Rents or Affordable Sales Prices; or

(ii) The Concession would have a specific, adverse impact upon public health or safety or the physical environment or on real property listed in the California Register of Historic Resources, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the Development unaffordable to Low and Moderate Income households. For the purpose of this subsection, "specific adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, written public health or safety standards, policies, or conditions as they existed on the date that the application for the Development was deemed complete; or

(iii) The Concession is contrary to state or federal law.

(c) If the findings required by subsection (a) of this section can be made, the Approval Authority may deny a request for a waiver only if it makes one of the following written findings, supported by substantial evidence:

(i) That the waiver would have a specific, adverse impact upon public health or safety or the physical environment, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the Development unaffordable to Low and Moderate Income households. For the purpose of this subsection, "specific adverse impact" means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified, written public health or safety standards, policies, or conditions as they existed on the date that the application for the residential project was deemed complete; or

(ii) That the waiver would have an adverse impact on real property listed in the California Register of Historic Resources; or

(iii) That the waiver is contrary to state or federal law.

If the Approval Authority is not the City Council, any decision denying a Density Bonus, Incentive, Concession, waiver, modification or revised parking standard may be appealed to the City Council within fourteen days of the date of the decision.

18.15.100 Regulatory Agreement

(a) Applicants for a Density Bonus, Incentive, Concession, waiver, modification or revised parking standard shall enter into a Regulatory Agreement with the City. The terms of the draft agreement shall be approved as to form by the City Attorney and reviewed and revised as appropriate by the Director of Planning and Community Environment, who shall formulate a recommendation to the Approval Authority for final approval.

(b) Following execution of the agreement by all parties, the completed Density Bonus
Regulatory Agreement, or memorandum thereof, shall be recorded and the conditions filed and recorded on the Development.

(c) The approval of the Regulatory Agreement shall take place prior to tentative map approval, and recordation shall take place prior to final map approval, or, where a map is not being processed, prior to Architectural Review approval. The Regulatory Agreement shall be binding to all future owners and successors in interest.

(d) The Regulatory Agreement shall be consistent with the guidelines of the City's Below Market Rate Program and shall include at a minimum the following:

(i) The total number of dwelling units approved for the Development, including the number of Restricted Affordable Units;

(ii) A description of the household income group to be accommodated by the Restricted Affordable Units, and the standards for determining the corresponding Affordable Rent or Affordable Sales Price;

(iii) The location, dwelling unit sizes (square feet), and number of bedrooms of the Restricted Affordable Units;

(iv) Term of use restrictions for Restricted Affordable Units of at least 59 years for both rental units and for-sale units;

(v) A schedule for completion and occupancy of Restricted Affordable Units;

(vi) A description of any Concession, Incentive, waiver, modification, or revised parking standard, if any, being provided by the City;

(vii) A description of remedies for breach of the agreement (the City may identify tenants or qualified purchasers as third party beneficiaries under the agreement); and

(viii) Other provisions to ensure implementation and compliance with this Section.

SECTION 3. CEQA The proposed Ordinance revises the requirements for granting a residential density bonus to comply with revisions to State law enacted by the Legislature through the adoption of Senate Bill 1818. Adoption of the draft density bonus codifies allowances that developers have been able to use in housing developments since 2005. Further, the revisions modify the criteria and incentives offered to qualifying developments but do not authorize construction not already permitted under the City's existing codes. Also, it is uncertain how many project applicants will seek to utilize the provisions of State law and this Ordinance and where such projects might be located in the City. Further, each individual project will be subject to its own environmental review. Consequently, this ordinance is exempt from the requirements of the California Environmental Quality Act (CEQA) pursuant to Section 15061(b)(3) of Title 14 of the California Code of Regulations since it can be seen with certainty that there is no possibility the adoption and implementation of this Ordinance may have a significant effect on the environment.

SECTION 4. Severability. If any provision, clause, sentence or paragraph of this ordinance, or the application to any person or circumstances, shall be held invalid, such invalidity shall not affect the other provisions of this Ordinance which can be given

effect without the invalid provision or application and, to this end, the provisions of this Ordinance are hereby declared to be severable.

SECTION 5. This ordinance shall be effective on the thirty-first date after the date of its adoption.

INTRODUCED:

PASSED:

AYES:

NOES:

ABSENT:

ABSTENTIONS:

NOT PARTICIPATING:

ATTEST:

_____
City Clerk

_____
Mayor

APPROVED AS TO FORM:

_____
Sr. Assistant City Attorney

APPROVED:

_____
City Manager

_____
Director of Planning &
Community Environment

Draft

Planning and Transportation Commission
Verbatim Minutes
October 19, 2011

EXCERPT

Residential Density Bonus and Concessions Ordinance to Implement State Government Code Section 65915 (aka SB1818).

Chair Martinez: Thank you. Is there anybody else? I assume not. We have three items on our agenda tonight. The first is a Study Session regarding the Housing Density Bonus and the concessions, ordinance related to state law 65915, something like that. I would like to welcome our new Senior Planner, Tim Wong. Welcome to the lion's den. We are going to begin with staff report.

Mr. Steven Turner, Advance Planning Manager: Thank you Chair Martinez. Steven Turner, Advance Planning Manager. Staff is pleased to continue this discussion with the Commission about the development of the city's Density Housing Ordinance. It has been some time since we last brought this topic to the Commission. It has been a number of years. Staff has been focused primarily on the development of the housing element as part of the Comprehensive Plan amendment. The intent was to bring the Housing Density Bonus Ordinance to the Commission sooner but with our continued work on the housing elements we felt it best to bring both the housing element and the density bonus ordinance on or around the same time to you and so we put off work for a little while on the Density Bonus Ordinance.

We are at a point now, especially with our new Housing Senior Planner on board with us to continue that work and we have done work over the past few months to prepare for this evening and this discussion so with that I wanted to introduce again Tim Wong, our Housing Senior Planner, who will lead us through the discussion this evening. That will be followed by Don Larkin, our Assistant City Attorney who will go into some legal aspects of Density Bonus Law.

Mr. Tim Wong, Afford. Housing Sr. Planner: Good evening. It's a pleasure to be here. The purpose of tonight's Study Session is to present and discuss the amendments to the Density Bonus Law and staff is seeking feedback from the Commission regarding the amendments as staff proceeds through the process of adopting these amendments into our local ordinance.

In 2004 the State passed SB1818 which significantly amended the existing State Density Bonus Law. Some of the more significant changes were the increase of higher maximum density to 35%. Previously the law had it at 20%. In addition, the new amendments provided that the developer could request up to three concessions or incentives and previously it was only one concession. Lastly, it requires that jurisdictions adopt the amendments into their local codes and so staff is taking this through the process as we speak.

As stated, jurisdictions must grant developers concessions and incentives up to a maximum of three depending on the percentage of affordable housing that the developer would propose in the development. So some of the more common concessions and incentives that can be requested include an increased floor area ration, increased height from the maximum height limits and

some relief from setback requirements. These are the more common but the developer can request for a variety of concessions or incentives.

So as part of this Study Session staff is looking for feedback about how to consider concessions and incentives when requested. Staff has provided you two Ordinances from the City of San Mateo and from the City of Santa Monica, different approaches, how they establish parameters for some of these concessions. The City of Santa Monica, they consider each request on a case by case basis while the City of San Mateo has created limits to their concessions and I believe you received outlines or summaries of how each of those jurisdictions proceed.

Again, as part of the Study Session staff is looking for feedback about how the Commission wishes to approach considering or establishing parameters to some of these concessions and so that really concludes my discussion and I'd like to turn the time over to Assistant City Attorney Don Larkin.

Mr. Donald Larkin, Senior Asst. City Attorney: Thanks. I thought it would be helpful to give just a little bit of background on the State Density Bonus Law and what the parameters of the legislation provide and then put some perspective on what the City can and can't do in terms of implementing the Density Bonus Law and I call it Density Bonus Law because its easier to remember than Government Code 65915 and SB1818. As the title of the statute implies, the primary purpose of this statute is to create density bonuses for the provision of below market rate housing and a density bonus refers to a bonus or additional residential density unit density, for example, in a thirty unit per acre zoning project on a one acre site the developer could normally develop thirty housing units. Under the Density Bonus Law if 5% of those units are rented to very low income renters then they would be entitled to a 20% Density Bonus and they could build 36 units. The majority of the statute is discussing the various formulas by which you get bonuses in residential density. We have not seen since I've been here an application from any developer who ever built up to the maximum density allowed in a multifamily zone. We don't really concern ourselves with density bonuses because we don't typically have requests for those.

Where we really have issues that we need to address is in the area of incentives or concessions which is a very small part of the State Density Bonus Law but one that has the bigger impact on Palo Alto and the one that we are looking for feedback on. I want to talk about three questions that come up in relation to concessions or incentives. First, what projects are eligible for concessions and how many they can receive, the second is how are the concessions requested and can they be denied and on what basis. And then the third is what specific concessions are or are not allowed in the Density Bonus Law.

So the first question, what projects are eligible for concessions. The threshold question, it is not necessary to receive a Density Bonus to receive concessions under the State Law. You have to build a housing project that is eligible for density bonuses but you don't actually have to request the density bonus. It's only necessary that the project provide the right level of BMR units to be eligible for the bonuses that are being requested. For rental projects, an applicant is entitled to one incentive for each 10% of the total units that are reserved for lower income households or 5% that are reserved for very low income households and they are entitled to up to three concessions as Tim said.

Condominium projects are eligible for concessions only if all of the units in a project are offered for sale so it's not possible to have a rental project and then sell off five units as BMR for sale

units. They all have to be offered for sale at the same time then that project would be eligible for one concession for every 10% of the total units sold at moderate affordability level and then it's up to three concessions that are required to be provided.

The second question is how are concessions requested and how can they be denied. This is an area where State Law isn't as definitive as it could be but what the State Law says is that applicant may submit a proposal for the specific incentives or concessions that the applicant is requesting and that they may request a meeting to discuss the request with planners. Although the statute says "may", my opinion is that an applicant has to actually request the specific concessions in order to be considered for them. It isn't sufficient to submit a request that doesn't comply with all of the zoning requirements and expect the planning staff to intuit that they are requesting a concession. So even though the statute says may they have to actually request the concessions as part of their application.

If the concessions are requested, they have to be granted unless the city makes a written finding based on substantial evidence that either the concession is not required to provide for affordable housing costs at the BMR levels proposed or the concession would have a specific adverse impact on public health and safety. A specific adverse impact is not just that it doesn't comply with zoning. It has to be a significant quantifiable direct and unavoidable impact based on objective identified written public health or safety standards, policies or conditions. For example, uniform fire code, if it violates any of these codes, those are written definitive safety standards that need to be met and a concession can be denied if a concession will result in violation of one of those codes.

The third basis for denying a concession would be that it is contrary to State or Federal Law. Unless one of these three findings is made based on substantial evidence, the concessions have to be granted. If a concession is denied, the applicant can challenge the denial and if the City is found to have abused its discretion in denying the concession, the City is liable for the applicant's attorney's fees.

So the third question on what specific concessions are allowed or excluded under Density Bonus Law. This is the area where I think the Commission can provide the most input because as Tim said we are expected to adopt our own implementation ordinance and that's where we can really define those parameters. We are still somewhat limited in how we can narrow them but at least there is some room for us to make some strong suggestions to applicants. The legislation identifies three very broad categories of concessions. The first is a reduction of site development standards or a modification of zoning code requirements or design requirements provided the project complies with the applicable building codes.

They talk in very general terms about what they mean by development standards but it includes things like reductions in setback, modification of square footage requirements which I think should also be interpreted as FAR requirements and reduction in parking requirements are some of the things legislature has identified as possible changes to development standards.

The second broad category is approval of mixed use projects. Particularly, what the statute says is approval of mixed use zoning if commercial, office, industrial or other land uses will reduce the cost of the housing development and if the other land uses are compatible with the housing project then existing plan development in the area.

And then the third and very broad category is other regulatory incentives or concessions proposed by the developer or the city which result in identifiable, financially sufficient and actual cost reductions. That's as much guidance as the legislature has given us on what concessions can be granted. They are very broad, essentially absent any authority and a developer can ask for just about anything they want but we think that providing some better guidance through the Ordinance would help to better shape what kinds of concessions we see and we think that there are ways to put some basic, at lease presumptive limits on what applicants can request as long as we leave open the option of applicant's giving evidence that whatever else they are seeking is absolutely necessary so with that I will turn it back to the Commission for questions and discussions.

Chair Martinez: Okay, I think I was supposed to open the Public Hearing so I'll do that. Commissioners, do you want to do a round of questions before we go to the public. Okay, Commissioner Lippert you'll have five minutes.

Commissioner Lippert: Are we permitted to, since this works with our housing element and the most significant part of our housing element is low, very low, and moderate income housing, is it possible to limit the language of SB or the Housing Bonus Density Law to those sites that we've identified as housing sites alone?

Mr. Larkin: No, the statute requires us to allow the concessions for any project that proposes to build below market rate housing so as long as they meet the requisite numbers of BMR units we have to grant them concessions.

Commissioner Lippert: So if someone came along and they wanted to build it in the R1 zone, or they wanted to locate it over by Bayshore freeway, we would have to permit that?

Mr. Larkin: We still don't have to allow multifamily in an R1 zone so it really only applies to multifamily zones that allow it.

Commissioner Lippert: But over by Bayshore and that area, if there were housing sites over in the east area and away from transit, we would have to permit that.

Mr. Larkin: We would still have to permit it even if it isn't in an ideal location as long as its somewhere housing is permitted.

Commissioner Lippert: Can you clarify for me, when we're talking about examples here, it may be more Mr. Wong's background, an increased floor area, increased height and relief for setbacks, do multiple setbacks count as one concession or is one concession per setback?

Mr. Larkin: I think there is some room for us to define that better. Right now, it's vague. I think there is some room for us to say in our ordinance that a relief for a side setback or relief from a front setback, rear setback is a concession and the Council and the Commission of the Council still have some discretion to allow more than the required concessions for projects where the Commission or Council think its appropriate so for example, in a 100% affordable housing project there is still some discretion to say, we think it a concession but we are going to give you more than the maximum three concessions that we are required to.

Mr. Curtis Williams, Planning Director: Board Member Lippert, an example of that would be the 801 Alma Project. That is 100% affordable housing project. They requested setback encroachments on all sites and I believe they treated that as one concession. I think since the fact since it was 100% housing unit they were more apt to accept those three setback encroachments as one concession.

Mr. Wong: The City of Santa Monica in theirs they do specifically state a 15% reduction on one side yard setback so…

Commissioner Lippert: When it comes to increased height, we do have certain limitations in terms of when properties are located within the proximity of the low density housing. Examples are R1 and R2. We cap that and we really don't allow people to come close to the maximum height limit. Would we be able to then allow for an increase in height for those properties that are near R1 or R2?

Mr. Williams: I assume what you're talking about is that if you were in 150 feet then you would have to be 35 feet instead of 40 or 50 feet or that kind of thing? So yes, we would have to allow for something as far as if they requested a height variance although, did you mention those two findings?

Mr. Larkin: I did mention the three findings.

Mr. Williams: So unless one of the findings could be made… The issue here is now the extent of that. Would they be allowed to go from 35 feet to 37 feet or from 35 feet to 60 feet? That's sort of the question and that's what I think this ordinance is best tailored to try to address is the extent of the deviations that might be allowed and the circumstances and sort of relationship on a particular project of how much affordable housing is being provided relative to the overall project vis-à-vis the request that's being made.

Commissioner Lippert: If I might just finish up on this to clarify the question I asked with regard to the height. Can we make a hard and fast rule that if we don't think 35 feet is appropriate within 150 feet of a low density housing development, can we actually say no?

Mr. Larkin: I don't think we can create a hard and fast rule. I think we can create limits on how much a concession we would allow but a hard and fast rule is we are not going to grant a concession for height that is within 150 feet of R1 is not something we can do.

Commissioner Keller: So one of the things that makes this interesting for the City of Palo Alto is that we have an inclusionary zoning ordinance. So the first question is, is the city attempting or are their prospects for attempting to modify the legislation so that inclusionary BMR housing exempt from concessions? In other words, you only get concessions for that which exceeds the inclusionary requirements.

Mr. Larkin: I think the current statute does not allow us to exempt the required units so that means anybody that builds a for sale project in Palo Alto and is providing units on site instead of in lieu fees is automatically entitled to one concession. I am not aware of any efforts to amend the state legislation.

Commissioner Keller: So we might consider that but what is interesting to me is that we have carefully crafted our zoning ordinance in mind of the inclusionary zoning. So it seems to me that there is in some sense essentially shredding of our zoning ordinance by asking additional concessions so I'm wondering if we can do institutional haircuts. For example, if we can cross the board for multifamily housing and say that FAR is reduced by 20% and you can get it back as a concession to increase FAR by 20% or whatever the number is, 25% would get you back to where you were. Is that possible?

Mr. Larkin: Not through our Density Bonus Ordinance but I suppose that would be possible through regular zoning ordinance change.

Commissioner Keller: Could we do a packet of changes that would reduce our density by 20% on one hand and simultaneously implement a Density Bonus Law that allows a concession of 25% bringing you back to where you were?

Mr. Larkin: I don't think there is a legal prohibition to doing something like that. It might be subject to challenge.

Commissioner Keller: I'm wondering if there could be a requirement that people in the zoning ordinance build to 80% of the allowed density of the standard density so if you're in RM40 you have to build to 32 units, if you are an RM30 you have to build to 24 units and it could be a concession to not build to that number.

Mr. Williams: There is a policy or has been a policy in the current Comprehensive Plan that we establish minimum densities for multifamily dwellings and we tried that in the zoning ordinance update. It didn't go over too well. In any event, I'm not aware that there is any legal reason we can't do that and some cities have done that to establish minimum as well as maximum densities for residential.

Commissioner Keller: Thank you. My last question has to do with the wording of the potential reasons for denying the concessions and it appears to me its kind of in the revised version is kind of blurry but it looks like its on D1A and it says the concession or incentive is not required to provide for affordable housing costs as defined in etc. or for rents and amounts. So I'm saying, how can we judge whether this is met or not and I'm wondering whether we can require that pro formas be submitted by the applicant and I'm not sure whether the Commission or the Council should review those or whether staff should review those but its impossible to judge that without having pro formas both with or without the concessions.

Mr. Larkin: I would also point out that there seems to be a discrepancy in the statute in order to request the concessions the concession only needs to bring the cost down but this would seem to imply that it actually has to make the project feasible so there is a discrepancy in the statute and I don't think there's a case that the court has analyzed so we don't have a lot of guidance on that but to answer the specific question, if you look at what the City of Santa Monica has done they sent out a list of specific concessions and they have pulled out applicants if they want to deviate from the list of acceptable concessions then they are going to have to provide pro formas. The pro formas are reviewed not by the Planning Commission or the Council but an expert that is hired at the expense of the applicant who can provide an expert opinion on whether the concession is necessary and whoever this ends up being applied.

Commissioner Keller: May I just clarify the answer to the question? So what I'm wondering is is it possible to blanket require that whenever concessions are requested that a pro forma has to be provided. Is that legal?

Mr. Larkin: I'm not 100% sure because it's not something that has ever been tested but it is something that can be explored if that's where the Commission wants to go.

Commissioner Garber: If I'm understanding what Santa Monica is doing, they have created groups of essentially pro forma concessions based on the types of zones, right? Can you also create geographic areas that are not necessarily defined by zones for those concessions to occur within?

Mr. Williams: I'm a little confused because I think we have to grant the concessions regardless of where they are so I don't think we can say in one specific area you can have concessions and then in the rest of the city you can't. I'm sure I'm misunderstanding probably.

Commissioner Garber: I may not be understanding my question. There is probably not enough information here for me to understand this entirely but what it seems to suggest here is that, using Santa Monica as the example, that there is some residential zone. Let's call it R30 or something, that they have created concessions just for that zone. Is that what I'm understanding or does it affect any zone that allows for multifamily housing to occur in it?

Mr. Larkin: If we're going to establish allowable concessions that are allowable as a matter of standard practice if you are in RM30 and you want a height exception then you are entitled to a 10% increase, but RM40 its 15%, if that's what you mean.

Commissioner Garber: Let me try this a different way. Can a city have both prescriptive concessions as well as one of the exceptions depending on where the project is in the city?

Mr. Larkin: Yes. I think the answer would be yes. I think we could have prescriptive concessions plus one up concessions for… the city always has the ability to grant more what it sets as the floor for projects where the concession is something the city finds particularly beneficial.

Chair Martinez: Commissioner Tanaka.

Commissioner Tanaka: Sometimes developers pay in lieu fees instead of actually building the BMR units so one question is if the developer wanted to get a concession could it be in lieu fees?

Mr. Larkin: No, they have to either provide units on site or purchase land to build the BMR units so they don't have to build the units on site in their project but if they don't they actually have to build the units somewhere else. They can't just pay in lieu fees to the city and the city acquire the land.

Commissioner Tanaka: Are these concessions ever transferable so that people can transfer them between projects?

Mr. Larkin: No they have to be provided on the project.

Vice Chair Fineberg: I got the buzzer and forgot my mic. I'm trying to sort out the idea of whether there is legal or other reasons that going the Santa Monica versus the San Mateo route might be more advantageous. One question I would like to start with is do we set precedent when we make a decision, let's say there is a project that is near and dear to everyone's hearts and we love it and we decide we are going to consider four faces, one setback and for whatever reasons we are very generous with how we consider the granting of concessions. The next project comes along for whatever reasons and it doesn't have that political support. It doesn't have the huge benefits to the public.

Once we've set a precedent that four sides is one setback, can the next project we then say, nope, sorry one setback is one side or one unit?

Mr. Larkin: I think the recommendation would be to set the parameters that you want in order to have a deviation from what is acceptable if, specifically on setbacks, I think the recommendation I would make is that the Commission and the Council wanted to allow a greater flexibility for 100% affordable projects just to put in the Ordinance. We can do more for 100% affordable but for standard projects these are the parameters and then that way, if you're setting a precedent it's a precedent that I don't necessarily think it will set a precedent but it certainly opens the door to that argument being made so I think the way to close that door is to decide when you want to be able to deviate from the standard practice.

Vice Chair Fineberg: That sounds like a great solution to that kind of scenario. The reason I'm concerned about it is if we were to go the San Mateo route where we were just general it seems to me the developers are going to want to maximize their return on investment and build the project that will yield them the highest income and that would mean a greater number of concessions that were larger so if we know that's what we're facing, are we in a strategic negotiation position that is made better by having a lower baseline and then let's say our low baseline says we must give X, could we then, this is the flip side of my previous question, could we then on a project by project basis decide we want to grant more or would that become arbitrary and capricious and then we are in trouble again?

Mr. Larkin: The only real guidance we have is some of the litigation that came out of the City of Berkeley in which essentially that's what the City of Berkeley said, that is we like this project that is being proposed. It gives a lot more BMR housing than would be required even for concessions and we want to give them more. The courts have said that's okay and they actually had a basis for it. I don't remember what the number was but it was substantially more than the BMR housing they needed even for the concessions they were seeking. So that's the only real precedent that we have on that issue but I think where the question is headed is an appropriate thing to look at for the ordinances. Do we want to create that type of flexibility?

Vice Chair Fineberg: I'm trying to think it through of which way gives us the control and the flexibility that we want and then the last thing is in the Santa Monica case it talks about when they're building into commercial zones that one of the concessions is eliminating the restriction on the number of stories that can be constructed within the allowable height limit of the commercial or industrial zoning district so it sounds to me that they're granting that as a concession but yet maintaining the height limit in that district and making an exaggerated example, sure they can give someone the right to build thirteen stories in a thirty foot building. They physically won't be able to do it but they've maintained that height limit. So why can they maintain a height limit and we can't?

Mr. Larkin: I'm not suggesting that we couldn't maintain a height limit. I think what we can't do is give a blanket. We are not going to grant concessions for height. We are going to need another way to limit those concessions and it may be something like an absolute height limit with some flexibility and the density bonus is only going to be to allow one extra floor of housing or something like that but it sort of, because this question has come up before. What happens if someone want to put 150 story skyscraper in downtown Palo Alto and the top 40 stories will be BMR do we have to let them do it and the answer is no.

Vic e Chair Fineberg: I don't think we have a fire truck that goes that high so it's an issue of public safety.

Chair Martinez: Since it's my turn I can have a follow up question. Have you looked at other cities regarding this height issue, Tim?

Mr. Wong: I spoke to the City of San Mateo and actually in their ordinance they don't list height as creating because there was a voter initiative to limit height in the city and speaking to the Senior Planner there so they can't go beyond that but in the other ordinances they do allow for relief from height, well not relief from heights that are maximums but they do allow them to go beyond.

Chair Martinez: I've looked at San Francisco and they have an absolute, depending on the geographical area, limit on height. In the area I'm working in you can't go higher than 68 feet and I said, but we're doing low income housing and they repeated that. You can't go higher than 68 feet so I think it is possible, if that's important to our community as it has been in the past, to make that distinction and say this isn't a concession. However, it seems to me that our Comp Plan is taking a pretty big hit, the housing element in terms of coming up with these concessions and related to that we are already talking about, I'll call it concessions for building housing and transit areas there at Cal Avenue.

So would that not be a concession if we already have it as an acceptable land use that someone can go build higher than 50 feet and therefore they can have three concessions plus the higher or do we have to revise our Comp Plan to clarify that?

Mr. Larkin: Well, I think Curtis will follow up on what I'm about to say but in the Density Bonus Law itself it says we are not required to do a Comp Plan amendment even if what is being requested is the concession to violate the Comp Plan but we don't have to worry about Comp Plan consistency for purposes of the concessions being requested so if its height, even though our Comp Plan says different, we can't apply that Comp Plan policy but I'll look at San Francisco and see on what basis they were able to set an absolute maximum. It could be that there is a safety standard as well that sets that maximum.

Chair Martinez: Curtis did you have something you wanted to say?

Mr. Williams: No I don't have anything else to add.

Chair Martinez: Is it possible to look at other things as concessions? For example, expediting the permitting process?

Mr. Larkin: You know that's a good question. I think that is something that could be requested by an applicant is an expedited process. I don't know that that's something you necessarily have the capability of granting in this case because the statute is so broad that it is pretty much anything that saves the applicant money and is allowed but I think if we were to all of a sudden have lots of applicants coming and saying we all want expedited processing we would have a difficult time meeting those concessions.

Chair Martinez: Okay, what about, and I think I know the answer is no but I'm going to ask it anyway. What about sort of livability and wellness as sort of items that we don't want to make concessions on? For example, I know that Councilmember Holman is big on private open space for affordable housing yet I think on 801 Alma that was granted as a concession to eliminate it so can we actually, I mean that's an important sort of livability thing for families that a space, can we actually take things like that off the table or even the daylight plane as not being acceptable concessions?

Mr. Larkin: I think that we can't typically when you look at these and what is meant by a health and safety welfare, you look at things like livability, open space, daylight plane and what the Density Bonus Law says is that those types of health, safety and welfare considerations are not what we would consider. We can only consider written defined objective safety standards. However, I think that we can rebut the presumption that a reduction in those things actually contributes to the financial viability of the project and that would be our opportunity to counter those things. We can also reduce the impact of those things by limiting the amount of concessions we are going to grant on a pro forma basis.

Chair Martinez: Okay, thank you. I think I'm going to stop for now. Can we go to members of the public that want to speak?

Vice Chair Fineberg: Three minutes for each speaker. The first speaker is Mr. Robert Moss to be followed by Herb Borock.

Mr. Robert Moss: Thank you Chair Martinez and Commissioners. The questions you ask and comments you make are very pertinent. I think you hit on a lot of problems and points that this whole thing brings up and let me remind you of something Commissioner Keller said. For 35 years, Palo Alto has required BMR units in projects over a certain size. Originally it was 20 units, now it is down to 5. Originally it was 40%, now it is 15%. So it is impossible for somebody to come in with a straight face and say we need a concession in order to provide BMR units. They'll lie to you about it but it has not been proven. Since the requirement has been put in, there have been over 6,100 homes built in Palo Alto and about 800 BMR units and nobody got a single concession so and then the thing that's worse about this is they get a concession for only 10% or building a third fewer BMR units than we require in a court ordinance so I think its perfectly valid to put in limits on the types of concessions you want to allow.

If you allow anyone to come in with whatever they want, you can end up basically with no zoning because somebody can come in and put in a 50 or 60 or 80 foot condo building in the middle of an R1 zone and you've lost all rational zoning so let me make a few suggestions on how you can try to get some rationality to this.

Someone comes in with 10% BMR units and they want a concession. The maximum concession they can get in FAR is an additional 10%. If they come in with 20% BMR units the maximum

FAR increase they can get is 20 to 25% so everybody knows up front what's allowed. The maximum height increase let's say is five feet or ten feet and you can adjust that according to the zone and proximity for example to residential.

Setbacks. Each setback is a single concession so if a guy wants a side yard setback, that's his concession. He wants a front yard concession, two concessions, side and front. You can always relax it if you feel wonderful about the project but put on paper limits that everyone can stand going in and if they say I'm going to sue you because I can't build BMR units without all of these concessions then you can point to the hundreds of units being built and the 15% requirement we've had over 35 years and take them into court and say, you're lying. How come everybody else can build and everybody else can give us BMR units and they even got a concession and you can't do it? You must be an awfully incompetent developer.

Vice Chair Fineberg: Thank you Herb Borock.

Mr. Herb Borock: Thank you and good evening Commissioners. I believe staff, Commission and applicant should stop referring to SB1818 which has since been superseded by other legislation. I think it is much more direct if you are going to refer to something to refer to the Government Code Section 65915 or some generic words with State Density Bonus Law.

One of the reasons to stop referring to a former bill in the legislature is that the current version of the law was completely restated and the last enactment and it resolved some of the ambiguities in the law and made some changes based on the experience and decisions of the courts. For an example, the last amendments and changes to the law made it unambiguous that in terms of setbacks, each setback is a concession. They did that by inserting an indefinite Article A setback.

Another thing is that we already have a zone district, overlay zone district, the pedestrian transit overlay oriented district which has the kinds of formulas that the previous speaker indicated. That is for BMR units, affordable units in addition to what we already require as BMR units you can get additional height or additional floor area so that kind of formula already exists in the code.

One other thing that you need to understand is that in terms of the rental units because of state law on vacancy control, that we cannot in our BMR program require the rental units but Density Bonus Law you can get concessions for rental units and the way we implement that we can use the BMR program so essentially we are using that same formula but it is not our BMR program is doing it its because that's what we use to determine the affordability of rental units when they are requested for concessions.

Finally, in terms of what's required for For Sale units that are affordable units, Government Code 65915 refers to an equity sharing arrangement but it says if there is some other local law that might conflict with it then that overrides it. It is unclear to me whether our BMR legislation for For Sale units which the staff is determined to use for implementing 65915 is the proper thing to do. I can read that law to say we are required to use the language that's in 65915 which is an equity sharing arrangement and that is just the first resident of the unit gets that affordable unit and after that when the unit is sold the city gets a certain amount of money in equity sharing to use for affordable programs. Thank you.

Chair Martinez: Thank you. We are doing remarkably well on time so Commissioners if there is additional questions before comments go ahead.

Commissioner Lippert: I've got a line of questioning with regard to our I guess PC process would the PC process allow for in addition the application of the Bonus Density Law so an applicant could come in and request a PC and apply.

Mr. Williams: Don, correct me if I am wrong but yes. That is actually happening on one project we're reviewing right now but the application of it is, a couple things about the PC. One is the PC itself allows deviation from zoning ordinance criteria but there are two or three standards that still apply even with a PC of 50 foot height being one, daylight plane from residential properties being another, etc. So those standards are ones that could be considered for concessions under the PC zone.

On the other hand, a PC is entirely discretionary for the city so if you think that is excessive even if it were something that were allowed under our ordinance for concessions you could deny the PC or require modification to it until it was an acceptable project so PC has that different aspect to it that allows for that level of discretion regardless of how many concessions they otherwise can have so you have maximum discretion.

Commissioner Lippert: Similarly the PTOD process we have…

Mr. Williams: Same thing, yes. In fact there was a PTOD granted, Mr. Hohbach's on Birch that had one concession associated with it. It was a PTOD and there was one concession for the amount of office space.

Commissioner Lippert: The last question associated with this is TDRs. In a zone where we don't necessarily allow for TDRs, for instance the Alma, what is 355 Alma? We don't allow application of TDRs but it could in fact be one of the concessions that might be permitted is the application of TDRs in order to get that to reduce parking because it's…

Mr. Larkin: I suppose it could. State law is broad enough that it could allow that. It's something our TDR ordinance does not allow so we would have to really look at how that would be applied but given the breadth and vagueness of the state law I suppose that's a possibility.

Commissioner Keller: So firstly, just to clarify the answer to Commissioner Lippert's question, the city has the authority to deny a PC or a PTOD application on the basis that it doesn't like the concessions and simply choose to say that you have to turn in with concessions we like or not at all if we wish to.

Mr. Williams: I don't think its so much that you don't like the concessions, its that you find the project meets the findings that are necessary for a PC or PTOD so its essentially finding that the rezoning or both the rezoning are appropriate for health, safety and welfare reasons and they are consistent with the Comprehensive Plan and those types of things so you just have to find that one of those findings does not apply or the public benefits aren't adequate for PC or whatever and you can deny it. It wouldn't be specific to saying you don't like the concessions, I don't think. I think that's more defensive.

Mr. Larkin: I think there is broader discretion on a PC zone because you are looking at the project as a whole, is the benefit of the project as a whole enough to justify whatever deviation from standard zoning that's being asked for so you're saying you don't think the benefit of the project justifies going over the height limit and all these other deviations from zoning so we don't want to do that. There is broader discussion on the PC zone than PTOD but otherwise I agree with Curtis.

Commissioner Keller: So it's fair to assume from that that we can take into account concessions requested in our PTOD analysis or in our PC analysis. Is that right?

Mr. Larkin: Very clearly on the PC analysis. I think on the PTOD I think you can still make the PTOD findings as Curtis described.

Commissioner Keller: So let me ask a different question which is to what extent, if we put limits on as on Santa Monica, on our concessions, to what extent do the concessions have to be usable or useful? For example, can we say a height concession can be one foot, that's a concession and an FAR concession can be 1% and each additional percent is an additional concession. Is that legal or where is the boundary on that?

Mr. Larkin: There has to be a relationship between the concession and the limit on the concession and the affordable housing being required so a one foot variation on height is not going to add any additional affordable housing and I think that would be inappropriate but I think for a 2% FAR increase is not going to add another unit of housing so I think there has to be some rational relationship between the concession that is being granted and the affordable housing that is being provided.

Commissioner Keller: If I may follow up on that, can we have a formula that says for every additional BMR unit that you can get or a certain percentage or any additional BMR unit over the maximum that you could have if it were fully developed? Are there formulas like that we are going to have?

Mr. Larkin: I think it would be legal. It is more complicated than what the two cities we have provided examples do but there is certainly nothing… In fact the Berkeley case would at least imply that that is something that would be allowable. We've got to give the concession but based on the amount of affordable housing we are going to give a different amount of concession.

Mr. Wong: Commissioner Martinez if I could just weigh in, in answer to Commissioner Keller's, staff did not provide but the City of LA does offer a concession based on proportionality in regards to height, if they offer 10% more than what is required its either a height proportionality or FAR so it has been done in that regards.

Commissioner Garber: I take it that the concessions that San Mateo and Santa Monica and Los Angeles for that matter were made, were they made as a result of the recent legislation so they were relatively recent ordinance changes for those cities?

Mr. Wong: I am unaware. I didn't see if they were actually concessions requested but…

Mr. Williams: You mean the changes in the ordinance, you see here, they were done in response to the SB 1818 when it was adopted.

Commissioner Garber: I was just curious to find out if one approach or the other doing these as one thing versus creating some type of prescriptive concessions has been more effective for creating additional BMRs in those particular towns. Is there any knowledge or data on that?

Mr. Williams: There isn't that we're aware of and it is pretty short lived as far as experience to date with it. It came into effect at a time when the residential market was… So there hasn't been an awful lot done under it.

Chair Martinez: Commissioner Tanaka.

Commissioner Tanaka: A couple of quick questions. The first one is, do we know how many projects we are actually, that come in actually and would be affected by this? Do you have any projection because I'm trying to figure out a case by case basis versus what Santa Monica is doing? Are we talking five cases a year, ten a year? I know it's hard to say.

Mr. Williams: It is. It depends on development activity. Theoretically any project with residential on it can make some kind of a request but we certainly see other residential projects that don't have requests on them so it's hard to judge.

Commissioner Keller: I think its great that you gave us San Mateo but do we know what our nearby neighbors are doing, Sunnyvale, Menlo Park, those surrounding us?

Mr. Wong: I did not do a review of those ordinances but staff would be happy to review them.

Mr. Larkin: We haven't looked at it within the last six months to a year. When we did look at it there were very few cities that had adopted implementation ordinances and we can certainly update our research and we can do that further.

Commissioner Tanaka: Okay, thank you.

Vice Chair Fineberg: I'm looking at the Santa Monica ordinance and on page 9, in reference to Commissioner Keller's earlier comment, it says at the bottom under Section 1, for each 1% increase in a percentage of restricted very low income affordable housing, a housing unit development will receive an additional 2 ½% Density Bonus and it goes on that the less affordable it is the less the density bonus so its actually a tiered gradient so doesn't that counter what you said before? We couldn't give you know, I know it might be a one to one or one to two or one to three but can't we have gradients for the bonuses?

Mr. Larkin: If I said it I didn't mean to imply that we couldn't have gradients. When we're talking about density bonuses they are talking about the units breaker density and that's in the State Law, actually copied right out of the State Law but I think we couldn't say, we have to give the concessions for 10, 20, 30% or 5, 10, 15 depending on the level but I think it was Commissioner Keller who asked if we could say for additional units we give additional concession amount of concession, I think that's appropriate.

Vice Chair Fineberg: Thank you. Is there any way that our language can include some concessions or language in the concessions that they get the concession for proportionality over what is currently required in the BMR program? I'll let that be answered in a moment but I guess what I'm struggling with is, we as a city have done what we're supposed to to try to remove the impediments to build affordable housing, to try and zone, to try and remove all the blockages. We have allowed extra density, extra height in areas where the best sites are for that affordable housing so we've done that and now with those enhanced conditions in place, we are also now being required to legislate that we are going to kind of be forced to have a double dipping that then with concessions you get even more and so that either, just thinking, what would the theoretical response to that be? Would you either go back and undo the progress we've made as a city and that just seems not an intelligent way to plan or you somehow incorporate into this a recognition that we've already built those bonuses?

Mr. Williams: If I could just respond to that because I think I would take a little exception to characterizing it that way and I would ask what we have done to provide concessions for affordable housing? We have certain development standards and then we require people, developers, to provide a certain percentage of that as affordable units and that is a disincentive to building more housing because its housing they are not going to make as much profit on. We don't distinguish our development standards aren't any different for affordable housing projects than they are for market rate housing projects so I don't think we, I think it would be a hard case to make that we've already provided incentives for affordable housing. We've provided a requirement for affordable housing and I think what the State Law does and I maybe should have started with this in this presentation, but the intent of the State Law is to recognize that when affordable housing is provided that there be a recognition of that and that there be concessions allowed that would help reduce the cost of that housing, not necessarily demonstrate that it is necessary to make the housing work but to reduce the cost of the housing and make it some more incentive for someone to do affordable housing.

I don't think that's in any way, shape or form intended to be unlimited so it makes a lot of sense to me that there should be some relationship proportionality, etc. between what's being offered and what's not but it is frankly a little disturbing when we start to hear or when we start talking about ratcheting back densities to allow them to go back up with affordable projects or amounts of concessions that are meaningless. It seems like we would be pretty subject to litigation as far as that being sort of thwarting the intent of the law and I would hope that from planner's standpoint, the City of Palo Alto has a good record in trying to promote affordable housing if it is requiring it in some cases but also we've helped fund a lot of affordable houses. We've put our money where our mouth is so we've been very supportive of affordable housing and I would hope we would continue that by recognizing that this law is intended to reduce to some extent the cost of housing so affordable housing, or more affordable housing could be built but again, within reason so we aren't looking at wild scenarios of misusing Density Bonus Law to get ridiculous concessions that don't really bear any relationship to the amount of housing being provided.

Mr. Larkin: Something to keep in mind because we didn't say it, when you're looking at comparing Santa Monica I think that's one of the cities that is closest to Palo Alto in terms of its affordable housing programs and they have a very aggressive, actually more aggressive than Palo Alto's inclusionary zoning residence and so keeping in mind that they are in the same position we are in terms of they've got BMR requirements that are very substantial and still provide the concessions, I think we can provide additional incentives for developers to go above and beyond

what we're requiring in our inclusionary zoning ordinances and to the extent we can incentivize providing even more than what we require, I think that's a fine objective. I think it's difficult to say we are not going to provide the concessions because we already require the housing anyway.

Chair Martinez: Well, I like this attitude that the Planning Director expressed that you know, it really is the intention both at the State Law and the city to be more aggressive in providing BMR units. I support that. What I see and what we've done though is really very modest in terms of concessions that have been asked for and they look more like concessions of the order of magnitude to be able, more sort of land development concessions. In other words, we need a little more space here and that setback and we are encroaching on the daylight plane a bit more. Largely they don't look like an attempt to overbuild on the site and maybe we've been fortunate heretofore in that regard but you know I see what we're attempting to do here. It's really more to get ourselves in compliance and I think what Bob Moss said earlier, we are doing a pretty good job of building BMR units in the city and accommodating them. I guess there is always room for improvement but I think I would like to just see the kind of incentives that sort of work with our Comp Plan, work with our zoning ordinances and really sort of accommodate the sort of modest things that we look towards. I don't know whether that's going to satisfy the law or not but it sure is consistent with what we've been doing and not at all contrary to sort of what the State Law is trying to do.

With that, let's, don't you want to fold in our comments at this point? Comments and questions together and we'll start with Commissioner Lippert.

Commissioner Lippert: Well I may not get to make any comments. These are pretty substantive these questions. SB375 which has to do with transit and the nexus of having housing and relieving CEQA review from cascading relief of CEQA from projects that are located near housing and particularly part of that has to do with providing bonus affordable below market rate housing units in those buildings. Is that going to create a problem with regard to this because here we are, we're moving or liberalizing the development regulations and at the same time if those are located near housing and they are below market rate units and they make all of the cascading findings for sustainability, the 10% affordable housing units and then they get their concessions on top of that, are we creating a real complex can of worms here?

Mr. Williams: I think SB375 and a lesson until the state amends it to put some real incentives in for CEQA isn't really going to have… the biggest effect of SB375 is its going to push to have cities like Palo Alto have housing and more affordable housing but at this point in time doesn't provide the kind of CEQA relief that is getting to a point where we are avoiding addressing the impacts because they are exempt from CEQA review. Exemption now have to meet such stringent limitations that they hardly ever apply and they have to, in order to have them apply in the future, would have to have a compliant plan associated with the sustainable community strategy that comes out and that is going to be a higher density that I don't know if the City of Palo Alto is going to be on that page or not and it is going to be in certain areas and that will be part of our Comp Plan in numbers and the housing element will be addressed as a whole. The environmental impacts and the whole housing element or of the whole Comp Plan in that framework which also does help subsequently with an individual project under CEQA. It will help with that but it will be addressed at one level or another, it will just be at a high area level instead of one specific level.

Commissioner Lippert: I didn't think I'd get to comment this time around. One more question then I'll close and make my comments next round.

Do we have the ability to adopt something similar to the PC process or PTOD process as far as review and application of the housing Bonus Density Law where an applicant would come forward and say its my intent to build more below market rate housing and to meet the requirements of the Housing Bonus Density Law and so I'm going to be asking for a variety of concessions and so it would be a discretionary review process and would come before the Planning Commission and the Planning Commission would vet whether those were appropriate relief and appropriate standards to the liberalization of the development regulations and then it would move forward to the Architectural Review Board for their review and then come back to us with our final recommendation to the City Council.

Mr. Larkin: It's possible to create some sort of review. You wouldn't want that to be the routine review. I think what Santa Monica has done is sort of a hybrid where if you meet the criteria or apply the concessions in the way they've spelled out in their ordinance then you're entitled to the concession. The granting of concessions as a general rule is not a discretionary act that is ministerial unless written findings could be made based on substantial evidence which is a higher test based on the normal findings test that Commission is required to make so on a routine basis having a hearing and making those findings is going to be a really difficult thing to accomplish but the way the Santa Monica ordinance accomplishes that is that we understand these things are normal. We get it. They are ministerial, we are going to apply them but if you want something outside the norm then we are going to justify it and we're going to look at it and if we can make those findings to deny it then we are going to take it to our Commission and they're going to make those findings and deny the concession.

Commissioner Lippert: To a lesser degree can it be something that is subject to a Director's Hearing and then the Architectural Review Board?

Mr. Larkin: It could be. The statute requires the findings be made in writing and they be based on substantial evidence. It doesn't define who has to make those findings so it's something that can be defined in the ordinance.

Commissioner Lippert: Is there an appeal process that could be associated with this also?

Mr. Larkin: That is a possibility. If we were going to have a Director's Hearing process I would recommend adopting something that would allow an appeal after the final decision.

Commissioner Lippert: I'm done with my questions. I told you they were pretty weighty.

Commissioner Keller: The first thing is considering the nature of what we're talking about I prefer the style of the Santa Monica ordinance over the style of the San Mateo ordinance.

Secondly, I disagree with the concept that we should give, since we require at least 10% of BMR units anyway, I disagree with the idea that we should give one concession for free even though State Law requires it but essentially it means that they have one joker if you will in their cards and they have to figure out one way of adjusting our zoning ordinance. So I would actually be in favor of an institutional haircut by reducing FAR by 20% and having a concession that you can

increase it by 20% which I think most developers would essentially use up that concession and I think that that basically gets us to the status quo.

I believe that what we should incent is extra good behavior, not the behavior I think the people are already doing. So from my point of view it makes us have formulas so if you ask for a concession that concession is formula based. The formula base should be based on two factors. One is the percentage of increase in BMR housing like Santa Monica has and the state ordinance has different weightings depending on what kind of housing so very low versus low versus moderate have different weightings and I think that makes sense.

Secondly, whatever percentage you get should be multiplied by the percentage of the project that's housing so if the housing is 10% of the project then you get one tenth of that percentage increase, whatever that dimension is so you pick your dimension, you get the formula based on the dimension for that concession, based on how much extra housing you're providing and what part of the project it is and we have this on various kinds, as many categories as we can think of. Height, setback which is on one dimension only at a time. Things like that you can do what you want and I wouldn't mind if the person gets five feet they can use two feet here and three feet there. If it's quantified it doesn't matter, whatever they want in terms of that. But that makes sense.

I think also that we should have no city concessions in terms of dollars or land and I think that's a useful thing and finally I think that pro forma should be acquired if you want to have a wild card concession that goes beyond any of those specifically defined in the ordinance as being quantitative.

Chair Martinez: Perfect timing. Commissioner Garber.

Commissioner Garber: So if I'm understanding correctly, ideally we would find a way to utilize the various concessions to support some of our larger goals that are in the Comp Plan. By definition the Comp Plan can't be opposed to State Law but there are some places we want more density in the city. There are places where having higher limits make more sense or if there were some way to make the concessions responsive to those particular areas, those particular conditions, ideally I would like to find a way to do that.

I don't know if that can be applied or done that way given the objective of the way the legislation is currently written. So Commissioner Lippert was exploring various discretionary ways, making it more PTOD or PC like but again it's not clear to me if we can actually accomplish that.

It does make sense to me that the concessions that we do make are more prescriptive rather than one off and the reason there is so that we can take some of the uncertainty out of the process. Perhaps one way to think about the opportunities to create incentives to do something that is more highly aligned with the goals of our city versus just the legislation is to then create some allowance or some way to allow greater concessions or the opportunity for the various bodies of the city to entertain the greater concessions in certain areas.

Again, I don't know if this can be done but perhaps there are blanket prescriptive for the entire city and then added concessions for particular areas. For example, PTOD zone, for instance near

transit or 101 or something of that sort. It's not clear to me exactly what those mechanisms are but again trying to find ways to do that.

My other concern in this is being a built out city, and although we are nowhere near as dense as Santa Monica and there are probably greater disparities in Palo Alto as there are in Santa Monica and we have an R1 zone and Santa Monica has single family homes but regardless there is greater impact creating height and density in Palo Alto and having that be indiscriminate has potentially greater impacts so one of the principles I am trying to bake into here is that the concessions that we do make, there is a relative equivalence. Higher, but even greater setbacks or greater density but something else doesn't happen. But at any rate, there is some sort of trade off so we get back to some balance of the impacts of the action relative to our broader community goals and impacts there.

Chair Martinez: Thank you. Commissioner Tanaka.

Commissioner Tanaka: I actually agree with that concept as well, that we have a Comp Plan and the goals we have we should try to preserve. Perhaps one day of doing that is if somehow the goals are not going to be met by the concessions is that at that point the project goes to some PC type process or go through ARB or PTC. I do like the idea of being formal based so you have some sort of measuring stick to use and I think Commissioner Keller had a reasonable approach that can be looked at.

I think getting the pro formas would be very nice but I don't know how practical that really is. One other idea I had which is, I know what this is trying to do which is provide more affordable housing and that's a worthy goal we should try to achieve and this is a little bit out of the box thinking so maybe it doesn't even fit here but we're adjacent to other areas that have dramatically lower land value and I brought up the thing about transferable concessions. Is it not possible let's say, if the developer has property in a nearby place that has dramatically lower land values that that could be an incentive? What we're looking for is leverage. How do you get the maximum amount of affordable housing in this area and one of the issues Palo Alto has is we have extremely high land values so every dollar we spend here doesn't go as far as an area with lower land values so maybe this is for the City Attorney to think about but if we do that we get the most good possible right? Because dollars in other areas go a lot further and it's not like we're hundreds of miles away from cheaper land, we're not very far. We're adjacent to very affordable land so that's something that can be thought of.

In regards to the limit of the current BMR standard, I think Palo Alto has done extremely well and it seems we have no problem getting BMR housing built in Palo Alto which is great but I do understand the concept of double dipping that Vice Chair Fineberg and Commissioner Keller brought up so I think that somehow has to be harmonized so you don't get the double dipping effect, and I don't think this is necessarily the right approach but whether it is rolling back some of the BMR requirements or not allowing the kind of joker in the hand type of approach that Commissioner Keller was mentioning earlier.

Mr. Larkin: Just want to jump in real quick because Commissioner Tanaka's idea intrigued me but I looked at the statute and it says land that is donated for purposes of bonuses has to be within the jurisdiction.

Commissioner Keller: Isn't there also a distance limit from the property, a quarter of a mile?

Mr. Larkin: That's not in the State Law. It might be within one of the ordinances.

Vice Chair Fineberg: I do have another question but I would like Director Williams to be present so I'm going to hold that question even if it comes back a later round of comments. I think the best route for us to implement the local adoption of Bonus Density Laws is something similar to what we see out of Santa Monica where we are very explicit, we set baselines and understandable, predictable rules that define what the concessions will be. We need to focus very carefully a lot of attention on how the implementation of these Bonus Density Laws will take a real form when they intersect with mixed use projects and PCs. The mixed use projects open up many, many cans of worms. We've already seen two of them and the questions of proportionality, questions of use, questions of what becomes a concession versus what became a negotiated sort of waiver of most of the zoning regulations so I think we must carefully focus on the mixed use and PCs.

I would like to echo other comments that it is important that our implementation includes some sense of proportionality that we give you an extra amount because we get some extra amount whether its one to two or one to five but not that it be, you give us one extra unit and get a 500,000 square foot office building. There would be some sense, and I'm exaggerating, but there be some sense of proportionality. I think that in cases where the developers are getting the ability to do mixed use office or commercial in areas that do not permit that as a use as their concession, that we in whatever manner our City Attorney's office determines is legal that we require pro formas because if we are expected to make decisions based on those commercial, office, industrial, whatever uses making the housing more affordable, that would be an unsubstantiated claim unless we have a way to confirm the veracity of those claims and pro formas, financial statements and projections of the project would be the city's way to confirm that.

I have one more question that I'd like to ask later when the Director is back.

Chair Martinez: Okay, our primary role as Planning Commissioners is to make recommendations on land use and while I can see from our own point of view to judge the honesty of an applicant's claim that we might want to see the numbers, I don't think it helps us weigh the value of the land use and I would hate to see us go down this road.

I would also like to agree with something the Planning Director said about it would be unfortunate of us to ratchet back our inclusionary goals and ordinance in order to control the misuse of concessions. I think what that would potentially do is suggest to some that okay, we won't ask for concessions and we'll just give you less BMR units. I think we have a very noble and effective policy as it works now and I don't think it would be a hardship on our city to find an effective means of increasing FAR or another measure proportionally to accommodate the state code.

I would suggest in regard to Commissioner Garber's concern about how do we effectively sort of encourage the proper use of concessions. One thing we might do is not allow concessions for height and the reason why is we already have Council directive and Comp Plan policies that say we will consider increases in height in transit oriented areas and so by that way we are encouraging housing in those areas of higher density housing in those areas and in places say closer to R1 zones and where they impact land uses, adjacent land uses, we don't even have to go

that way. Let's continue with our Comp Plan policy that we have. It's a good one. It has other merits to it regarding pedestrian travel, public transit uses, reducing carbon footprint and let's focus on concessions that allow development which is the purpose of this law, allow development to proceed without taking use of the land, making proper land use developments rather than allowing it to be abused by height and things that go against the core of what is essential in our Comp Plan. In other words, we value the development and urban design of new development in the context of the city and let's not sort of give that away by allowing inappropriate use of increased height.

Commissioners, let's try to go one more round of comments, three minutes and really try to give staff some feedback of what you would like to see in our ordinance.

Commissioner Lippert: I'm not going to go into the details of how important this law is. It's pretty significant in terms of us achieving the goals of what we have to do in terms of providing affordable housing in this community.

If you look at the notion of increased floor area, increased height and relief of setbacks it's talking about the same thing, density. Its really talking about is increasing the mass or the density of housing and how you achieve it whether it be make the building taller, make it wider, increase the density of it, very unimportant. What is important here I believe is looking at with these incentives, encouraging development in the right parts of the city and its happened in an appropriate way without becoming an imposition on this community and using it to further the goals of the Comp Plan and the housing element.

What I would like to see happen here with regard to this is to say that whatever the height, whatever the relief for setbacks, whatever the floor area is, the portion that is the affordable low income housing other parts of the building can't exceed what's being done here in terms of density so if someone or the developer is suggesting increasing the mass of the building, the height or width, it has to be solely dedicated to the affordable housing element, not that they can expand the building beyond the boundaries and apply it to market rate housing, apply it to more commercial floor area and that would begin to establish an envelope or some restrictions so that the wild card that Commissioner Keller was talking about really can't be played. They have to belly up to the bar and say we are really serious about incentivizing or creating more housing here and again, one of the limitations I would say is corridors, staircases, exiting, all the lobbies, all those areas that are incidental to the building couldn't be loaded onto what those bonus concessions are either so it begins to reign in some of those standards. Does that make sense at all?

Chair Martinez: Commissioner Garber with a follow up.

Commissioner Garber: It's really just a question because I'm not quite understanding the concept you are trying to get out. This is what I heard and I'm not sure I heard it right. Let's say I'm an applicant and I proposed a mixed use property someplace and I'm asking for concessions because I've got a number of BMR units I'm going to create but I also have commercial I want to do and one of the concessions I'm asking for is height so I build to whatever the setbacks I am allowed to for commercial and then I create a tower out of my BMR and then that's it? Is that what's happening?

Commissioner Lippert: I'm not suggesting at all that your commercial couldn't violate the rules, that you couldn't take that commercial and put it on the top of the building. What I'm suggesting is that those incentives and those increases for additional density cannot exceed what's being proposed as the benefit in below market rate housing so if you're going to be building 5,000 square feet of below market rate housing in this project, the concessions can't exceed the amount of square footage…

Commissioner Garber: You're talking about you end up with some FAR and that envelope of FAR can't be mitigated. You can reshape it but you can't be above or below or at least above that amount of FAR.

Commissioner Lippert: Right, so you can't say add another 5,000 square feet of commercial to the building. You could only add another 5,000 square feet of below market rate housing. So in other words, your incentives don't drive the other development or the other floor areas in the project.

Commissioner Garber: So as an applicant I wouldn't be able to add additional market rate housing, be it rental or condo or whatever to pay for for instance, a bunch of FAR additions.

Commissioner Lippert: That's exactly right and Commissioner Keller made a very good point here and I apologize because its very complex but we already have in our ordinance here that we have to provide a certain number of below market rate units when we build housing and if somebody were to come along and say well, I want to take those units offsite and have them be an in lieu fee, well then they don't get a concession for that. That's removed from that project and therefore, that one concession isn't part of this project because all those market rate units have been taken offsite.

However, if somebody wanted to double the number of market rate units, have at it. You can get a relief on your setbacks, you can get a relief on your height and up to three concessions in terms of the density. I apologize, double BMR.

Chair Martinez: Okay, Commissioner Keller.

Commissioner Keller: A couple of observations. I believe our BMR ordinance requires that the BMR units be on site and it's the city's option to put them elsewhere in terms of in lieu fees that the city does not allow developers to request that. It's the city's option to do that, that's my understanding but I may be wrong.

The second thing is that I am very sympathetic with the idea of increasing density in PTOD but we're already doing that so we don't need to triple dip in terms of providing increased PTOD and increasing for concessions and increasing for higher concessions because PTOD the process already handles that. If we want to handle something near freeways we should have a zoning for that so I think our Comp Plan is already handled based on the way we have our zoning anyway so I think that that's already in our process so we should let the normal process work with the concessions on top of that kind of the way we talked about.

I'm sympathetic with Chair Martinez's comment about capping heights. I'm not sure if that's legal, whether if people ask for a concession on height can we simply say no? I don't know the answer to that but I do think there seems to be some consensus first of all, in terms of some

proportionality and prescriptive, there is a consensus in terms of worrying about projects that are slightly housing and mostly something else, getting lots of concessions that are disproportionate so I think that's a clear consensus of the Commission.

There are several people who seem to be sympathetic to the idea of double dipping for the first concession and I have to say that I am supportive of exceeding the 15%. I am happy to give a second concession when you get to 20%, a third when you get to 30% or more. That's what we want to encourage, giving the first concession for free for something they already have to do. To me that's double dipping and that's when the joker comes in, the wild card, to our zoning ordinance. It says break a rule for free for something you're already doing and that's something we have to undo by forcing them to use that concession for FAR because that's what they would probably have to use it for first and if they want to go beyond that, then great. Have at it.

I would also be happy with the idea of having something in the ordinance that gives us more discretion for 100% affordable housing developments. That makes a lot of sense so there is a lot of consensus there, some areas of disagreement so we seem to be getting reasonably close.

Commissioner Garber: I get entirely and appreciate Commissioner Keller's comments that the zoning already is beginning to tell us where we want height and density which I entirely appreciate. My comments were really focused on areas of the city that have, for whatever reason, we haven't considered or understood that may be abhorrent to that and that's really my only caution there. I'm really intrigued by the Chair's suggestion about not including height as one of the concessions because we have other processes which allow for height and maybe that is a very valid way of approaching it.

Finally, I also share the Chair's caution regarding pro formas which I believe except for really unusual circumstances is really a panacea and what our focus should be on is the use of the property and the benefit the projects give to the community versus trying to figure out whether the applicant is making money or not. Not to be crass about it, but if an applicant wants to go out of business and give a great benefit to the city then its fine by me and I don't need to know how much money they are making or not making, nor do I want to create an incentive that if they are spending a lot of money then it's a good thing. I really don't think it's our business to be in that.

Commissioner Keller: I'd just like to ask my fellow Commissioner Garber how he thinks about the idea of requesting pro formas if you have one that is not of this fixed menu of concessions. If somebody asks for a new concession or concession beyond then they provide pro formas to staff.

Commissioner Garber: Again, I think part of the reason that the Commission has been intrigued and in a certain way incented to pursue the concept of requiring pro formas is because a number of applicants have come before us saying well, you know what, I can't make money if I provide the mix you're asking for or the amount or if I don't get more area and I really don't care. That should not be their reasoning that they are approaching the city for this. They need to either follow the rule or ask for the rule to be interpreted or whatever that is but they shouldn't be asking us to make that sort of, I'm not stating this very well, but they shouldn't be coming to us with that as a basis for their decisioning, at least in that way.

Relative to your question, I understand, but affordable housing for someone to purchase the housing, not for the developer to actually create it or not, right? We're not concerned whether the developer can afford it, we're concerned whether somebody can purchase it.

Commissioner Keller: I think finding A for denial is the concessions incentive in order to provide for affordable housing units so that directly reflects the developers cost structure and that's why if you ask for something that's not a standard concession then pro forma is being used to justify it so that gives you a basis for denying it if that's not necessary.

Commissioner Garber: City Attorney, I am assuming that that is correct?

Mr. Larkin: As I mentioned earlier I think there is a conflict in the law but that is what that finding is. That finding is the concession requested is not required to provide housing at the affordability levels being proposed. There is a separate part of the statute that says you can request a concession if it will make the cost of the housing lower. Those two don't jive and I don't know how a court will make them jive at some point but as of right now there is a conflict.

Commissioner Garber: Yeah, I guess I'm more familiar with the concept that is not iterated here on this particular page but to Commissioner Keller's point, if in fact, the way this reads, I would agree with you and I would recant what I said that sure, having them demonstrate that in fact isn't really a pro forma perhaps but some document that records the basis of cost which may not be there for how much money they are making but it creates the project for less money then maybe that is something that should be a part of it. Does that make sense?

Chair Martinez: Vice Chair Fineberg with a follow up.

Vice Chair Fineberg: I appreciate being allowed to follow up with Commissioner Garber. The City Attorney referenced the section of the code that I kind of want to test your ideas on. If a developer wants to have the concession be mixed use in an area where industrial or commercial isn't normally allowed they can get a concession for that in violation of the city zoning if, and only if, the building of that industrial or office use allows… I can't see it in the ordinance but if I can use the word loosely, subsidizes or reduces the cost of building that housing.

My concern is how would we understand the veracity of that claim if you build 2,000 feet of office space, does that make 1,000 apartments more affordable? If you build 100,000 square feet of office does that make five units of housing more affordable and how will we know whether that claim is legitimate and its my understanding that we necessarily wouldn't be the ones that analyze the data, that staff might or third party consultants that have financial expertise so it takes it off our plate. We are not all trained and I think I would have the capacity to understand the pro formas but we are not all trained at that so would knowing what we were doing is testing the underlying claim for the concession change your feeling on it?

Commissioner Garber: In light of the conversation Commissioner Keller and I just had, I've allowed the door to open on my thinking so long as we're understanding this law correctly although it's interesting that as the City Attorney said there is some conflict there. My concern here is I am more interested in the benefits that the projects have for the city than I am for how the project benefits the applicant. Perhaps I'm being one sided here but that is really where the basis of my interests are.

Vice Chair Fineberg: I would agree and I don't think what we're testing is how it benefits the applicant but whether the office or industrial or commercial use benefits the production of the affordable housing which is our goal here.

Chair Martinez: But if I may, how would that change your view? I can't make that final step.

Vice Chair Fineberg: There is some common sense test that if you're building, I keep coming with these extreme scenarios so its easy to see, but building a 1,000 square feet of office would not make 1,000 apartment units more affordable in any order of magnitude to justify a change of use. Building 100,000 square feet of office to build five units and we just had a developer say if they were for sale units it would be the housing subsidizing the office if they were for sale units. So each case is going to be different but there is some scenario, there are the numbers which will speak for themselves and you don't know unless you have the numbers.

Commissioner Garber: Thank you. So I don't have a direct answer and again, I am not an applicant trying to convince the city of a particular project but it would seem to me that, not that we've done this as a Commission directly in any way, but let's take the sort of examples that you were talking about. If you had a large, talk in very relative terms, piece of property and you had the opportunity to have a big impact on the amount of affordable housing that the city could have and you're only providing let's say what's allowed and your first proposal was to do what's allowed plus the 1%, I don't think I would need a cost benefit analysis to say well you know what, you've got a big piece of property, it should be a lot more relative to the amount of housing that we're trying to get into the city given the size of your property.

You could probably turn that into a formula and the second scenario is that another applicant comes in and says I've got a really big piece of property and I could do what's allowed but I want to do 30% more at which point again, I don't think I need a cost analysis, you know, how much the project costs one way or another but that's a much better benefit for the city. It's a lot more reasonable to imagine supporting this type of an application.

Commissioner Lippert: There's another way to look at it and I don't think a pro forma is necessary either. I agree with Commissioner Garber here. If you just look at say, the office building or retail building or housing costs the same to build. Then you look at the density. Office density, it is one person for every 250 square feet I think is what we use whereas if you were to look at what an apartment is in terms of density to say two or three people in a 1,400 square foot unit, it's pretty small. There's a big difference in terms of density there.

If you were to look at what retail is, retail is again the same as what offices would use a blended rate so it would be one for 250 or 300 square feet but then when you go to an auditorium or an assembly building it's what, 50 square feet for every person even less than that. So that's the way to look at it in terms of other than dollars and cents if you consider that it costs the same amount to build it as an office building versus a multifamily complex.

Chair Martinez: Commissioner Keller, bring it home for us please.

Commissioner Keller: Thank you. Let me make the observation that the three people who are licensed architects don't need to see numbers, probably because they already understand them and they already know what they would be. Then there are two, possibly a third Commissioner who aren't licensed architects don't have a way of understanding it without seeing some sort of

numeric analysis but that may be an interesting way of distinguishing this so I guess it may depend on whether the fourth person, the new person added to the Commission is an architect or not which way this goes but the thing that's interesting to me is that I think there is a consistency with respect to our City Attorney describes two clauses in the ordinances as the State ordinances being inconsistent and I think they are consistent.

One ordinance says the whole thing, project, is affordable so the purpose of concessions is to make affordability and the other says the purpose of concessions is to reduce the cost and it seems to me those are opposite sides of the same coin and the real question is how big the coin needs to be to make it affordable but essentially the concessions are used to reduce the price. That's how they become below market rate is by reducing the price so it seems to me that the ordinance is pretty clear but I'm not an attorney nor do I play one on TV.

This is all about the developer's cost structure in terms of this. I want to say one more thing about this just to tie it up and that is we don't really care about whether the developer makes a profit. What we care about is the production of affordable housing. That's what we care about. We also care about minimizing the impacts of affordable housing. Concessions increase the impact to affordable housing so the extent we can minimize the impacts, by minimizing the concessions to those that are absolutely required to provide the affordable housing and pro formas can help us quantify that or some sort of quantification helps us figure out the degree to which this, and I'm suggesting it not be for all concessions but really for wild card concessions when they ask for something that isn't part of our menu, then they have to provide pro formas to be analyzed by staff or consultants.

It seems to me that provides the basis for rebutting the presumption that it is for the purpose and is needed. Thank you.

Commissioner Tanaka: Mine are quick so you'll have to call on Commissioner Garber. So I support the idea of perhaps no height concessions. That seems to make sense to me. I think one thing we want to do as a safety, this whole revision, is to allow anyone to contest a concession that the project is getting and take it to review for the PTC. I think that might be a good safeguard unless there is something really crazy that happens.

I forgot to mention it earlier but I do support the concept that we need some sort of mechanism that gets rid of this double dipping in terms of, we already require the BMR we already get a lot of BMR built. There is no need to give concessions for what is already required so we need to fix that whether it is reducing the FAR and making that a concession or taking away the BMR requirement. I'm not sure what it is but something has to make this consistent. Thanks.

Chair Martinez: Finally Vice Chair Fineberg.

Vice Chair Fineberg: I just want to clarify that in my view, we shouldn't be looking at the pro formas to determine the value of the benefit to the city, whether it's valuable, what the density is. To me, the narrowest reason would be when we are granting the concession that there is a land use change and according to the code, if they can justify that the non-conforming use adjusts the cost of the affordable housing, we need to test that claim. I'm not necessarily adverse to the more general conditions that Commissioner Keller is stipulating. Where if we go with a menu and if it's something that's not on the menu and if it's legal, how we can justify that I'll leave in the City Attorney's hands.

My last question is something for the Director. The reason we're having this discussion is to figure out how to get more affordable housing built and when I think back on the last five years I'm thinking of one big project that actually built houses, Arbor Real, and the rest of them paid in lieu fees which we had, something like $7 million collected from maybe seven projects and that went to buy the land at Ole's. Had we actually required those developments to build the actual units, we would have had something, let's say an average over 50 or 100 units at seven sites but we might have yielded something between 50 and 75 actual units with a higher value than a micro unit that we are going to be building.

So the economies don't work in my mind when we conglomerate money and then have to invest in an account to build tiny units. The reason I'm going on about this is we, in each of those projects, gave away setbacks, three feet along the length of fifteen houses or DEEs at no charge. Then we didn't receive any sort of commensurate value of an actual unit being built because we were paying in lieu fees so I know this is a little off the implementation of local ordinance but maybe we want to look at how we define ARB granting of DEEs as setbacks where we are not giving away those things for free and where if we require it be a concession then it also would trigger the actual building of a physical unit and not an in lieu fee and that would be the highest yield we could get instantly with no extra investment on the city, no requirement to find additional land with no requirement to get outside funds. We could instead of giving those away we could get actual units so I don't know if we define DEEs differently in the implementation of this or do we just need to go back and tweak that in other places in our zoning.

Mr. Williams: I think the DEEs and other exceptions might have been granted for those projects weren't done because they were providing affordable units so to me that's sort of a separate issue. Are we appropriately providing DEEs? It wasn't under the rubric of this ordinance, this state law that we were doing it. We would have to look at what that sort of balance is. I would point out though, I can think of my count would be that we probably have built or enabled 150 units from those projects, affordable units.

Vice Chair Fineberg: How many of those were in actual housing developments versus in lieu fees and then that in millions of dollars more built 100% affordable projects somewhere else?

Mr. Williams: I'd say its about fifty-fifty because the one you might not be thinking of is the bridge housing project with the CJL project with 50 entirely affordable onsite units were part of that project so that's one that was onsite. Ten of the classic were onsite and the others were paying in lieu fee.

Vice Chair Fineberg: Sterling Park paid in lieu fees and then at least in my mind the one right next to Altaire is 100% affordable so I don't think if that as the units within the project. To me that was a sort of set aside and their in lieu fees paid for that at a different site and then they had to bring millions of dollars and bonds so that to me would be more like Treehouse or 801 Alma but the only ten that I could think of was Arbor Real that actually got built.

Mr. Larkin: Sterling Park has ten onsite units and paid in lieu fees for ten. Redwood Gate has requirements for seven so it was seventeen onsite units that were not built in exchange for leveraging the Treehouse Project and 801 Alma Project so its apples and oranges in a sense but there were a substantial number of units to be built or leveraged in the case of in lieu fees.

But to your first point, in order to get the bonus concessions the units have to be onsite so that is an incentive to build the units onsite instead of in lieu fees.

Chair Martinez: Okay Commissioners, my job is to close the public hearing which I should have done earlier and thank you staff for being here and close this item. We'll take a ten minute break.