

DATE: December 12, 2023

TO: Honorable Mayor and City Council

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VIA: Kimbra McCarthy, City Manager

TITLE: **Review of the Below-Market-Rate Affordable Housing Program**



STUDY SESSION MEMO

PURPOSE

The purposes of this Study Session are for the City Council to:

- Receive the review of the City’s Below-Market-Rate Affordable Housing Program; and
- Provide direction on policy changes for the program.

BACKGROUND

The City’s Below-Market-Rate Affordable Housing Program (BMR Program) includes periodic reviews to evaluate program efficacy and to make policy changes on a more frequent basis as needed to ensure that the program is meeting its objectives. This is the first of such reviews, with the second review to follow in 2028 per Program 1.9 in the City’s 2023-31 Housing Element. This Background section provides a brief history of the BMR Program—first established in 1999 and later modified in 2018 (Phase 1 update) and 2019 (Phase 2 update)—followed by the Discussion section, which includes the evaluation components as identified in the City’s Housing Element.

Original BMR Program (Established in 1999)

The original Below-Market-Rate Affordable Housing Program was adopted by the City on January 12, 1999 (the 1999 BMR Program). The program required market-rate rental and ownership residential projects to include 10% of the units as deed-restricted affordable units. BMR rental units were allowed between 50% and 80% of the Area Median Income (AMI), but units were typically set at 65% of the Area Median Income (AMI). BMR ownership units were allowed between 80% and 100% AMI. Developers could opt to pay an in-lieu fee, which is the option that most developers took. This resulted in more fees, but less on-site BMR units.

Due to the *Palmer v. City of Los Angeles* ruling, Mountain View—like many cities—did not enforce the BMR inclusionary requirements for rental market-rate housing projects between 2009 and

2017. During this time, the City implemented a Rental Housing Impact Fee (RHIF) program instead, while continuing the BMR Program for ownership projects. Under the RHIF program, providing on-site units was the alternative to paying the RHIF.

In 2017, Council held two Study Sessions on affordable housing priorities and a five-year strategic framework:

- September 2017 Study Session: Council provided direction on several policy priorities related to the BMR Program, including preference for on-site affordable units integrated with market-rate units rather than receiving Rental Housing Impact fees or BMR in-lieu fees, increasing the fee levels, a desire for more middle-income housing opportunities, increasing ownership opportunities, and preserving BMR ownership units.
- November 2017 Study Session: Between the September and November Study Sessions, Assembly Bill (AB) 1505 was signed into law, which restored the ability for cities to implement inclusionary housing for rentals. In anticipation of the law going into effect on January 1, 2018, Council supported a two-phase process to update certain parts of the BMR Program as soon as possible while recognizing that other updates needed additional time to analyze and bring back options. The two-phase update process is summarized below.

BMR Program Phase 1 Updates (2018)

On February 13, 2018, Council held a first reading of the ordinance to approve the following Phase 1 updates:

- Increase the affordable housing requirement for rental developments to 15%, but keep the current 10% requirement for ownership developments until the second phase of the BMR Program modification process.
- Increase the in-lieu fee for rental projects to \$34.57 per square foot and provide flexible alternative mitigations.
- Rescind the Rental Housing Impact Fee program.

Council held a second reading of the ordinance on February 27, 2018, and the Phase 1 updates went into effect April 29, 2018.

BMR Program Phase 2 Updates (2019)

On June 18, 2019, Council held a first reading to approve the Phase 2 updates, which included an overall update of the BMR Program. The second reading was held on June 25, 2019, and the Phase 2 updates went into effect on August 24, 2019, which are the current BMR requirements.

“BMR Phase 2” and “current BMR Program” are synonymous and the remainder of this report uses the terms interchangeably.

The purposes of the current BMR Program are to:

- Increase the diversity and supply of affordable housing.
- Deliver affordable housing integrated with market-rate units.
- Facilitate inclusive, economically sustainable, and complete communities for a diverse range of families and households.

Table 1 summarizes the current BMR Program requirements. Note that the requirements are based on the Area Median Income (AMI) and income limits adjusted by household size as annually published by the State Department of Housing and Community Development (HCD). For example, rent for a low-income unit at 80% AMI is based on an income limit of \$137,100 for a four-person household. For a moderate-income unit at 120%, the income limit is \$174,050 for a two-person household. See Attachment 1 for a comprehensive 2023 State income limit chart.

Table 1: Current BMR Program Requirements

Component	Requirement	Note
Objective Standard	On-site BMR units integrated with market-rate units in same structure.	Advances equity and inclusion in mixed-income communities.
Applicability	All residential projects creating one or more units.	Accessory dwelling units and licensed care facilities are excluded.
Duration	Affordable in perpetuity.	Preserves the BMR housing supply.
Percentage	15% BMR requirement for both rental and ownership market-rate projects. 25% BMR requirement for rowhouse/townhouse projects.	Residential projects with less than seven units can pay in lieu fee for the fractional BMR unit.
Income Levels (Rental)	50% to 120% AMI, with weighted average of 65% AMI or less.	Must provide minimum of two income levels to achieve greater diversity and middle-income housing.

Component	Requirement	Note
Income Levels (Ownership)	<p>80% to 120% AMI, with weighted average of 100% AMI.</p> <p>Rowhouse/townhouse projects must also provide units 120% AMI to 150% AMI with a weighted average of 135% AMI.</p>	Must provide minimum of two income levels to achieve greater diversity and middle-income housing.
Housing Cost	Maximum of 30% of income level designated for a BMR unit, based on annual State HCD income limits. (Applies to ownership projects and initial rents for rental projects).	<p>BMR initial rents factor in utility allowance. Maximum annual rent increases of 3% for in-place tenants.</p> <p>BMR sales prices factors in mortgage, taxes, utilities, HOA dues, and insurance. Assumes 5% downpayment.</p>
Unit Mix	Proportionate mix of BMR units at various AMI levels and unit sizes.	Provides diversity and prevents clustering of BMR units into certain unit sizes. Achieves more equitable distribution of unit types to meet housing needs.
Location and Design	BMR units shall be reasonably dispersed throughout the development and have comparable design with market-rate units.	Provides diversity and prevents clustering of BMR units in certain locations, such as all on ground floor in the rear for example. Achieves more equitable distribution of housing location and choice.
Alternative Mitigations	Specified options are in-lieu fee, land dedication, development of off-site units, and other. Applicant must make request, satisfy finding requirements, and demonstrate why proposed alternative mitigation furthers housing opportunities to a greater extent than on-site BMR units.	On-site BMR units is objective standard. The City Council has discretion to approve or deny the request. Satisfying the finding requirements does not constitute automatic approval of request.

Benchmarking

Table 2 below provides a summary of select comparable cities in the region with local BMR Programs. Note that every city has highly specific nuances in the requirements and implementation of each program, even though the requirements are broadly similar at a high level. This benchmarking is not intended—nor was it possible—to be an in-depth review of the programs in each jurisdiction; rather, it is to provide a high-level comparison of key BMR requirements across the jurisdictions. The information in Table 2 includes wording directly from the requirements stipulated in each jurisdiction to stay as accurate as possible with the different requirements.

That said, the benchmarking shows that Mountain View is comparable to most cities regarding most of the core BMR requirements.

Table 2: Benchmarking BMR Programs in Other Cities

Component	Mountain View	Cupertino	Palo Alto	San Jose	Santa Clara	Sunnyvale	Redwood City	San Mateo
Program Date	6/25/2019 (Phase 2)	5/20/2020 (Revised)	4/17/2017 (Revised)	3/9/2021 (Revised)	1/13/2018 (Revised)	9/25/ 2019 (Adopted)	9/27/2021 (Revised)	1/3/2020 (Revised)
% Required (Rental)	15%	15%	Not applicable*	15% or 10%	15%	15%	20%	15%
AMI Levels (Rental)	50%-120% AMI and weighted average \leq 65% AMI	6% up to 80% AMI; 9% of Units at up to 50% AMI	Not applicable*	Depends on % reqmt. 30%-120% or 0%-30% AMI	50%-120% AMI and weighted average \leq 100% AMI	30%-80% AMI	VLI to Moderate Income	50%-70% AMI
% Required (Ownership)	15% (25% for rowhomes)	20%	15%-20%	15%	15%	15%	15%	15%
AMI Levels (Ownership)	80%-150%; 100% and 135% AMI weighted averages	10% of Units up to 100%; 10% of Units up to 120% AMI	50% to 120% AMI	\leq 110% AMI	\leq 100% AMI	80%-120% AMI	Moderate Income	100%-110% AMI
Preferences	Yes	Yes	None	None	Yes	Yes	Yes	Yes
Minimum Project Size	1 unit	7 units	3 units	10 units	1 unit	4 units (rental); 7 units (owner)	5 units*	5 units

Component	Mountain View	Cupertino	Palo Alto	San Jose	Santa Clara	Sunnyvale	Redwood City	San Mateo
Duration of Affordability Restriction	Perpetuity	99 years	99 years	≥99 years	≥55 years (rental); ≥20 years (owner)	55 years (rental); 30 years (owner)	≥55 years (rental); ≥30 years (owner)	Perpetuity (rental); 45 years (owner)
Housing Cost	Similar methodology of 30% of AMI of unit inclusive of utilities/other housing costs							
Unit Mix	Similar methodology of having BMR units proportionate/comparable to market-rate units							
Alternative Mitigation	1. In-lieu fee 2. Land dedication 3. Off-site construction 4. Other alternatives	1. Land Dedication 2. Off-site construction 3. Acq/Rehab of Existing Units	<u>For owner BMR units only</u> 1. In-lieu fee 2. Land dedication 3. Off-site construction 4. Acq/Rehab of Existing Units	1. In-lieu fee 2. Land dedication 3. Off-site construction 4. Acq/Rehab of Existing Units	1. In-lieu fee 2. Land Dedication 3. Off-site construction	1. In-lieu fee 2. Land Dedication 3. Acq/Rehab of Existing Units 4. Preserve expiring BMR Unit 5. Partnerships	1. In-lieu fee 2. Land dedication 3. Off-site construction of Existing Units 4. Acq/Rehab of Existing Units 5. Agmt w/City for Financing	1. Off-site construction 2. Agmt w/City for Financing 3. Variation on bedroom mix
Approval Method	Discretionary	Discretionary	Discretionary	By-right	Discretionary	Discretionary	By-right	By-right

* Palo Alto does not have an inclusionary requirement for rental projects. Instead, it implements a housing impact fee.

DISCUSSION

This section provides the findings, recommendations, and Council questions for the five main evaluation criteria in Housing Element Program 1.9 as summarized below (See Attachment 2 for Program 1.9 verbatim):

- Housing Element Evaluation Criterion 1: Continue BMR program, as revised in 2019, to include more opportunities for inclusionary units as opposed to fees.
- Housing Element Evaluation Criterion 2: Review BMR program to evaluate program efficacy and identify potential modifications to improve efficacy based on City goals, including furthering affordable housing production across unit types, special needs, and affordability levels.
- Housing Element Evaluation Criterion 3: Whether the BMR program facilitates mobility and access to opportunity and if any improvements could be made to increase mobility and access to opportunity.

- Housing Element Evaluation Criterion 4: Potential policy changes based on best practices, new laws, or unanticipated program outcomes.
- Housing Element Evaluation Criterion 5: Potential cleanup in guidelines/policies/procedures.

The scope of this review is to update the BMR Program as needed to increase program efficacy and to make administrative cleanups to increase the clarity of the requirements. It is not meant to be an overhaul of the BMR Program, which was just conducted in 2019.

Data and Limitations

Data used to evaluate efficacy of the current BMR Program is based on pipeline projects (including both those already approved/entitled and those under review) subject to the Phase 2 requirements; no residential projects subject to the requirements have started construction or been completed. The COVID-19 pandemic caused significant disruption across all economic sectors, including real estate and residential development. The City's consultants who assisted with this review have noted that challenging development conditions exist across the region and State, whether or not there are local BMR programs. Meeting the City's BMR Program goals will require that the pipeline projects are eventually built.

Additionally, data in this report is current as of November 2023. Changes to the pipeline projects can still occur. Several projects (particularly the ownership projects) in the entitlement process have not yet completed the BMR compliance plan. Therefore, neither the proposed BMR unit mix nor AMI levels of the units are known at this time for these projects. However, all projects will be required to provide a BMR unit mix proportionate with the market-rate units and AMI levels that meet the BMR requirements. Going forward, applicants will be required to provide the proposed BMR unit mix and AMI levels upfront as part of their formal planning application submittal requirements.

Finally, the analysis attempted to compare projects under the current BMR Program with past projects subject to the former requirements to demonstrate how the Phase 2 requirements have been effective in achieving BMR goals. However, data for past projects is not complete, primarily because they are in hard copy records that still need to be located. Locating the complete files for past projects and ensuring sound record-keeping practices for current and future projects will be part of the BMR administration going forward.

Housing Element Evaluation Criterion 1: Continue BMR program, as revised in 2019, to include more opportunities for inclusionary units as opposed to fees.

The current BMR Program (Phase 2 requirements) has been significantly more effective in achieving on-site BMR units for both rental and ownership units than the original BMR Program

(1999 requirements). Under the original BMR Program, approximately 130 residential projects were subject to the BMR Program. However, most of the projects appeared to have paid in-lieu fees. Only 20 BMR projects and 186 on-site BMR units (172 rental and 14 ownership units) were created. Under the current BMR Program, 14 projects and up to 344 on-site BMR units (298 rental and 46 ownership units) are in the project pipeline. See Attachment 3 (existing projects/units) and Attachment 4 (pipeline projects/units).

Table 3 below shows that the original BMR Program created only 172 on-site BMR rental units between 1999 (when the BMR Program started, i.e., the 1999 Program) to 2018 (when the Phase 1 and 2 modification process began). It took 15 projects and nearly 3,700 total units to create the 172 on-site BMR units for a BMR percentage of only 4.7%.

Conversely, the current BMR Program has an estimated 298 on-site BMR rental units in the pipeline, approved or in the entitlement process—already surpassing the 172 existing BMR rental units—in just four years since the effective date of the Phase 2 requirements, resulting in a much higher BMR percentage compared to the 1999 Program. Note that one large pipeline project is evaluating alternative mitigation options instead of providing on-site BMR units. (See Table 3 and Attachment 4). The applicant has not yet submitted the necessary information for staff to evaluate the alternative mitigation request. If the project is approved to move forward with alternative mitigations, the number and percentage of on-site BMR units under the current BMR requirements would decrease.

**Table 3: Comparison of Rental Projects under 1999
Versus Current BMR Program**

	1999 Program	Current Program*
BMR Projects	15	7
Market Rate Units	3,504	1,869
On-site BMR Units	172	298**
Total Units	3,676	2,167
BMR Percent of Total	4.7%	14.0%**
Alternative Mitigations	Most projects appeared to have paid in-lieu fees.	6 of 7 projects subject to the on-site requirements have been approved to or have proposed providing the BMR units.

* One project subject to Phase 1 BMR is in the pipeline, which will add two on-site BMR units and 22 market-rate units, for a total of 24 units. This project is not included in Table 2. Additionally, other projects that are not included here are Gatekeeper, Builder's Remedy, and North Bayshore projects. These projects are subject to different programs and requirements and are, therefore, excluded from evaluating the efficacy of BMR Phase 2 requirements.

** As noted, one project is evaluating on-site BMR units versus alternative mitigation options. The applicant has not yet submitted—and staff has not reviewed—a formal BMR compliance plan. If the project is approved to move forward with alternative mitigations, the number and percentage of on-site BMR units under the current BMR requirements would decrease.

Table 4 below shows similar results regarding ownership projects. Only 14 on-site BMR ownership units were created under the original BMR Program. It took 15 projects and nearly 170 total units to create the 14 on-site BMR units for a BMR percentage of 7.7%. Like rental projects, the majority of ownership projects subject to the BMR program appeared to have paid fees instead of providing on-site units.

Conversely, the current BMR Program has 46 on-site BMR ownership units in the pipeline—over three times the number of existing BMR ownership units. It will take seven projects and 268 total units to produce the 46 on-site BMR units for a BMR percentage of over 17%. There are no residential projects subject to the on-site BMR requirements that are proposing an alternative mitigation. The current pipeline is projected to achieve a BMR percentage greater than 15% because the pipeline includes two rowhome projects with a 25% BMR requirement.

**Table 4: Comparison of Ownership Projects under 1999
Versus Current BMR Program**

	1999 Program	Current Program
BMR Projects	5	7*
Market-Rate Units	169	222
On-site BMR Units	14	46
Total Units	183	268
BMR Percent of Total	7.7%	17.2%
Alternative Mitigations	Most projects appeared to have paid fees.	None.

* Includes two rowhome projects with 25% BMR requirement.

These results demonstrate that the Phase 2 modifications have been effective in increasing the number of on-site BMR units based on the pipeline projects.

Additionally, there have been significant demand for BMR units over the past two years. One-bedroom BMR rental units—including very low-, low-, and moderate-income units—have had an average of 41 applicants per unit. Two-bedroom BMR rental units—including low- and moderate-income units—have had an average of 74 applicants per unit. One three-bedroom ownership unit had 131 applicants. Therefore, continuing to increase the number of on-site BMR units remains an important goal to address the significant demand for such units.

Housing Element Evaluation Criterion 2: Review BMR program to evaluate program efficacy and identify potential modifications to improve efficacy based on City goals, including furthering affordable housing production across unit types, special needs (including accessible units), and affordability levels.

The current BMR Program is furthering affordable housing production in Mountain View across unit types. As discussed above, the total number of on-site BMR units in the pipeline subject to the current Phase 2 requirements already exceeds the total number of existing BMR units, even though the Phase 2 requirements have been in place for only four years versus 20 years for the original program.

Across unit types

- *Tenure*: There are up to 298 on-site BMR rental units in the pipeline, which exceeds the existing 172 on-site BMR units. There are 46 on-site BMR ownership units, which significantly exceeds the existing 14 on-site BMR ownership units.
- *Unit sizes*: The specifics of several pipeline projects subject to Phase 2 requirements are still being determined. However, the projects must include a distribution of BMR units by number of bedrooms that is proportionate to the distribution of the market-rate units. The BMR units must also have square footages comparable to the market-rate units.

Special needs (including accessible units)

The BMR Project pipeline under the current requirements do not include any units for special needs. “Special needs” housing refers to affordable housing that is developed for specific populations, such as for seniors, those with disabilities, or the unsheltered. Special needs housing typically includes supportive services with specialized providers with the expertise to care for the residents and include public funding to facilitate the construction and/or operations of the development. The developments are usually 100% affordable housing rental projects with deeper AMI levels including very low- (50% AMI) and extremely low-income (30% AMI) units, such as those in the City’s Measure A MOU project pipeline.

The focus of the BMR Program is to create on-site BMR units that are considered general affordable housing, i.e., not special needs housing. Market-rate developers and property management companies typically do not have the expertise to provide supportive services directly or contract with and oversee specialized providers. Requiring property owners to provide supportive services in BMR units in addition to subsidizing the affordable housing costs or rents would increase the cost of the residential development, which would introduce a new potential constraint on residential development. It would also require the City’s third-party BMR administrator to monitor and ensure that the supportive services are provided as required. Finally, staff and the City’s consultants did not identify BMR programs in other cities that include

special needs housing. For these reasons, staff recommends that the BMR Program continue to focus on general affordable housing and not units for special needs that require supportive services.

However, addressing special needs can also include incorporating accessibility features in the BMR units. Often referred to as “universal design,” BMR units can be designed in a manner to be as physically accessible and usable to as many people as possible regardless of age, disability, or other factors. Illustrative examples include sinks/kitchen counters at different heights, nonslip flooring, lever door handles instead of knobs, etc. Staff recommends evaluating universal design options to meet the consideration for accessible units under the Housing Element, Program 1.9.

Recommendation No. 1: Evaluate program requirements to increase the physical accessibility of BMR units. This will include reviewing HCD’s universal design model ordinance to develop a checklist of design requirements. Options will be brought forward for Council consideration as part of the BMR Program Ordinance update.

Separate from the BMR Program, staff will continue to incorporate housing for special needs with supportive services part of the City’s 100% affordable housing project pipeline.

Affordability levels

The specifics of several pipeline projects subject to Phase 2 requirements are still being determined, including the distribution of the units by income levels. However, the projects must meet the AMI requirements of the BMR Program such as the weighted average AMI and include at least two different AMI levels to provide a diversity of affordability levels.

Although the 1999 BMR Program allowed BMR rental units to be set between 50% and 80% AMI, in practice most, if not all, of the units were set at 65% AMI. The 1999 BMR Program allowed ownership units to be set at 80% to 100%. However, this is a limited range that does not address the significant needs above 100% AMI. The current BMR Program provides a greater range of AMI levels for both rental and ownership projects than the 1999 BMR Program.

Housing Element Evaluation Criterion 3: Whether the BMR program facilitates mobility and access to opportunity and if any improvements could be made to increase mobility and access to opportunity.

“Mobility” and “access to opportunity” are terms related to affirmatively furthering fair housing (AFFH) as stipulated in Assembly Bill (AB) 686. AB 686 was passed in 2018 and applies the obligation to AFFH to all public agencies in the State and created new fair housing related requirements for the 2023-31 Housing Element. In the AFFH context, mobility refers to the ability of lower-income individuals and households to have choices regarding where they live, particularly in geographic areas that are located near services, amenities, and infrastructure such

as transit, health care, grocery stores, schools, parks, employment, and other resources, i.e., areas with access to opportunity.

The City's BMR Program facilitates mobility and access to opportunity in three ways:

- On-site BMR units integrated with market-rate units is the objective standard of the Program. On-site BMR units result in residential development that includes both market-rate and affordable housing. Such mixed-income developments increase the opportunity for BMR residents to interact with higher-income residents. Additionally, because market-rate housing units are often built in resource-rich areas—or areas that will be resource-rich in the future—the inclusion of BMR units in mixed-use developments facilitate mobility and the creation of affordable housing in areas of opportunity.
- Equitable distribution of BMR unit sizes within the development. Market-rate residential projects must include BMR units distributed by unit size in the same proportion as the market-rate units. For example, if a development has 25% one-bedroom units, 50% two-bedroom units, and 25% three-bedroom units, the BMR units shall have the same unit-size distribution.

Additionally, the square footage of the BMR units must be comparable to the market-rate units. For example, if a two-bedroom unit in a market-rate development is 1,200 square feet, the two-bedroom BMR unit shall also be comparable in size.

This ensures that the BMR units are equitably provided in the project relative to the market-rate units and that households of different sizes have the opportunity to live in these developments.

- Equitable distribution of BMR unit locations within the development. All BMR units must be reasonably dispersed throughout the residential development. This ensures an equitable locational distribution of the BMR units and prevents the BMR units from being clustered in less desirable locations, such as putting all BMR in the back corner on the first floor of a development. The locational distribution facilitates inclusive communities and advances equity and fair housing goals.

The most effective way for the BMR program to facilitate mobility and access to opportunity is to ensure that the Program is effective in achieving the objective standard of on-site BMR units. This results in the development of mixed-income communities located in amenities-rich areas. The above analysis shows that the current BMR program has been significantly more effective in creating on-site BMR units and mixed-income communities than in the 1999 BMR Program.

Alternative Mitigation Requirements—Options to Increase Mobility and Access to Opportunity

AB 1505 requires that BMR programs applicable to rental housing provide alternative mitigations to the on-site BMR units, even though on-site units are the most effective way to increase mobility and access to opportunity. To strengthen the ability of the current BMR Program to affirmatively further fair housing, staff recommends the following modifications:

- Add general language that all alternative mitigations must demonstrate how the proposed alternative mitigation facilitates mobility and access to opportunity to meet AFFH requirements.
- Add specific AFFH requirements to alternative mitigation options, depending on which options Council wishes to include as part of the BMR Program updates (discussed further below). For example, if Council wishes to include land dedication to the City, the dedicated site should include criteria to be in close proximity to the market-rate development and/or be located in a high-opportunity area.
- Evaluate incentives for affordable housing in areas designated in the Housing Element. **The 2023-2031 Housing Element includes Program 2.6 (Affirmatively Furthering Fair Housing), which requires the City to adopt incentives and zoning to facilitate property owners south of the El Camino Real Precise Plan such as dedicating land to affordable housing developers or build affordable housing.** This program is intended to encourage more affordable housing in the portions of the City with the highest opportunity scores based on State metrics. The deadline to adopt these incentives is December 31, 2024. To help meet Program 2.6, the City can adopt incentives specifically targeting off-site alternative mitigations south of the El Camino Real Precise Plan. For example, a large development in the northern part of the City could work with affordable housing developers and one or more property owners south of the El Camino Real Precise Plan to fulfill their BMR unit requirements in the locations identified in the Housing Element. If the City Council supports this strategy, staff will reach out to affordable housing developers, market-rate developers, and several large property owners and bring back options to achieve this program (such as allowing the alternative mitigation as a by-right incentive) as part of the BMR Program Ordinance update. See alternative mitigation options below for further discussion.

Housing Element Evaluation Criterion 4: Potential policy changes based on best practices, new laws, or unanticipated program outcomes.

Staff and the City's economic and legal consultants reviewed best practices in other cities, new laws, and unanticipated program outcomes to identify potential policy options/changes to the BMR Program. The primary area for potential policy changes relate to alternative mitigations to better align with the provisions of AB 1505.

- Alternative mitigation options allowed for both rental and ownership projects OR only for rental projects

AB 1505 and the requirement for alternative mitigations apply only to rental developments. This State requirement does not apply to ownership projects: It is a local decision whether or not to provide alternative mitigation options for ownership projects.

The City's current BMR Program—as is typical in other cities—does allow an applicant of either a rental or ownership project to request an alternative mitigation. Requiring ownership projects to provide on-site BMR ownership units is the most effective way to achieve more affordable ownership units. An alternative mitigation to providing on-site BMR ownership units could make it more difficult to create middle-income ownership housing (80% AMI to 150% AMI)—which has been a Council priority—and the City is not required to offer alternative mitigations to an ownership project.

Question No. 1: Does Council wish to continue allowing alternative mitigation options for both rental and ownership projects only OR does Council wish to allow the options only for rental projects?

- Value of the alternative mitigation

The current BMR Program stipulates that an alternative mitigation “may only be granted if the City Council determines that such alternative will further affordable housing opportunities in the City to a greater extent than providing BMR units on-site based on the standards in these Guidelines and that the alternative mitigation is preferred to the on-site requirement.” This requirement means that the value of the alternative mitigation must be greater than the value of the on-site BMR units.

Based on legal review and analyzing trends of how cities have been implementing AB 1505, cities cannot mandate that the alternative mitigation be a greater value than the on-site BMR units in order to receive Council approval. Requiring a greater value may cause the alternative mitigation to be infeasible, which would result in the alternative mitigation not being a real and available alternative and potentially conflict with AB 1505.

Recommendation No. 2: Modify the current BMR requirement to state that the value of the alternative mitigation shall be no less than the value of providing (all costs, including land and construction) the required number and type of BMR units.

- Determining the value

The BMR Phase 2 update set the in-lieu fee to be economically equivalent for an applicant to provide on-site BMR units. Setting the in-lieu fees to be economically equivalent to the

on-site BMR units makes it more likely for an applicant to provide the units rather than paying the in-lieu fee. The equivalency methodology means that the in-lieu fee can also be used to compare the value of an alternative mitigation relative to the value of the on-site BMR units. Staff notes that the in-lieu fee is increased annually by the Consumer Price Index and should be reviewed at least every three years based on changes in land and construction costs.

Recommendation No. 3: Use the BMR in-lieu fee to calculate the value of the alternative mitigation.

- Establishing two nondiscretionary alternative mitigation options

Under the current BMR Program, all alternative mitigation requests are subject to Council's discretionary approval even if the applicant can demonstrate that the alternative mitigation meets the City's criteria for evaluating such requests. However, based on updated review by staff and the City's consultants of AB 1505, as well as reviewing trends in other cities with BMR programs, the City would be in greater compliance with State law by providing in the BMR ordinance at least two alternative mitigation options that a developer can select and do not require additional Council discretionary approval as part of project review.

Council can choose from the specific options currently listed in the City's BMR Program, which are in-lieu fees, land dedication, and development of units off-site. If Council wishes to include land dedication and/or development of off-site units as by-right options, staff recommends adding the following requirements. These would be minimum requirements for the alternative mitigations to be by-right. Staff will develop more details around these recommended requirements and bring back options for Council consideration as part of updating the BMR Program Ordinance.

- Land dedication:

- AFFH requirements: Develop options to meet AFFH objectives as discussed in the mobility and access to opportunity section above, including location of the land to be dedicated to the City.
- Size: The size of the land dedication should be based on realistic density assumptions and appropriate unit sizes to ensure that the dedicated site can accommodate the unit numbers and types required per the BMR Ordinance.
- Financial contribution: Land dedications to the City create an obligation for the City to facilitate the production of affordable housing that would have otherwise been the developer's obligation to fulfill through on-site BMR units. Land dedications should include a financial contribution so that the alternative

mitigation is not dependent on City contributions to realize the affordable housing. The value of the financial contribution should be no less than the value required to construct the number and type of BMR units as discussed above.¹

- Cost-recovery fees for RFQ/RFP process: Alternative mitigations through land dedications to the City require the City to undertake the Request for Qualifications/Request for Proposals process to select a qualified affordable housing developer to build a stand-alone project. An additional fee shall be paid by the applicant set in an amount that recovers staff costs associated with an RFQ/RFP process for the dedicated land. The amount of the fee shall be charged per hour of staff time spent and is proposed to be calculated as part of the cost allocation plan and user fee study project that is currently being undertaken.

- Development of units off-site:
 - AFFH requirements: Develop AFFH criteria, including but not limited to achieving Housing Element Program 2.6 as discussed in the mobility and access to opportunity section above.

 - Not dependent on City contributions: If an applicant wishes to provide the affordable units off-site instead of integrated with the market-rate units, the off-site units must be provided without City contributions, just like the on-site BMR units are the applicant's responsibility without any City contribution.

 - Note that this option could impact the City's affordable housing project pipeline. Some developers have discussed partnering with a nonprofit developer to build the affordable housing off-site. This would typically require the nonprofit developer to seek local, State, or Federal funding sources to make the off-site project feasible, which would compete with the City's pipeline projects seeking the same funding sources and may, therefore, impact the pipeline.

Additionally, Table 2 above includes alternative mitigation options used in other cities. Of the other options, Council may wish to consider including the acquisition/preservation of existing housing units as an alternative mitigation. This option has already been used in an existing project (preservation of 660 Mariposa Avenue—an existing apartment building covered under the City's Community Stabilization and Fair Rent Act—as part of the Tillery Project located at 1720 Villa Street) and can help achieve other City goals such as preventing tenant displacement. If Council wishes to include acquisition/preservation of existing

¹ Staff notes that these requirements would not apply to Precise Plans that have their own affordability requirements and/or where a separate economic feasibility study was conducted to allow for land dedications to meet the BMR requirements (such as the North Bayshore Precise Plan).

housing units, staff will bring back options, including AFFH criteria for Council consideration as part of the BMR code updates.

Staff recommends Council select a minimum of two nondiscretionary options from the following four options: in-lieu fees, land dedication, development of units off-site, and acquisition/preservation of existing units. If Council wishes to include other options, staff recommends considering them as discretionary options (see next item).

Question 2: Which by-right alternative mitigation options (minimum of two) would Council like to include in the BMR Program (in-lieu fees, land dedication, development of off-site units and/or acquisition/preservation of existing units)?

- Discretionary alternative mitigation options

Council can—but is not required to—include alternative mitigation options subject to its discretionary approval in addition to the two nondiscretionary items. The discretionary options can also include a catch-all provision to allow consideration of other alternative mitigations not on a preestablished list.

The current BMR Program includes a catch-all provision that allows applicants to propose other options not specifically listed in the BMR Program. This provides for innovative approaches and/or flexibility for applicants and Council. However, other options that are not listed are typically more complicated and time-intensive for staff to analyze since it is a unique alternative mitigation request.

Question No. 3: Does Council wish to continue including a discretionary catch-all provision, and does Council wish to include any specific discretionary alternative mitigation options?

Related Information and Updates

- **Charging staff time to applicants for evaluation of alternative mitigation requests:** In the past, the City absorbed the staffing/consultant costs associated with evaluating and completing alternative mitigations, such as developing tenant relocation plans, nonstandard regulatory agreements, etc. Certain projects with approved alternative mitigations have taken extensive staff and City consultant time to evaluate and implement. Staff will begin charging applicants hourly staff time to recover the costs associated with evaluating/completing the alternative mitigation requests. Alternative mitigations requests are more complicated and time-intensive for staff to evaluate than a project with on-site BMR units. If applicants opt for an alternative mitigation rather than providing on-site BMR units, they should pay for the staff costs to evaluate and assist the applicant with completing the approved alternative mitigation. Staff notes this is in addition to the RFQ/RFP cost recovery fee for land dedications discussed above.

- **SB 330 and State Density Bonus Law:** Staff notes that State laws also limit the ability of local jurisdictions to place requirements on projects that comply with State laws, including Senate Bill (SB) 330 and State Density Bonus Law. For example, affordable units created to meet State requirements can count towards a development's BMR obligations if the units also meet the City's BMR requirements. Additionally, projects that qualify for a density bonus under State Density Bonus Law can qualify for one or more concessions to avoid compliance with local laws if it would reduce the cost of providing the affordable units.

Housing Element Evaluation Criterion 5: Potential Cleanup in Guidelines/Policies/Procedures.

Staff recommends the following cleanups to clarify the BMR requirements:

- **Requirements based on income levels designated to units:** The intent of the BMR program is to establish requirements based on the AMI levels designated for each BMR unit, not the actual incomes of the tenant. For example, an 80% AMI unit could be occupied by a household whose income is 70% AMI. The initial rent would be based on the 80% AMI level (adjusted for household size) as determined by annual State income limits published by HCD, not the 70% AMI of the household's income. However, the BMR Ordinance and Administrative Guidelines are not always clear whether the requirements are based on the AMI designations of the BMR units or the incomes of the BMR household. This cleanup will allow developers to clearly understand the requirements at the time of project application and propose the income levels and associated rents of the BMR units to meet the program requirements.

The BMR Program will be updated to clarify that the requirements are based on the income levels associated with the BMR units and not the actual incomes of the households.

- **AMI level and associated income ranges:** The BMR Program currently includes the following income category definitions:
 - Very Low-Income is 50% AMI or less
 - Low-Income is 50% AMI to 80% AMI
 - Moderate-Income is 80% to 120%

However, when the same AMI straddles two income categories, it can cause confusion. For example, 80% AMI is currently part of the definitions for the Low-Income and Moderate-Income categories.

The definitions for the income categories will be modified as follows:

- Very Low-Income is 50% AMI or less (no change)
 - Low-Income is greater than 50% AMI up to 80% AMI
 - Moderate-Income is greater than 80% up to 120%
- **Allowable annual rent increases for in-place tenants:** The BMR Program allows a maximum annual rent increase of 3% for in-place (i.e., existing) tenants. The allowable in-place rent increase is recorded on the BMR regulatory agreements for projects but is not stated in the BMR Ordinance or Administrative Guidelines.

The BMR Program will be updated to explicitly state the 3% maximum allowable annual rent increase for in-place tenants.

- **HOA reserve applicability:** Applicable ownership projects must include an HOA reserve to help lower-income households pay for future increases in HOA fees in order to maintain the affordability of the BMR units. This includes an HOA reserve for units designated as low income (80% AMI) or less. However, this AMI requirement is not clearly stated in the Ordinance.

The BMR Program will be updated to clarify that the HOA reserve requirement applies to all ownership units at 80 % AMI or less.

- **Clarify that ownership projects can have a weighted average AMI equal to or less than 100% AMI.**

The current BMR Program requires residential ownership developments to include BMR units between 80% and 120% AMI, with a weighted average AMI equal to 100% AMI. (Townhomes and rowhomes have additional requirements). Projects with lower-income BMR ownership units must include an HOA reserve for those units. These requirements are intended to increase middle-income homeownership opportunities as well as to facilitate the long-term financial sustainability of homeownership for lower-income households.

However, many residential projects request a density bonus. To maximize the density bonus, the State requires very low-income units (i.e., 50% AMI, which is less than the 80% to 120% AMI range for BMR ownership units). This has resulted in some condo projects having deeper affordability levels, which “pulls down” the overall weighted average to less than 100% AMI. To “pull up” the weighted average to 100% AMI, the applicant would need to add more BMR units at higher AMI levels, which would result in a BMR requirement of greater than 15%. Applicants have requested a concession to avoid having to add more BMR units beyond the 15% requirement.

The BMR Program will be updated to clarify that:

- Ownership projects can have a weighted average equal to or less than 100% AMI as long as the project includes an HOA reserve for BMR units designated as 80% AMI or less.
- If the above requirement is met, neither additional BMR units nor a concession is required to meet the BMR requirements.

These clarifications would also be consistent with guidance that the State Department of Housing and Community Development (HCD) recently issued to the City of West Hollywood regarding the treatment of lower-income units, State Density Bonus Law, and West Hollywood’s BMR and AMI requirements.²

- **Administrator of HOA reserve:** The BMR Administrative Guidelines do not stipulate who receives and administers the HOA reserve. The intent is that the applicant provides the reserve to a third-party administrator, such as the HOA management company. The applicant can choose to have the City’s BMR administrator implement the HOA reserve, which would be an agreement between the developer/HOA and the BMR administrator.

The City’s role is enforcing that the applicant pays the HOA reserve to an appropriate administrator and the administrator implements the HOA reserve according to the requirements. The BMR Program does not intend for the City to be the administrator, which would require the creation of a new program, involve State reporting requirements, and involve the City in any future disputes between BMR homeowners.

The BMR Program will be updated to clarify that the applicant pays the HOA reserve to an administrator and not to the City.

- **Update the administering department:** The BMR Program was originally administered through the Community Development Department. The BMR Program is now administered through the newly formed Housing Department.

² In 2022, HCD’s Housing Accountability Unit provided written technical assistance to the City of West Hollywood opining that a similar program in West Hollywood was preempted by the State Density Bonus Law. West Hollywood’s Inclusionary Housing Ordinance imposed a 20% inclusionary requirement and further required one Moderate Income unit for every low- or very-low income unit provided. In practice, this meant that a project providing low- or very-low income units to qualify for the State Density Bonus Law could end up providing more than 20% of the units as affordable. Because the State Density Bonus Law does not allow jurisdictions to impose additional requirements on projects simply because a density bonus is requested, HCD advised West Hollywood to “credit” projects for their deeper affordability and not require more than a 20% inclusionary requirement, even if that would result in fewer moderate income units.

References to Community Development and Director will be updated to reflect the Housing Department and Director.

Other Input

Staff seeks Council input on additional policies it wishes to evaluate, if any. Council direction on additional policy considerations will be incorporated into the BMR code update process.

Question No. 4: Does Council have additional input on policies it wishes to consider as part of this BMR Program review and code update process?

FISCAL IMPACT

There is no fiscal impact with providing policy direction to staff for BMR Program updates. Modifications to the alternative mitigations section may result in projects paying BMR in-lieu fees. Additionally, any fees associated with cost recovery for staff time to implement the BMR Program and alternative mitigations will be included in the annual Master Fee Schedule update.

RECOMMENDATION

That the City Council receive the review of the City's Below-Market-Rate Affordable Housing Program and provide direction on policy changes for the program, including the following:

Recommendations:

1. Evaluate program requirements to increase the physical accessibility of BMR units.
2. Modify the current BMR requirement to state that the value of the alternative mitigation shall be no less than the value of providing (all costs including land and construction) the required number and type of BMR units.
3. Use the BMR in-lieu fee to calculate the value of the alternative mitigation.

Council Questions:

1. Does Council wish to continue allowing alternative mitigations options for both rental and ownership projects only OR does Council wish to allow the options only for rental projects?
2. Which by-right alternative mitigation options (minimum of two) would Council like to include in the BMR Program (in-lieu fees, land dedication, development of off-site units, and/or acquisition/preservation of existing units)?

3. Does Council wish to continue allowing applicants to propose other options not specifically listed, and does Council wish to include any specific discretionary alternative mitigation options?
4. Does Council have additional input on policies it wishes to consider as part of this BMR Program review and code update process?

NEXT STEPS

Staff will modify the BMR Program Ordinance and Administrative Guidelines based on Council input/direction provided at this Study Session. Modification of the Ordinance will require bringing the item to the Environmental Planning Commission (EPC) as well as first and second readings of the Ordinance amendments at Council. Staff estimates that the Ordinance will be brought forward for EPC and Council consideration in Q2/Q3 2024 depending on the direction Council provides at this Study Session. If needed, another Study Session may be held to receive Council feedback on detailed alternative mitigation options prior to the Ordinance amendments.

The next review of the BMR Program will be in 2028 per the City's Housing Element.

PUBLIC NOTICING—Agenda posting.

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- Attachments:
1. 2023 State Income Limits
 2. 2023-31 Housing Element Work Plan Item 1.9
 3. Summary of Existing BMR Projects/Units Subject to 1999 Requirements
 4. Summary of Pipeline BMR Projects/Units Subject to Phase 2 Requirements