



Bureau of Planning and Sustainability

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MEMO

DATE: April 10, 2015

TO: Planning and Sustainability Commission

FROM: Eric Engstrom, Principal Planner

CC: Susan Anderson, Director; Joe Zehnder, Chief Planner

SUBJECT: **Staff Analysis of Community-Based Anti-Displacement Recommendations**

Introduction

On February 24th the Commission received testimony from a coalition of community groups concerned about how the Comprehensive Plan addresses displacement and expanding access to affordable housing. The testimony included four sections (Equity, Assessment and Mitigation, Housing, and Zoning Projects), with a number of specific policy and programmatic recommendations for each. Staff met with stakeholders from this group on April 2nd.

This memo provides a more complete response to the coalition's recommendations. The recommendations in this memo are based on one meeting with a group of coalition representatives. We intend to continue working with these stakeholders and to bring in other City bureaus whose support will be important to having effective anti-displacement approach within and beyond the Comprehensive Plan.

Staff's analysis and recommendations concerning the Coalition recommendation follows and is organized into four sections:

1. **Comprehensive Plan amendments** – A summary of policy amendments that staff recommends in response to collation testimony.
2. **Scale and Applicability** – Policy questions and options that staff would like to discuss with the PSC:



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1900 SW 4th Avenue, Suite 7100, Portland, OR 97201 | phone: 503-823-7700 | fax: 503-823-7800 | tty: 503-823-6868

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- a. What type and scale of decision or project should be and can be reasonably subject to a full-scale equity impact analysis.
 - b. How to address recommended anti-displacement topics and strategies that go beyond what is reasonably governed by the Comprehensive Plan.
3. **Legal Research Agenda** – Follow up questions about Oregon land Use law, and how these tools could work in that context. We don't have all the legal answers yet, but would like to identify a legal research agenda, with a possible follow up meeting more geared to having attorneys talk through some questions.
4. **Zoning Tools** – The zoning tools we have been researching.

At the end of the memo is a table summarizing how specific suggestions from the February testimony relate to these topics.

1. Comprehensive Plan amendments

Staff recommends the following Comprehensive Plan policy amendments in response to displacement testimony.

- A. Guiding Principles and Chapter 1 – Make affordability a more explicit part of the guiding principles at the beginning of the plan. The guiding principles are the overarching and integrating goals for the plan. Equity is firmly established as one of those guiding principles, but the principles may be stronger if affordability is more clearly established as a central issue.

Also in Chapter 1, add policy to support use of community benefits agreements that can help more equitably share the benefits of new development with affected communities. These agreements would be relevant to major projects with public investment and to land use changes proposed as part of major area plans.

- B. Chapter 2 introduction – Put greater emphasis on effective involvement of those potentially adversely impacted by a decision. This includes using culturally relevant outreach, and more explicitly linking evaluation of how decisions may affect these groups to actions or policies to mitigate that impact.
- C. Policy 3.3 – Equitable development – Add the idea that decisions using or related to major policies or projects in the Comprehensive Plan should include actions or provisions to identify and mitigate inequitable impacts. We also agree that mention of community benefits can be made in Chapter 3, Design and Development, and/or in the general development principles in Chapter 4.
- D. Policy 5.28, Affordable housing resources – Add value capture mechanisms to the list of example policies and programs in this policy.
- E. Policy 5.11, 5.24, 5.34-5.36 – Make clear the preference for “permanently” affordable housing in one or more of these policies.

- F. Policy 5.15, involuntary displacement includes a mention of land trusts. Add an expanded policy supporting land banking as an affordable housing and anti-displacement approach.
- G. Policies 5.36, 5.27, 5.3. These policies already provide a broad basis to use tools like inclusionary zoning, if they were legal. That said, we agree that a more direct reference to exploring regulatory requirements is appropriate.
- H. Chapter 5 New Policy. Add policy that sets a numerical target for regulated affordable housing, and that requires the City to develop a financial strategy to meet or refine that target.

2. Scale and Applicability

This section discusses two recurring themes in our analysis of the coalition proposals: questions about scale of analysis and the relationship of the tool to the City's role as a land use regulator. The second question relates to the scope of topics governed by the Comprehensive Plan.

A. What type and scale of project should be subject to an equity impact analysis?

Both impact assessment and community benefit agreement tools raise questions about what is the appropriate scale of project to be subject to these policies, analysis to be undertaken, and mitigation to be expected. Would these tools be implemented with every new apartment building, or with every new sidewalk? Or would they be reserved primarily for larger planning decisions that impact large numbers of people – like adoption of new area plans, or development of significant infrastructure like a new light rail line?

Carrying out good impact analysis and negotiating community benefit agreements involves resources and time. The scale of that effort must relate to the scale of the thing being examined. If there is a mismatch, the requirement can become a barrier to making needed community investments, or become a barrier to ensuring an adequate supply of housing. For example, the cost of impact analysis and negotiating a community benefit agreement could be larger than the cost of many sidewalk and safety projects in the TSP. If these requirements were imposed on small housing development, these procedural costs could substantially increase the per-unit cost of the housing, which would be counterproductive to addressing affordability concerns.

Impact assessments and community benefit agreements do have a place in land use decision-making – but Staff recommends that any policy related to these tools acknowledge the appropriate scale of analysis, and consider scale thresholds for when these tools would be used. These thresholds need to be set so that these tools are used where they will make the most difference, and not used where the cost may outweigh the benefits.

B. What is within the scope of Comprehensive Plans

Comprehensive Plans govern the physical development and form of the city - in terms of land use, density, and growth-related infrastructure projects. The Comprehensive Plan is not a comprehensive collection of city policies about all of its operations.

Some of the specific tools suggested by the collation testimony may have merit, but there is a debate about how appropriate they are for the specific focus and span of the Comprehensive Plan. Some of the suggested tools fall outside of what a Comprehensive Plan governs. Impact assessments and community

benefits agreements implemented under the umbrella of the Comprehensive Plan may have some limits on the kinds of topics that they address. In addition, tax policy, tenant protections, and hiring and contracting practices are not governed by Comprehensive Plans.

As a land use regulator, a local government may address through its land use regulations, whether a particular project is allowed, the permitted density and intensity of development, adequacy of public infrastructure, and design elements. The impacts of a large project can be addressed by adding conditions of approval, some of which may require dedication of land, construction of improvements, or payment of money. Under these circumstances, a local government is limited to addressing land use-related impacts.

For example, several of the Coalition's recommendations do not have the characteristics of a zoning or Comprehensive Plan policy or implementing tool:

- Recommendation 2D, capturing windfall real estate profits. The Comprehensive Plan does not govern the City's taxing functions. City Council could, hypothetically, adopt one or more taxes or special fees on real-estate transactions, regardless of Comprehensive Plan policy.
- Recommendation 3D, tenant protections. The City and State do have tenant rights laws, but they are not part of the Comprehensive Plan because they do not relate to physical form of the City. Zoning codes provide some protection for property owners and communities related to the physical impacts of development. The kind of specific protections they suggest would be stronger if they are done outside of the zoning/planning arena, as direct codes under the City's general powers. Zoning codes operate within a larger legal framework that emphasizes property owner rights, which may not be a helpful frame of reference for enforcement of tenant rights.
- Recommendation 4A, reconstruction opportunity area overlay. Although this is labelled as an overlay zone, many of the topics addressed within it are not within the scope of what a zoning code can directly regulate – such as contracting and hiring, living wage job development, business preservation and development, culturally appropriate homeownership supports to households.

This approach may be more akin to a coordinate Community Development Program, involving PDC, Housing, and BPS or the kind of provisions expected in an urban renewal area plan. Like the tenant protection question, some of these programs may be stronger if they operate outside of planning and zoning frameworks. To the extent it is regulatory, it may relate to tax policy, urban renewal development agreements, business license requirements, or perhaps in the CSP related to public infrastructure spending.

3. Legal Research Agenda

Staff analysis of coalition recommendations uncovered several legal questions that deserve further analysis to fully understand the feasibility of some recommendations. Below is a summary of potential research topics. BPS has proposed a collaborative investigation of these issues with interested stakeholders. This initial list is the result of preliminary review by the City Attorney.

- A. Prohibitions on unconstitutional conditions: Under existing US Supreme Court case law, a condition of approval imposed on development that imposes an exaction (dedication of land or payment of money) must satisfy constitutional constraints. That is, it must be related to a legitimate local government interest (nexus) and must be related to the scale of impacts of the development (rough proportionality) to pass constitutional muster. Some of the topics typically addressed through a CBA are beyond the scope of what is typically addressed through land use regulations and the land use review process. Further research is needed to determine how one might evaluate nexus and proportionality questions related to CBA requirements.

Community Benefits Agreements that are adopted as part of the terms of a public/private development partnership that includes public financial involvement are not subject to these limitations because they are not imposed as part of a land use decision.

- B. Prohibition on neighbor consent requirements: The US Supreme Court has ruled unconstitutional land use regulations that require a property owner to obtain the consent of surrounding neighbors before the owner may apply for or obtain a land use approval. This kind of regulation is held to be an unconstitutional delegation of the local government's authority—that is, the government is giving up its role to say yes or no by giving neighbors a veto power over a proposed project.

Requiring negotiation of a CBA as a precondition to approval of a project could be viewed as an unlawful neighbor consent requirement. If the negotiating coalition won't agree to the terms of a CBA, the developer's ability to apply for or obtain approval of a proposed project is thwarted.

- C. Oregon-specific legal issues: State statutes impose a range of unique requirements and limitations that may affect the City's ability to use CBAs as a land use tool in Oregon. These limitations stem from the fact that Oregon land use law is structured very differently than most other US States, including California and Washington. Whether any of these Oregon provisions poses an outright prohibition on using CBAs or impact analysis tools in the land use arena remains to be determined. A non-exhaustive list of relevant statutory provisions include:

- Needed housing statutes, which require the City to offer developers the ability to obtain approval of a residential project by complying with clear and objective development standards. The City may also require design review using a discretionary approval track (i.e. a discretionary land use review), as long as the developer has the option of seeking approval through compliance with clear and objective standards instead. (ORS 197.303, 197.307). This statute is designed to ensure local governments do not unreasonably limit the supply of needed housing. Historically zoning and land use tools have been used by local communities to block affordable housing.
- The statutory prohibition on imposing conditions of approval on a discretionary land use review that establishes—or has the effect of establishing—the sale price for a housing unit or residential lot or parcel or requires the unit or lot to be designated for sale to a particular class of buyers. (ORS 197.309) This provision may be changed as part of the proposed removal of the State inclusionary zoning pre-emption. However, there is concern that if the following provision is not also amended, Cities would only be able to consider inclusionary zoning for for-sale housing.

- The statutory prohibition on local governments' ability to establish rent controls unless the local government is providing a benefit to the developer (such as a loan, grant, or other public subsidy). (ORS 91.225) State change to this provision is likely to be needed for Cities to actually undertake an affordable housing inclusionary zoning policy.
- The authorization of local government development agreements, which appears to focus on addressing the provision of infrastructure by a developer and sequencing of land use reviews. (ORS 94.504 – 197.528)
- The requirement that local governments implement the statewide planning goals through their comprehensive plans and land use regulations. The statewide planning goals regulating natural resources, economic development, housing, public facilities and services, or transportation may impose requirements that affect the City's flexibility to use CBAs in some circumstances.
- State statutes imposing procedural requirements and timelines for making final land use decisions may affect the type of projects for which use of a CBA or impact analysis tool is realistic.

4. Zoning Tools

The Bureau of Planning and Sustainability (BPS) has two studies underway are exploring the use of zoning bonuses as an additional financial incentive for affordable housing development. These bonuses would be incentives for private developers to voluntarily provide affordable housing in exchange for an increase in development entitlement, such as density or height. Options are under consideration that would allow the affordable housing to be provided on-site, off-site or through payment into a fund. There are two studies underway by and aimed at identifying opportunities to leverage additional floor area ratio (FAR) and/or height in exchange for a community benefit, such as affordable housing.

Central City Bonus Study

(Consultant: Economic & Planning Systems, Inc.)

The Central City Bonus Study is evaluating and calibrating the current Central City bonus structure to incent the production of affordable housing. There are currently 18 bonus programs available. Adopted between 1998 and 2003, these programs were designed to meet goals at the time. As market conditions and policy objectives have changed, the need to reevaluate the system has become apparent. An updated Central City bonus structure would continue to allow additional density to be built in exchange for a public benefit, but the new structure would prioritize affordable housing development above other benefits.

Mixed Use Zones Project

(Consultant: Johnson Economics)

The Mixed Use Zones (MUZ) Project is evaluating three possible zoning bonus provisions:

- An affordable housing bonus that would be applied to all mixed-use zones outside of the Central City. The project is identifying opportunities to incent affordable housing in private sector development through a bonus system while maintaining sensitivity to the context of adjacent residential neighborhoods. A bonus system in the mixed use zones would lower base entitlement, and allow developers who take advantage of the bonus to build at a higher density than is currently permitted in these zones.
- A bonus provision for projects that include affordable Commercial space possibly administered by a third party nonprofit entity where affordable rents can be guaranteed for a specified longer time period.
- A “large site” bonus allowing additional flexibility for building height and density linked to a master site plan review and community benefit agreement.

Response Summary

Coalition Recommendation	Follow Up				Notes
	Policy Response	Scale and Applicability Discussion	Legal Research	Zoning Tools	
1-A. Community involvement	Yes			Yes	Chapter 2 policy
2-A. Impact analysis	Yes	Yes	Yes		Consider integration into Guiding Principles
2-B. Mitigation	Yes	Yes	Yes		Policy 3.3, or General Development Principles in Chapter 4
2-C. Benefit agreements	Yes	Yes	Yes		Policy 3.3, or General Development Principles in Chapter 4
2-D. Capture windfalls		Yes			Tax policy – not a Comprehensive Plan topic
3-A. Permanently affordable homeownership	Yes		Yes		Policy 5.11, 5.24, 5.34-5.36.
3-B. Land banking	Yes				5.15 – possibly expand into separate policy.
3-C. Permanently affordable units	Yes		Yes		Policy 5.26, 5.27, 5.31.
3-D. Tenant protections.		Yes			State and local regulations – not a Comprehensive Plan topic
4-A. Reconstruction opportunity overlay zone		Yes	Yes		Community development tool – not clear that it is a zoning code tool.
4-B. Mixed use zones			Yes	Yes	Mixed Use and Central City FAR zoning bonuses.