

**Council Meeting: July 17, 2012****SUBJECT: Consider Adding Criminal Background Checks to Below Market Rate (BMR) Program Qualification Process (Study Issue 12-11)****REPORT IN BRIEF**

Study Issue CDD 12-11 (Attachment A) was prepared at the request of City Council in January 2012 to study the City's ability to require prospective BMR home buyers to undergo a criminal background check prior to being permitted to buy or rent a BMR home or apartment. The issue arose from a local resident's complaint about a neighbor who purchased a BMR home and was later arrested and charged with committing a crime.

The California Penal Code allows certain governmental agencies to perform criminal background checks for specific purposes, such as public agency employment, certification and licensing. Although the Penal Code gives authority to housing authorities to access certain criminal background data collected by the state Department of Justice ("DOJ"), it does not give the same authority to municipal housing departments that administer affordable housing programs developed pursuant to an inclusionary zoning ordinance.

Given the statutory restrictions on accessing criminal background information, as well as the significant fair housing, privacy rights and equal protection concerns, the City is precluded from obtaining DOJ criminal background data on prospective BMR homebuyers. Significant legal risks would also be incurred even if such data were available to screen BMR buyers.

BACKGROUND

In 1980, Council adopted Sunnyvale Municipal Code (SMC) Chapter 19.66: Affordable Housing and Single Room Occupancies ("the Ordinance"), which established the Below Market Rate (BMR) Housing Program. The BMR Program has been an important tool for providing affordable housing opportunities for Sunnyvale's lower and moderate-income households. By March 2012, the BMR Program had produced 380 BMR homes and 639 rental apartments. Of those, 318 homes and 202 rental apartments are still subject to the BMR program requirements, while the BMR restrictions on the remaining units have expired and those units have converted to market rate. In FY 12/13, an additional 46 BMR rental units will be added to the inventory. Staff anticipates approximately 130 new BMR homes to be created in the coming three years.

The BMR Rental Program is administered by each property owner/manager. The City requires that property managers apply tenant screening policies to all

prospective tenants. Each year, households must recertify their continued eligibility for the program.

BMR homebuyers must qualify for a first mortgage and provide a down payment of at least 5% of the BMR purchase price. City Housing staff is responsible for administering the application process to determine program eligibility of prospective buyers. In addition, each applicant/co-applicant(s) must obtain a mortgage from a lender, which involves an extensive review. Just as with any private purchase of property, lenders do not require any borrower to undergo a criminal background check to obtain a loan. Loans are underwritten to determine the borrower's ability to repay the debt. This review includes review of credit history, verification of employment, employment history, debts, income and other criteria.

The City does not develop, sell or own BMR homes. All proceeds of the sale of these homes go to the developer. BMR owners, like all the other market rate owners in the development, are bound by the same Homeowner Association ("HOA") Covenants, Conditions and Restrictions ("CCRs") and must pay all applicable HOA dues, property taxes and special assessments when due. The BMR program restrictions also require BMR homeowners to maintain adequate homeowner's insurance, maintain the property in good condition, abide by the program's resale and occupancy restrictions, and occupy the home as their primary residence.

Attachment B discusses local survey results of BMR Program practices and recent modifications to the City's BMR enforcement requirements.

EXISTING POLICY
HOUSING AND COMMUNITY REVITALIZATION SUB-ELEMENT

Goal A: Assist in the provision of adequate housing to meet the diverse needs of Sunnyvale's households of all income levels.

Policy A.3 – Utilize the Below Market Rate (BMR) Housing requirements as a tool to integrate affordable units within market rate developments, and increase the availability of affordable housing throughout the community. Preserve Sunnyvale's mobile home parks as an affordable housing option. Maintain at least 400 acres of mobile home park zoning.

Goal E: Promote equal housing opportunities for all residents, including Sunnyvale's special needs populations, so that residents can reside in the housing of their choice.

Policy E.2 – Implement City ordinances regarding prohibition of discrimination in housing.

DISCUSSION

Study Issue CDD 12-11

This study issue originated from a resident's complaint about a neighbor who purchased a BMR home, and was subsequently arrested and charged with committing a crime. The BMR homeowner has recently been convicted of murder in the first degree and awaits sentencing.

In developments with a HOA, minor nuisances, neighbor disputes, and CC&R violations are primarily handled by the HOA. More severe public nuisance, blight, and health and safety concerns may be handled by the appropriate City department or division (e.g. DPS Patrol, Neighborhood Preservation, Building Division, etc.). There are also civil remedies under state law that residents may pursue when disputes arise between two private parties, such as between neighbors (e.g. boundary fence repairs, adjacent tree issues, lot line disputes, etc.).

Legal Analysis and Survey of Relevant Legal Authority

Attachment C provides a survey of relevant statutes and case law provided by the City Attorney's office concerning access and limitations to individual records and criminal background check reports. A discussion of the legal distinctions between Public Housing Authorities and other public agencies is also included.

FISCAL IMPACT

No fiscal impact would occur if the staff recommendation is approved by Council. A decision to require criminal background checks would likely create both operational and fiscal impacts as well as potential litigation risks.

PUBLIC CONTACT

Staff held a First Time Homebuyer Workshop in March 2012, and a member of the public inquired whether applicants had to submit to a criminal background check. Several of the attendees voiced an objection to City staff even considering this requirement. Attendees commented that it appeared that the City was presuming that lower and moderate income households were more likely to commit a crime than other households in Sunnyvale. One attendee stated that they felt this requirement would be discriminatory.

A public hearing to discuss this issue was heard by the Housing and Human Services Commission at their May 23, 2012 meeting. The minutes from the meeting are provided in Attachment D. Two members of the public spoke in favor of adding a requirement to conduct a criminal background check as part of the BMR qualification process, while all four commissioners supported staff's recommendation to not require criminal background checks as part of the BMR qualification process. However, two commissioners felt this was a valid concern and perhaps staff should look into options to ensure enforcement and where possible adopt guidelines similar to those used by the Housing Authority of the County of Santa Clara, in a way that is safe and supportable for the City.

Public contact was made by posting the Council agenda on the City's official-notice bulletin board outside City Hall, at the Sunnyvale Senior Center, Community Center and Department of Public Safety; and by making the agenda and report available at the Sunnyvale Public Library, the Office of the City Clerk and on the City's Web site.

ALTERNATIVES

Because this City is legally precluded from performing criminal background checks, staff has identified only one alternative for Council action.

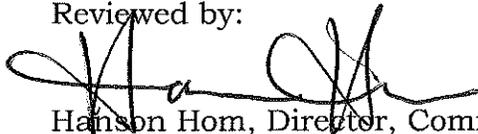
1. Do not add criminal background checks to the BMR Program qualification process.

RECOMMENDATION

Alternative 1: Do not add criminal background checks to the BMR Program qualification process.

The statutory and case law review has determined that the City's Housing Division is precluded from performing background checks on prospective BMR homebuyers or tenants.

Reviewed by:

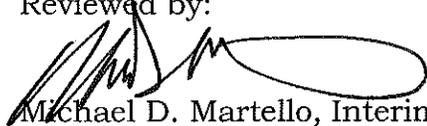


Hanson Hom, Director, Community Development

Suzanne Isé, Housing Officer

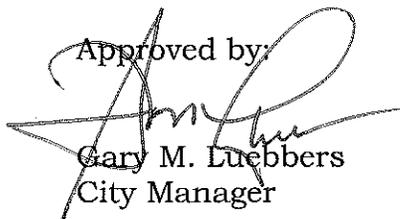
Prepared by: Ernie DeFrenchi, Affordable Housing Manager

Reviewed by:



Michael D. Martello, Interim City Attorney

Approved by:



Gary M. Luebbers

City Manager

Attachments

- A. Study Issue CDD 12-11
- B. Survey BMR Programs and Sunnyvale Enforcement Practices
- C. Legal Analysis and Survey of Relevant Legal Authority
- D. Minutes – May 23, 2012 Housing and Human Services Commission Meeting

Attachment A
Study Issue CDD 12-11

2012 Council Study Issue

CDD 12-11 Consider Adding Criminal Background Checks to Below Market Rate (BMR) Program Qualification Process

Lead Department Community Development

History 1 year ago None 2 years ago None

1. What are the key elements of the issue? What precipitated it?

This study will evaluate the City's ability to require applicants to the City's Below Market Rate (BMR) Housing Programs to undergo a criminal background check at the time their initial BMR eligibility application is submitted for City approval. This issue arose when an individual who purchased a BMR home was arrested and charged with committing a crime some time after their purchase of the BMR home. Other than this extreme example, criminal activity has not been an issue for the BMR program during its 30-year history. Extensive screening of BMR applicants is currently conducted, although the focus is on applicants' ability to obtain a mortgage, and their household and income eligibility pursuant to the BMR program eligibility guidelines. Lending institutions also screen applicants for good credit history, adequate income, and a solid employment history prior to approving mortgage loans for BMR (and market-rate) home buyers.

This issue will require more in-depth research from City Attorney and Community Development staff to explore the legality and viability of requiring background checks for BMR Program participants. Additionally, the study will assess possible fair housing legal challenges and general City litigation risk associated with denying applicants from the program due to their criminal record, if any.

The City's initial statutory and case law review has determined that the City's Housing Division is most likely precluded from performing background checks on BMR applicants. California Penal Code section 11081 and 11105 et. seq., limits access to Department of Justice criminal history information only to limited agencies expressly enumerated in the statute. Currently, only Public Housing Authorities that administer Section 8 housing programs or operate housing for minors or persons categorized as aged, blind or disabled have been granted this access. The City's Housing Division is not a Public Housing Authority for purposes of this statute and therefore would not have access under these provisions.

If Council directs staff to move forward with the criminal background check Study Issue, staff will need to identify funding for each inquiry, adjust staff priorities to administer this new requirement and manage dispute resolution.

The study will include researching various state and federal laws and cases and reviewing other policies from surrounding jurisdictions to determine the legality of performing criminal background checks for BMR Programs. The ability to deny access to a BMR unit based on this information would also be analyzed.

2. How does this relate to the General Plan or existing City Policy?

Housing and Community Revitalization Sub-element:

Equal Housing Opportunities and Special Needs

Goal E - Promote equal housing opportunities for all residents, including Sunnyvale's special needs populations, so that residents can reside in the housing of their choice.

Policy E.1 Support the provision of fair housing services and tenant/landlord mediation to residents.

Policy E.2 Implement City ordinances regarding prohibition of discrimination in housing.

3. Origin of issue

Council Member(s) Whittum, Davis

4. Staff effort required to conduct study Moderate

Briefly explain the level of staff effort required

This issue will require research and policy planning from City staff (OCA and CDD) to determine the legal issues surrounding the City's ability to require criminal background checks for local housing programs, potential Fair Housing issues as a result of disqualification determinations, and a dispute resolution policy.

5. Multiple Year Project? No Planned Completion Year 2012

6. Expected participation involved in the study issue process?

Does Council need to approve a work plan? No

Does this issue require review by a Board/Commission? Yes

If so, which? Housing and Human Services Commission

Is a Council Study Session anticipated? Yes

7. Briefly explain if a budget modification will be required to study this issue

Amount of budget modification required 0

Explanation

NA

8. Briefly explain potential costs of implementing study results, note estimated capital and operating costs, as well as estimated revenue/savings, include dollar amounts

Are there costs of implementation? Yes

Explanation

Costs associated with performing the initial background check, reviewing report results and administering applicant inquiries as a result of the findings.

9. Staff Recommendation

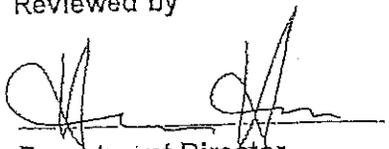
Staff Recommendation Drop

If 'Support', 'Drop' or 'Defer', explain

Based on the City's initial review of the relevant statutes and cases as described in Section 1, it is highly unlikely that the City's Housing Division would have the authority under the California Penal Code to access Department of Justice records to perform criminal background checks for purposes of applicant screening. The Housing Division is not expressly authorized to access that information under the Penal Code. Moreover, the Legislature has statutory jurisdiction over the field of regulation for criminal background checks for governmental entities. It is highly doubtful that the City could enact its own ordinance allowing Housing Division access to such information.

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Reviewed by

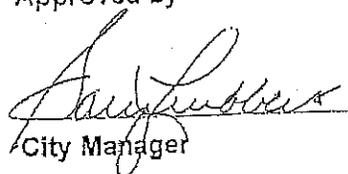


Department Director

1/19/12

Date

Approved by



City Manager

1-20-12

Date

Attachment B
Survey BMR Programs and Sunnyvale Enforcement Practices

Local Survey Results

Staff contacted surrounding cities with BMR programs, including Santa Clara, San Jose, Cupertino, Milpitas, Palo Alto and Mountain View to find out if any of their program requirements include criminal background checks. None of these jurisdictions require applicants to submit to a criminal background check as a condition of buying or renting an affordable housing unit.

Staff also contacted property management executives at two of the Bay Area's largest non-profit housing providers with properties in Sunnyvale. Their tenant screening process is primarily focused on an applicant's credit history. However, they both indicated that criminal background checks are conducted for all potential tenants using a third-party provider which pulls criminal background data from local public records, as they cannot access the official DOJ records. Generally, a felony conviction within the last 7 to 10 years will prohibit a potential tenant from renting a unit in one of their developments.

Staff also contacted managers of several market-rate apartment complexes which include BMR rental apartments in Sunnyvale. The managers reported that they do not conduct criminal background checks. They screen all potential applicants with a financial background reporting service, which includes a credit check, rental payment history and check writing history. All of the complexes surveyed use third-party data providers to verify the information.

Some of these third-party data providers have generated scrutiny by consumer groups. A recent report released on April 11, 2012 by the National Consumer Law Center (attached) stated that criminal background screening companies' reports routinely mismatch people, omit crucial information about a case, reveal sealed or expunged information, provide misleading information and misclassify offenses. Moreover, these commercial entities are not governed by Penal Code requirements governing the use, control, timeliness and veracity of information records; rather, they are governed by the Fair Credit Reporting Act, which also governs commercial credit reporting agencies and are known for numerous reporting errors. As a governmental agency, it would put the City at risk to rely on unofficial criminal background information that is not regulated by the relevant Penal Code statutes.

Current BMR Enforcement Requirements

Each year BMR home owners are required to certify in writing, under penalty of perjury, that their BMR home is their primary residence, and that they are in full compliance with the BMR home owner restrictive covenants, which are recorded against title to their homes upon purchase. These covenants prohibit renting out the home, over-encumbering the home, neglecting or damaging the property, or creating nuisances, among other prohibitions. The covenants also require the

home owner(s) to pay property taxes, assessments and homeowner's association dues when due, make payments when due on all mortgage loans secured by the home, maintain homeowners' hazard insurance, and occupy the home as the primary residence for at least ten months of each year.

To improve compliance and allow for effective enforcement of the restrictions in the future, staff contracted with a special housing counsel, Goldfarb & Lipman to revise the City's standard form BMR restrictive covenants, which consist of an owner's occupancy and resale agreement and a performance deed of trust which creates a monetary lien on the property, allowing the City to recover any "excess proceeds" that may be due in the event of certain types of default and/or violation of the restrictions. These legal instruments are recorded against title to the BMR homes upon close of each sale escrow or, in some cases, refinance transactions. The new covenants provide stronger and/or clearer enforcement provisions than those of the prior standard form covenants.

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FOR IMMEDIATE RELEASE: APRIL 11, 2012

Contacts: Jan Kruse or Persis Yu, 617-542-8010 ext. 361
jkruse@nclc.org; pyu@nclc.org

Download the full report, including examples of how real people have been harmed:
<http://www.nclc.org/issues/broken-records.html>

CRIMINAL BACKGROUND CHECKS: RAMPANT ERRORS COST WORKERS' JOBS AND SKIRT FEDERAL LAW

The National Consumer Law Center Urges Action to Hold Companies Accountable

BOSTON, Mass.—Since September 11, 2001, there's been an explosion in criminal background checks for job applicants by employers, yet many reports are riddled with errors. *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses*, a report from the National Consumer Law Center (NCLC), also finds an industry-wide lack of accountability and incentives to cut corners mean that tens of millions of workers may pay for these third-party errors with their jobs while employers waste money and miss out on hiring qualified employees.

"Background screening companies routinely cut corners to improve their profits and then they wipe their hands of any responsibility for producing an inaccurate or misleading report that can cost a worker his or her job," says National Consumer Law Center Staff Attorney Persis Yu and co-author of the report. "Federal regulatory agencies and states should rein in the Wild West of the background screening industry by holding companies accountable."

NCLC's research reveals that criminal background screening companies' reports *routinely*:

Mismatch people (i.e. a person with no criminal background with someone who has a record, which is especially problematic for people with common names);
Omit crucial information about a case, (i.e. a person is arrested but then found innocent);
Reveal sealed or expunged information (i.e. a juvenile offense);
Provide misleading information, (i.e. a single charge listed multiple times); and/or
Misclassify offenses (i.e. reporting a misdemeanor as a felony).

Many of these errors can be attributed to common practices by background screening companies, such as:

- Retrieving information through bulk record disseminations and failing to routinely update their databases;
- Failing to verify information obtained through subcontractors and other faulty sources;
- Using unsophisticated matching criteria;
- Failing to use all available information to prevent a false positive match; and
- Lacking understanding about state specific criminal justice procedures.

About 93% of employers conduct criminal background checks on some applicants, while 73% of employers conduct checks on all applicants, according to a 2010 survey by the Society for Human Resource Management. Yet there are no licensing requirements and there is no system for registration for background checking companies. Anyone with a computer and access to records can start a business; the total number of companies is unknown.

The National Association of Professional Background Screeners (the industry trade organization) has a voluntary accreditation program that contains some simple procedures (many of which are legally required) that background checking companies can take to enhance the quality of their information. Unfortunately, few companies actually are willing to commit to even the limited recommendations of their own trade association.

"Working without adequate federal supervision, many commercial background screening companies have produced poor quality reports that, in the most extreme cases, have shut people from their careers," notes co-author Sharon Dietrich, who is managing attorney in Community Legal Services of Philadelphia's *Employment and Public Benefits Units*.

RECOMMENDATIONS

The National Consumer Law Center report recommends that federal regulatory agencies and states use their authority to clean up industry-wide problems. For example, the Consumer Financial Protection Bureau could issue regulations under the Fair Credit Reporting Act (enacted in 1970 by Congress to protect the privacy of consumers) to ensure *greater accuracy of background checks* and to require consumer reporting agencies to register so consumers can correct inaccurate and misleading information. The Federal Trade Commission can investigate major commercial background screening companies for common FCRA violations and investigate major, nationwide employers for compliance with the FCRA requirements for users of consumer reports for employment purposes.

State legislatures and courts also have a role. They can require companies that receive bulk data from court databases to promptly delete sealed and expunged criminal records and routinely update their records. States can also audit companies and if not in compliance, states can revoke the companies' receipt of data.

"Background screening companies generate billions of dollars in revenue for producing sloppy work while consumers are left handcuffed with little recourse to challenge and correct misleading or incorrect personal information," says National Consumer Law Center attorney Persis Yu. "Where's the justice in that?"

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Since 1969, the nonprofit National Consumer Law Center® (NCLC®) has used its expertise in consumer law and energy policy to work for consumer justice and economic security for low-income and disadvantaged people, including older adults, in the United States. NCLC advances economic fairness through policy analysis and advocacy; consumer law and energy publications; litigation; expert witness services; and training and advice for advocates. NCLC works with nonprofit and legal services organizations, private attorneys, policymakers, and federal and state government and courts across the nation to stop exploitive practices and help financially stressed consumers build and retain wealth.

Attachment C
Legal Analysis and Survey of Relevant Legal Authority

LEGAL ANALYSIS AND SURVEY OF RELEVANT LEGAL AUTHORITIES

A survey of relevant statutes and case law provided by the City Attorney's office concerning access and limitations to individual records and criminal background check reports is provided below.

Statutory Authority

The California Penal Code regulates governmental access to official criminal background information compiled by the Department of Justice and has preempted the field of regulation. These statutes give express authority to certain governmental agencies to perform criminal background checks for employment, certification and licensing purposes. Although the statutes give authority to PHAs, this authority is not granted to municipal housing departments that administer local developer land use requirements pursuant to an inclusionary zoning ordinance.

The regulations limiting access to criminal background information are contained in several provisions of the Penal Code. For example, Penal Code section 11076 states that "[c]riminal offender record information shall be disseminated, whether directly or through any intermediary, only to such agencies as are, or may subsequently be, authorized access to such records by statute." Additionally, Penal Code section 11081 states that "[n]othing in this article shall be construed to authorize access of any person or public agency to individual criminal offender record information unless such access is otherwise authorized by law." Therefore, only authorized individuals within an agency may access the criminal background information.

The main grant of authority is in Penal Code section 11105(b), which states that "[t]he Attorney General shall furnish state summary criminal history information to any of the following, if needed in the course of their duties....

(11) Any city or county ... or any officer or official thereof if access is needed in order to assist that agency, officer, or official *in fulfilling employment, certification, or licensing duties* (emphasis added), and if the access is specifically authorized by the city council, board of supervisors, or governing board of the city, county, or district if the criminal history information is required to implement a statute, ordinance, or regulation that expressly refers to specific criminal conduct applicable to the subject person of the state summary criminal history information, and contains requirements or exclusions, or both, expressly based upon that specified criminal conduct...."

According to this provision, city officials may only access criminal history information for purposes of "employment, certification or licensing". Review of a BMR housing application is not related to City employment or the issuance of a license (e.g. a local massage therapist license), therefore the only provision that the Housing Division might qualify under would be the "certification" of BMR

applicants. However, court decisions and subsequent legislative amendments have clarified that criminal background information is available only to certain housing agencies and only in limited circumstances.

The Special Case of Public Housing Authorities

In 1990, a California appellate court denied the Housing Authority of Sacramento access to criminal history records and found that non-disclosure of criminal records is the general rule under Penal Code section 11105 and that exceptions to non-disclosure must be narrowly construed. (See *Housing Authority of the City of Sacramento v. Van de Kamp* (1990) 223 Cal.App.3d 109.) In the *Van de Kamp* case, the Housing Authority of Sacramento had petitioned the court for a writ of mandate directing the California Attorney General to furnish criminal records of applicants for public housing under the theory that the tenants were being "certified" for eligibility. (*Id.* at 111.) However, the court held that "certification" within the meaning of the statute referred only to occupational and employment certification; therefore, criminal background access was not granted. (*Id.* at 116.)

In 1994, the California Legislature modified the Penal Code to expressly give "public housing authorities" the ability to access criminal background history. The legislative history suggests that this change was made to give express authority to these agencies since they were federally mandated by HUD to screen tenants for criminal history who participated in HUD programs or lived in public housing developments owned and managed by the housing authority. This change is reflected in Penal Code section 11105.03, which reads in part:

- (a) Subject to the requirements and conditions set forth in this section and Section 11105, local law enforcement agencies are hereby authorized to provide state criminal summary history information obtained through CLETS for the purpose of screening prospective participants and prospective and current staff of a regional, county, city, or other local public housing authority (emphasis added), at the request of the chief executive officer of the authority or his or her designee, upon a showing by that authority that the authority manages a Section 8 housing program pursuant to federal law (U.S. Housing Act of 1937), or operates housing at which children under the age of 18 years reside or operates housing for persons categorized as aged, blind, or disabled.

For informational purposes, the Code of Federal Regulations ("CFR") 24 CFR 960 sets forth tenant eligibility requirements for admission to, and occupancy of public housing developments. For example, section 960.204 states that a tenant applicant may be denied admission for public housing if: (1) an individual was evicted for drug related criminal activity; (2) members of the household are currently engaging in illegal use of a drug; (3) an individual was convicted of methamphetamine production; and (4) if an individual is subject to sex offender registration requirements. However, this code has no bearing on affordable housing developed by private developers pursuant to municipal inclusionary zoning requirements, nor does the CFR override California statutory law which

precludes municipalities from accessing DOJ records needed to screen tenants for these criminal history records.

Difference between City Ownership Program and Public Housing Authority

In Sunnyvale, BMR homes and apartments are developed by private developers pursuant to land use regulations (inclusionary zoning) and without any HUD funds or other financial assistance from the City.

In contrast, a Public Housing Authority is defined by HUD as "...a State, county, municipality or other governmental entity or public body (or agency or instrumentality thereof) authorized to engage in or assist in the *development* of or *operation* of low-income housing" (emphasis added). A PHA is funded primarily by HUD to operate Section 8 and other public housing programs. Section 8 programs involve subsidies, and are strictly regulated by HUD.

The only PHA in this county is the Housing Authority of the County of Santa Clara ("HACSC"). It provides rental subsidies and develops and operates affordable housing for low income families, seniors and persons with disabilities living in Santa Clara County. The HACSC would be entitled to apply for and receive criminal offender history in accordance with the Penal Code. However, given the strict controls the state legislature has imposed on criminal offender history, any tenant or applicant background information that the HACSC has compiled cannot be shared with other agencies such as the City's Housing Division.

The City's Housing Division, in contrast, is not a PHA organized under the federal statutes and regulated by HUD. The City does not own or manage federal housing developments nor administer programs funded by HUD, such as federal Section 8 housing vouchers or public housing developments. In Sunnyvale, the BMR homes for sale are affordable to moderate income home buyers, while the BMR rental apartments are affordable to low income tenants. Moreover, the BMR rental apartments are mixed-income private rental properties which do not qualify as "low-income housing" as defined by HUD federal laws.

Additional Legal Issues

Notwithstanding the statutory difficulties in accessing this information from the DOJ, there are other legal considerations that complicate the analysis. For instance, there is no applicable California statute that allows criminal convictions to be used to disqualify prospective BMR home buyers, and consequently there are no relevant cases that discuss which disqualifying convictions would be legally supportable. This raises a myriad of policy questions that could also trigger fair housing concerns (i.e., disparate impacts on certain demographic populations), privacy rights and equal protection issues. One problematic policy concern is whether lower and moderate income homeowners should be subjected to stricter background checks than market-rate buyers within the same development.

Fair Housing Issues

Discussions with the Silicon Valley Law Foundation (SVLF) have raised some fair housing concerns. They contend that there should be evidence that prospective

BMR buyers as a group cause a disproportionate amount of criminal activity relative to the general population within the community. Staff is unaware that any such findings have been made. In fact, staff is unaware of any specific concerns regarding criminal behavior of BMR occupants in the 30-plus year history of the program.

SVLF has submitted an analysis of concerns associated with conducting criminal background checks on prospective BMR applicants. The analysis notes that both the Federal Housing Amendments Act and California's Fair Employment and Housing Act prohibit discrimination in housing based on race, gender, national origin, and other protected categories (42 U.S.C. § 360, *et seq.*; Government Code § 12900, *et seq.*) They note that prohibitions include not only overt, intentional discrimination, but also facially neutral policies and practices that have a disproportionate impact on certain groups (Title VIII of the Civil Rights Act of 1968). Using arrest and conviction records to screen for housing is an example of the kind of neutral selection criteria that invites scrutiny.

Additional analysis from the SVLF stated that if criminal background checks are performed only for prospective purchasers of BMR homes, and not for market rate homes, there would likely be a disparate impact on lower-income people of color who are more likely to live in and/or own BMR units.

Megan's Law

In the course of completing this study issue, staff also investigated whether California's "Megan's Law" provided the City with any ability to conduct background checks on BMR housing applicants. Megan's Law provides the public with certain information on the whereabouts of sex offenders, through an online database provided by the Department of Justice, so that members of local communities may protect themselves and their children. The law is not intended to punish the offender, and specifically prohibits using the information to harass or commit any crime against an offender. This law requires persons convicted of specified sex crimes to register as sex offenders with a local law enforcement agency, and to update their information annually. The information provided in the Megan's Law database can only be used to protect a person at risk. Except to protect a person at risk, or as authorized under any other law, use of any information disclosed on this web site for purposes relating to housing or accommodations is prohibited by California Penal Code § 290.4 *et seq.*

Jessica's Law

In the course of completing this study issue, staff also investigated whether California's "Jessica's Law" also known as Proposition 83 provided the City with any ability to conduct background checks on BMR housing applicants. Jessica's Law prohibits convicted sex offenders from living within 2,000 feet of a school or any place where children gather. It requires registered sex offenders who have been convicted of a felony sex offense to be monitored by GPS devices while on parole and for the remainder of their lives. A violation of this provision would be a misdemeanor offense, as well as a parole violation for parolees. The California

Department of Corrections and Rehabilitation is responsible for ensuring compliance with this law.

Attachment D
Minutes – May 23, 2012
Housing and Human Services Commission Meeting



DRAFT MINUTES

SUNNYVALE HOUSING AND HUMAN SERVICES COMMISSION May 23, 2012

The Housing and Human Services Commission met in regular session in the City Hall West Conference Room, 456 W. Olive Avenue at 7:00 p.m. with Chair Dietrich presiding.

The meeting was called to order at 7:05 p.m.

ROLL CALL

Board/Commission Members Present:

Eric Anderson, Hannalore Dietrich, Younil Jeong, and Mathieu Pham.

Board/Commission Members Absent: Patti Evans (unexcused)

Council Liaison: Councilmember Patrick Meyering (present).

Staff Present: Community Development Director Hanson Hom, Assistant City Attorney Kathryn Berry, Housing Officer Suzanne Isé and Housing Programs Technician Edith Alanis.

Others: Councilmembers Jim Griffith and Tara Martin-Milius, MidPen Housing Project Manager Abigail Goldware, MidPen Housing Project Manager Robert Baca, Bill Hawkes, resident, other members of the public.

SCHEDULED PRESENTATION

Service Recognition

Councilmember Jim Griffith presented Commissioners Younil Jeong and Mathieu Pham with a certificate and thanked them for their service during their term that is to expire on June 30, 2012. He also announced the Commissioner Jeong would be continuing with the Housing and Human Services Commission for another term starting in July and thanked her for continuing her service.

PUBLIC ANNOUNCEMENTS

None.

CONSENT CALENDAR

Chair Dietrich asked for a motion to approve the consent calendar.

Commissioner Anderson moved and Commissioner Pham seconded to approve the Consent Calendar.

Motion passed unanimously 4-0-0.

PUBLIC COMMENTS

Councilmember Tara Martin-Milius also thanked all the Commissioners for their service.

PUBLIC HEARINGS/GENERAL BUSINESS

Chair Dietrich asked if there were any objections to moving agenda item 4 - Continuation of Item 3 from April 25 meeting: Public Hearing: Proposed Housing Mitigation Fund Affordable Housing Project Awards, to the top of the Public Hearings/General Business section. There were no objections.

2. Continuation of Item 3 from April 25 meeting: Public Hearing: Proposed Housing Mitigation Fund Affordable Housing Project Awards.

Officer Isé gave a recap. In January the City issued a Request for Proposals for Affordable Housing Capital projects. The City received two proposals. MidPen requested the full amount of \$5 million dollars in Housing Mitigation funds for a comprehensive interior and exterior rehabilitation of Homestead Park Apartments. St. Anton requested \$3.75 million for construction of a new rental housing project, known as Pastoria Central.

This item was continued from the last meeting because the Commissioners only allocated half of the available funds and hoped to be able to partially fund both projects; however, St. Anton was unable to produce a viable project for \$2.5 million in housing funds, and withdrew their proposal.

Officer Isé noted that the Commissioners could now reconsider MidPen's original request and could opt to fully fund it if desired.

Chair Dietrich opened the public hearing at 7:13 p.m.

Project Manager Robert Baca asked the Commission to recommend awarding the \$5 million to fully fund the proposed rehabilitation project.

He reviewed the scope of work for the project and highlighted the benefits of rehabilitating the interiors of Homestead Park now rather than in phases or in the future when the cost of labor and materials will increase. The residents would only be inconvenienced once by the construction work, rather than several times, and the bidding will be more competitive with the full scope of work.

Chair Dietrich closed the public hearing at 7:18 p.m.

Commissioner Jeong asked why St. Anton couldn't move forward with the Pastoria Central Project.

Director Hom explained that it had to do with the density of the project not being compatible with the surroundings and also with its design. He also noted that St. Anton has decided to move forward with a reduced project that will not include affordable housing units.

Officer Isé asked Project Manager Robert Baca to comment on the additional matching funds that MidPen has secured. Robert mentioned that MidPen is receiving \$500,000 from the California Solar Initiative and has expanded the scope of work to include solar thermal for water heating for up to 9 buildings. The funding for the rest of the 25% match will come from the property reserves and a loan from MidPen.

There was some discussion and more questions about the scope of work.

Chair Dietrich asked for a motion.

Commissioner Anderson moved and Commissioner Pham seconded to recommend approval of a conditional loan commitment of \$5 million for the rehabilitation of Homestead Park.

Motion passed unanimously 4-0-0.

3. Public Hearing: B/C Draft RTC: Consider Adding Criminal Background Checks to Below Market Rate (BMR) Program Qualification Process (Study Issue CDD 12-11).

Officer Isé gave an overview of the draft Report to Council scheduled for hearing on July 17th. She noted that this was one of the study issues approved to be studied this year and that it was initiated at the request of a member of the public regarding a neighbor in a BMR home who was arrested and charged with committing a crime. That case is still awaiting trial.

Officer Isé also gave a quick overview of the BMR Program and its requirements. She explained that the City administers the BMR ownership program and determines whether the applicants are eligible to apply to purchase the homes, but it does not own or sell the homes, the developers do.

The City doesn't screen rental applicants for eligibility for the BMR rental program, as that was delegated by Council to the property owners/managers, but it does conduct annual audits to ensure compliance with the program.

Staff consulted with the Office of the City Attorney to determine whether a criminal background check could be added to the process for eligibility screening of home buyer applicants. The Office of the City Attorney has indicated a variety of reasons why it would be highly risky for the City to attempt to do criminal background checks.

The process that would be most reasonable and preferable is prohibited by the California penal code, because the City cannot access the criminal background database that is administered by the Department of Justice for this purpose. The alternative of using private third-party providers is risky as their data is highly error-prone.

Officer Isé noted that the City is not a party to the BMR sales transactions, which are between the seller and the buyer, just like any market rate home sales, which also do not generally involve any type of background check. The City's role is to determine that the buyers are income-eligible and that they live or work in Sunnyvale, or in some instances in the County of Santa Clara.

Officer Isé also noted that the circumstances that initiated this study issue are quite unique and an anomaly, as it is the first time such a case has come up in 30 years of the BMR program. As unfortunate as this situation is, in practical terms there is little that can be done to either prevent or predict when and where alleged crimes like this domestic violence case may happen, as they are crimes of passion.

Chair Dietrich opened the public hearing at 7:39 p.m.

Mr. Bill Hawks explained that he is the member of the public that initiated this study issue. He passed out a hand out that outlined his rationale for his request.

He noted that the City of Sunnyvale uses background checks for other issues such as in hiring new employees and doesn't understand why it cannot be incorporated in the BMR eligibility process.

He mentioned that he doesn't think that the City is enforcing the BMR guidelines that can force the owner to sell the property if it's not occupied by the home owner, and characterized the BMR program as public housing.

An unidentified member of the public agreed with Mr. Hawks' point of view and supported background checks.

Chair Dietrich closed the public hearing at 7:53

Commissioner Anderson asked for clarification of the intent of this study. Director Hom explained that it is to explore the possibility of including criminal background checks as part of the BMR eligibility screening process. Commissioner Jeong pointed out that this study issue explored the requirement, but did not address what would be done with the data that would be obtained.

After some discussion and questions, the Commissioners determined that they didn't feel comfortable taking any formal action on this item, but opted to state their individual opinions the City Council.

Commissioner Jeong expressed that the BMR program expands the social and economic diversity of the community and she does not recommend adding a criminal background check to the BMR process.

Commissioner Mathieu Pham recommended not adding the criminal background check on this type of program. He feels the City would be exposed to law suits and allegations.

Commissioner Eric Anderson felt that there is a valid concern, and he would like to be able to do something that would provide, if not a perfect system, some type of diligence. He supports the staff's recommendation that the City is not able to do a specific background check, however, he think that there should be some time spent on finding some form of enforcement and also to adopt any specific guidelines being used by the Housing Authority or other parties that are using background information in a way that is safe and supportable for the City.

Chair Dietrich expressed that after initially learning about the specific situation that brought about this study issue, she felt that background checks were appropriate. However, she acknowledges that this situation is an anomaly. She also expressed that background checks are not always reliable; she suggested exploring other options to handle such situations when they present themselves to provide some relief or peace of mind to the neighbors.

4. Public Hearing: B/C Draft RTC: Modifications to the Zoning Code Related to Chapter 19.66: Affordable Housing and Single Room Occupancies (Study Issue CDD 09-12C and Non-Routine HO-01).

Officer Isé noted that tonight's slide presentation was the same as the one used during the public outreach meetings on this matter.

Officer Isé noted that this Report to Council consolidates all the suggestions that have been received through multiple channels over the last few years. The majority of the recommendations focus on the BMR ownership program. The goal is to make the BMR ordinance easier to read, easier to implement, provide more options for compliance, and improve provisions for enforcement applicable to both the potential buyers and the developers, and to make the current municipal code compliant and consistent with existing state and federal laws and regulations related to density bonus issues. She then presented the slides with an outline of the proposed amendments.

Chair Dietrich opened the public hearing at 9:41 p.m.

There were no comments from any member of the public.

Chair Dietrich closed the public hearing at 9:42 p.m.

After some discussion, Chair Dietrich asked for a motion.

Commissioner Anderson moved and Commissioner Jeong seconded to recommend Alternative 1: Adopt the Ordinance provided in Attachment B to: modify the zoning code related to Below Market Rate Housing Requirements; update the density bonus provisions; and move the density bonus and single room occupancy subsections from Chapter 19.66 to Chapters 19.18 and 19.68, respectively.

Motion passed unanimously 4-0-0.

5. Budget Review

Officer Isé briefly reviewed the materials that were included in the commissioner's packet, and noted that City Council asks that the Boards and Commissions take a look at the proposed budget each year and provide comments before its adoption. She also explained that they could choose to make a formal motion to recommend approval or modification of the budget, provide comments or not take any action at all.

She pointed out that the housing mitigation line item will be replaced with the Commission's recommendation to allocate those funds to MidPen for the Homestead Park Rehabilitation.

Commissioner Anderson moved and Commissioner Pham seconded to recommend approval of the Budget as presented by staff and ask that Council maintain the \$100,000 in General Fund support for CDBG related activities.

Motion passed unanimously 4-0-0.

6. Creation of a Citizen Advisory Committee (CAC) for the Lawrence Station Area Plan

Director Hom explained that the Lawrence Station Area Planning project was awarded a grant by the Metropolitan Transportation Commission to help finance the planning efforts to establish

a transit-oriented type of development around the Caltrain Station. The program guidelines for this grant require the City to establish a CAC to provide community input. During Phase I, three development options were already identified for the plan area. One emphasizes mostly residential, the second office and employment development, and the third one is a mix of both. The CAC's goal is to help further refine the options for Council. This committee is expected to meet once a month for a twelve-month period.

Commissioner Jeong expressed interest in participating.

Commissioner Anderson moved and Commissioner Dietrich seconded to nominate Commissioner Jeong to be part of the CAC

Motion passed unanimously 4-0-0.

NON-AGENDA ITEMS AND COMMENTS

B/C Members Oral Comments

STAFF Oral Comments

INFORMATION ONLY ITEMS

None.

ADJOURNMENT

The meeting adjourned at 9:53 p.m.

Respectfully submitted,

Suzanne Isé
Housing Officer