Office of the City Attorney

MEMORANDUM

June 10, 2019

To: Timothy Burroughs, Planning Director

From: Farimah Brown, City Attorney
Chris Jensen, Deputy City Attorney

Re: Applicability of Inclusionary Housing Requirements (BMC Chapter 23C.12)

The Planning Department has requested clarification as to how to apply the Inclusionary Housing Requirements for owner-occupied housing (BMC Chapter 23C.12) to the development of contiguous parcels, under circumstances where the parcels are under common ownership or control.

The Inclusionary Housing Requirements apply to the following types of projects:

1. Residential housing projects for the construction of five or more Dwelling Units;

2. Residential housing projects for the construction of one to four new Dwelling Units, when such Units are added to an existing one to four unit property, which has been developed after August 14, 1986, and the resulting number of units totals five or more. All Units in such a property are subject to the requirements of this chapter; [and]

3. Residential housing projects proposed on lots whose size and zoning designation is such to allow construction of five or more Dwelling Units.

(BMC § 23C.12.20.A.)

A question has arisen as to when the development of contiguous parcels under common ownership or control should be considered a single "residential housing project" for purposes of applying the Inclusionary Housing Requirements. The term "residential housing project" is not defined in Chapter 23C.12. However, both the

2180 Milvia Street, Berkeley, CA 94704 Tel: 510.981.6998 TDD: 510.981.6903 Fax: 510.981.6960
Email: attorney@ci.berkeley.ca.us

California Environmental Quality Act ("CEQA") and subdivision law provide guidance in interpreting the term.

The CEQA Guidelines define "project" as "the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (14 Cal. Code Regs., § 15378(a).) Under the Guidelines, "[t]he term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." (*Id.*, § 15378(c).) Case law interpreting CEQA's definition of project reinforces the need to avoid "piecemealing" or "segmenting" the environmental impact analysis of phased development projects. (See, e.g., *Laurel Heights Improvement Association v Regents of University of California* (1988) 47 Cal.3d 376, 396; *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.)

These concerns about "piecemealing" or "segmenting" phased developments are relevant to determining the applicability of the Inclusionary Housing Requirements. The Requirements apply, *inter alia*, to "[r]esidential housing projects for the construction of five or more Dwelling Units." (BMC § 23C.12.20.A.1.) If separate development applications on adjacent lots under common ownership control were considered separate projects, the applicant would avoid responsibility for complying with the Inclusionary Housing Requirements despite developing a total of more than four Dwelling Units on the adjacent lots.

Similarly, case law interpreting the Subdivision Map Act recognizes that a property owner cannot avoid complying with Act's parcel map requirements, which apply to subdivisions of five or more parcels, through successive application to subdivide a parcel into four or fewer parcels. (*Bright v. Board of Supervisors* (1977) 66 Cal.App.3d 191, 195-196.) Although the sequential development of owner-occupied housing on adjacent parcels may not involve a subdivision of land, this case law interpreting the Subdivision Map Act is persuasive authority supporting the conclusion that sequential development applications may be considered to be part of a single residential development project under Chapter 23C.12.

The legislative history of the Inclusionary Housing Requirements also supports this interpretation of the ordinance. In discussing the applicability of the Requirements, the June 10, 1986 Planning Commission report recommending their adoption observed that "[t]he applicability section . . . contains language to close possible loopholes of building less units or building units incrementally as a means to avoid the requirements of the ordinance." (Memo to Mayor and Council Re: Adoption of Inclusionary Zoning Ordinance, June 10, 1986, at p. 4.) Thus, the language now codified in BMC section 23C.12.20.A.2-.3 was intended to close "loopholes" that would allow applicants to avoid

compliance with the Inclusionary Housing Requirements. This lends further support to an interpretation of the Requirements that treats separate applications to develop contiguous parcels under common or ownership control as a single residential housing project.

In sum, analogous areas of law and the legislative history of the ordinance support applying the Inclusionary Housing Requirements to the development of contiguous parcels under common ownership or control. Based on the analysis set forth above, concurrent development on adjacent parcels by the same applicant will almost always be a single project for purposes of applying the Inclusionary Housing Requirements. Where sequential applications are made to develop Dwelling Units on contiguous parcels, the Planning Department may look to the facts and circumstances surrounding the development to determine whether the applications relate to a single project. For example, the existence of easements or other evidence of a common scheme of development may establish that separate applications to develop Dwelling Units on contiguous parcels relate to a single project, thereby requiring the Inclusionary Housing Requirements to be applied based on the total number of Dwelling Units that will developed.