DEVELOPMENT MANAGEMENT OVERVIEW

Prepared for the City of Cupertino

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Like many communities throughout the State, Cupertino is concerned about balancing the benefits of economic development with the effects of rapid growth. The impacts of such growth can overwhelm the City's ability to accommodate it and affect the quality of life in the community. The City Council directed staff to evaluate ways to balance these issues, including a potential implementation of a community benefits program for development projects. The purpose of this overview is to address the steps that have been taken to review various methods to address growth, quality of life, and to provide a summary of the reviewed approaches, as well as their benefits and constraints.

History of Process

- General Plan

  On December 4, 2014, Cupertino's City Council adopted an amended General Plan titled Community Vision 2040. The amended plan reflects community input, regulatory changes, best practices, and the desire to achieve community-building, sustainability, economic, and fiscal objectives. The City Council continued the considerations related to development heights, development allocations, and the potential for a Community Benefits Program until 2015.

- Community Benefits

  In early 2015, the City engaged Economic & Planning Systems (EPS) to provide information regarding the advantages and disadvantages based on a variety of existing Community Benefit Incentive Zoning (CBIZ) programs in California and to assist with discussions regarding a potential program in Cupertino.

- Additional Programs Analyzed

  During this research on CBIZ programs, various alternative options to address growth and quality of life were considered, including growth allocations programs and regulation through General Plan land use designations and zoning.

Assessment of Community Concerns

The main areas of concern regarding development in the City that have been addressed throughout this process revolve around the following:

- Impacts on schools and lack of school resources, such as facilities, land and funding;

- Impacts on and lack of public facilities and utilities, such as libraries, a community center and utility systems;

- Impacts on and lack of public open space, parks and trails; and

- Impacts on transportation network, including inadequacy of city-wide bicycle, pedestrian, transit improvements and facilities.

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Community Benefit Incentive Zoning

California cities have a long history of exacting community benefits through a variety of mechanisms, including fees, conditions of approval, and development agreements. More recently, Community Benefit Incentive Zoning (CBIZ) programs have offered an alternative approach. CBIZ programs are structured around an exchange in which municipalities offer optional increases in development potential in return for public assets (or funds) desired by the community. The incentive must be above what normally would be allowed and the public benefit must be beyond what otherwise would be required. Because these programs are optional, development outcomes vary based on the degree of participation in the plan. That is, some developments may not take advantage of the incentive while others do. The optional nature of the program creates increased uncertainty regarding the final urban form that ultimately will be achieved.

The magnitude of the community benefit sought must be equal to or less than the value of the incentive offered. In order for community benefits to be achieved, the public sector must create value through the provision of an incentive (commonly increased development density). CBIZ programs are founded on the concept of "value capture." CBIZ programs must be carefully tailored to be attractive to project proponents and simultaneously achieve quality of life goals of the community. Program design and development should evaluate the range of potential development outcomes, including the built form and magnitude of expected community benefits, to ensure that the exchange of development rights for community benefits is desirable.

The Concept of Value Capture

Cities and government agencies create value with investments in public facilities and services (e.g., transit, sewer upgrades) as well as through changes to the zoning code that increase the value of land. Typically, when the public sector creates value in these ways, landowners enjoy a financial gain in the form of higher land value, realized when they sell or develop their land. This increase in land value is an unearned financial benefit that accrues to the private sector, though it is generated (and commonly paid for) by tax-payer funded public entities. The term "value capture" reflects the situation in which the public sector reclaims some of the "unearned" value created for the private sector by public sector activities. The State of California's Affordable Housing Density Bonus Law is an example of a value capture program. Under this law, developers are granted additional density allocations in return for the development of affordable housing units.

If the public sector seeks to extract more value than is created, it is unlikely that project proponents will use the program. Since the value of development incentives varies with market conditions, development incentives may be very valuable in a strong market but of lesser or no value in a weak market. Therefore, CBIZ programs respond to market conditions or anticipate that the program will not be used during periods of market weakness.

CBIZ requires a healthy real estate market with sufficient market value to support the incentives. For example, in order for a CBIZ program that seeks to capture value from an upzoning to be successful, there must be market demand to support the higher-density, higher-cost real estate products that are made available through the zoning change. Currently, Cupertino has strong residential and commercial real estate markets and is a viable candidate for CBIZ in this regard.

CBIZ Program Basics

Literature on the topic of CBIZ programs establishes two primary types of programs, including "negotiation-based" and "plan-based" programs. Negotiated community benefits may occur in the context of a Development Agreement or not. Plan-based programs are "formulaic" (the term used here) and typically are implemented in a "ministerial" fashion, without discretion.

Negotiation-Based CBIZ Program

Under a negotiated approach, the development incentive and associated community benefits package are jointly agreed upon between the municipality and the project proponent. That is, the CBIZ does not define fixed relationships between incentives and required community benefits. Negotiated programs are relatively costly to administer, perceived by the community as opaque processes and may be viewed as risky by the development community. However, these programs offer the flexibility to increase or reduce community benefit requirements to reflect changing market conditions. The primary advantage of negotiation-based programs is that the potential for the community benefits requirement may be crafted to reflect the economics of the proposed project and the current real estate market, while the disadvantage is the negotiation process is commonly highly labor intensive and, therefore, may not be practical for smaller projects.

Formulaic (Plan-Based) CBIZ Program

Under a formulaic (plan-based) approach, specific development incentives are made available in return for the provision of commensurate pre-defined community benefits. The principal advantages of a formulaic approach are the reduction of project risk, for both the development community and the municipality, through program certainty and lower program costs. The key disadvantages are that the program cannot respond to unique project challenges or fast-changing market conditions.

Case Studies

EPS studied CBIZ programs in San Diego, Emeryville, Santa Monica, and Berkeley. The table below offers a high-level overview of these programs. The following section details the program in Santa Monica, which seeks to incorporate elements of the formulaic and negotiated approaches to CBIZ.

Overview of Case Study Programs

CBIZ Design	City of San Diego	City of Emeryville	City of Santa Monica	City of Berkeley
Basic Method	Formulaic	Formulaic	Formulaic & Negotiated	Negotiated
Determination of Community Benefit	Predetermined exchanges and charges	Point system for project elements	Formulaic program under development; Negotiated incentives by Development Agreement	Negotiated by Zoning Adjustments Board
Key Incentive Type	FAR Bonus	Height, FAR, and DU/Acre	FAR Bonus	Height

City of Santa Monica

As part of the City of Santa Monica's most recent General Plan Update, a community outreach process explored the question "what makes a livable city?". Responses led urban planners to land use standards that could maintain the City's unique attributes, improve neighborhood livability, and provide affordable housing. Santa Monica's Land Use and Circulation Element (LUCE) update, adopted in 2010, reflects a six-year community input process and provides for community benefits though a unique "tiered" approach. With the LUCE in place, the City has begun implementation steps, including the preparation of an updated Zoning Ordinance.

The Santa Monica Community Benefits Program was adopted as part of the LUCE in 2010. The Plan establishes a three-tier system in which a base tier of development (Tier I) is allowed as of right and approval is "ministerial" (non-discretionary) while higher "bonus" levels of development require the provision of community benefits and approval is discretionary.

Per the LUCE, in most of the commercial areas, the maximum base height for a project without community benefits is 32 feet (typically 2 stories). Development above this Tier I level requires community benefits. The LUCE calls for projects seeking development above the base level to be sorted into two tiers (Tier II and Tier III). Tier II projects must provide community benefits that will be considered through a discretionary permit or Development Agreement (DA) process. Tier III projects require additional community benefits to be negotiated in a DA.

Santa Monica's five priority categories of Community Benefits include:

1. Trip reduction and traffic management;

2. Affordable and workforce housing;

3. Community physical improvements (e.g., streets, open space, neighborhood retail);
4. Social/cultural facilities; and
5. Historic preservation.

Santa Monica has not fully implemented the LUCE. Today, projects that seek to develop at levels above the base entitlement must pursue a DA with the City. City staff is seeking to fully implement the Community Benefits Program with the updated City Zoning Ordinance, which is currently under development. The revised Zoning Ordinance will detail the community benefit requirements that allow additional density for Tier II projects. While the Planning Commission had considered a points system for Tier II projects, Santa Monica anticipated that this approach would be challenging to implement and has not been adopted. The City also explored the potential to charge certain impact fees and require affordable housing from Tier II projects. These requirements likely would have taken advantage of nexus studies that justify maximum fee levels. As community benefits may constitute an exaction under California Law, the City seeks to demonstrate a proportional relationship between the community benefit payment and the impact of the project.[1] Alternatively, Tier II projects could have had the option provide on-site amenities that satisfy Tier II requirements.

Currently, Santa Monica relies heavily on the use of DA to negotiate optimal community benefits. While the DA process is highly flexible and allows for a diverse range of potential benefits, these agreements commonly are time consuming and thus expensive to implement. Despite this, the market potential for development in Santa Monica is exceptionally strong and as of 2012, 24 DAs had been approved or were pending since the adoption of the LUCE in 2010. While developer interest in pursuing projects above base zoning in exchange for community benefits is strong, the City is seeking to curtail the number of projects that come through a DA process due to the burden on City staff.

Benefits and Constraints

CBIZ programs allow additional development, whether in the form of height or floor area ratio, and do not regulate the pace or ability to develop. Therefore, while they may address the impacts of a proposed project and the provision of community benefits to address those impacts, CBIZ programs allow such development through the implementation of zoning ordinances. Basically, in exchange for addressing the areas of community concern noted, the City would be allowing increased height or other development above the base zoning.

Formulaic CBIZ programs provide clear guidelines for applicants in terms of the additional development they can achieve. However, such programs provide very little discretion since the additional bonuses are structured in the zoning ordinance. Negotiated programs, on the other hand, can be very difficult to administer and they do not provide the certainty to developers that is inherent in a formulaic program.

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[1] See Planning Commission Report: Zoning Ordinance Update: Implementing Tier 2 Community Benefits, April 3, 2013.

Growth Management Programs

Growth management is a tool that has been used by California cities for over 40 years. Growth management systems regulate the amount of development that can take place in any given period of time. For example, growth management systems may include a population or housing cap or a commercial square footage cap.

Some programs operate as a "competition," whereby developers seek to obtain development allocations through an application process conducted on a set basis, typically once or twice a year. Generally, applicants will be required to obtain growth allocations in order to proceed with development. The City of Morgan Hill has adopted such an approach, which is described in more detail below and is currently being implemented.

A number of other California cities have adopted competitive growth allocation programs, which were later eliminated or suspended. The City of Brentwood implemented a competitive growth management program for residential projects, the RGMP, for a number of years during its greatest periods of growth. The RGMP was suspended in 2011 due to the recession. In 2005, the City of Ventura eliminated its development cap and competitive process as established by its Residential Growth Management Program.

Further, some cities limit growth, but do not require a competition for allocation. For example, the City of Livermore has set a cap on residential units every three years, with numbers ranging from 140 to 700 units. The City of Petaluma, the first city in California to adopt a residential growth management system in the early 1970s, also has a maximum allotment of units, but no competitive process.

While the City of Cupertino currently sets city-wide development allocations over its General Plan horizon, it does not currently have a competitive or metering process in place.

Case Study - City of Morgan Hill

The City of Morgan Hill's Residential Development Control System (RDCS) issues allotments to developers who wish to build residential units in the City through a competition process. The City has used this system since 1977 prior to the implementation of the Regional Housing Needs Allocation (RHNA) process by Housing Element Law. The impetus of the RDCS was to address the impacts of intense growth at a time when the infrastructure was not prepared to absorb the growth. The population growth in the City impacted the ability of the City to provide sewage treatment, water and other necessary municipal services. The RDCS was initially adopted by ballot measure and has been modified over the years to meet the City's needs and address exemptions.

The competition is based on an evaluation system that utilizes a series of standards and criteria set forth in the Morgan Hill Municipal Code. Morgan Hill's General Plan describes the RDCS in the following way, with allowances for small development projects:[2]

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[2] Morgan Hill's General Plan, http://www.morganhill.ca.gov/DocumentCenter/Home/View/1148

This system shall provide for awards of development allotments based on the number of points scored for all development proposals biennial competition, or outside of a competition but based on requiring projects to achieve a minimum point score . . . . The point scale used shall take into account the impact of the proposed development on the following public facilities and services: water supply system, sanitary sewer and treatment plant, drainage and runoff, fire and police protection, traffic and other municipal services.

Proposed developments shall be awarded points for provision of schools, and related facilities, open space, orderly and contiguous development, public facilities, parks and trails, low-income and moderate income housing and housing for the elderly, and diversity of housing types; and for quality of architectural design and site design.

Small residential developments provide special benefits to the City by encouraging local developers, providing design variety, and promoting utilization of smaller lots. These developments do not impose as high a burden on municipal services as do larger projects, because their demands are incremental and they tend to be infill developments. Such small developments may be unable to compete with larger developments in terms of the levels of amenities provided. In order to treat small developments in a manner reflecting their benefits to the community, the Residential Development Control System shall be designed to provide for small development through appropriate means selected by the City Council, such as a separate small project competition and a more streamlined and less costly process.

The process takes places on an annual or biannual basis and developers who wish to build housing units are required to compete for the ability to obtain a development allocation. The process begins by dividing projects into various categories for the competition, such as "small" projects, multi-family housing and open market. Each year, Morgan Hill determines the number of units available in each category and then evaluates projects according to a set of objective standards and criteria in 14 separate categories. Morgan Hill's Municipal Code provides the specifics of the city's point system and specific guidelines for how to earn points in various categories, such as schools, open space, public facilities, parks and livable communities. Generally, projects with the highest number of points receive a building allocation. Thereafter, the project applicant applies for the land use entitlements required to proceed with the proposed project. All projects that receive RDCS allotments must enter into a Development Agreement.

Traditionally, Morgan Hill received more requests for allotments than the required allocations. However, more recently, most projects were able to receive allocations. In addition to the time required to process requests for allocations, Morgan Hill must also continue to monitor the projects to ensure compliance with the RDCS program.

While it appears that the RDCS has served Morgan Hill well, the administration has been time intensive and has required a significant amount of staff time. Morgan Hill is currently in the midst of its Morgan Hill 2035 project and is considering how to streamline and improve the system "to be more efficient, effective, and sustainable while maintaining its most important benefits: a population cap, pace of development; high quality development; and contribution toward community amenities."[3]

Benefits and Constraints

Growth allocation programs with a competitive process provide benefits to the public and ensure a good pace of development. However, they are administratively burdensome as they require a great deal of staff time to implement. Further, if proposed development is less than the annual allocation, there is no ability to review the various applications to consider the potential benefits of high quality development or community amenities. A complicated growth allocation system can also discourage developers that are not familiar with the system or City processes. Where growth allocation programs set a cap on the number of residential units, they must be consistent with a city's Housing Element and may also draw more scrutiny if they are challenged in court.

Lastly, once the criteria and standards in the program are established, it may be difficult to encourage flexibility and to respond to changing market conditions or City desires or trends. The fact that a number of cities have either eliminated or suspended previously adopted growth allocation programs and that Morgan Hill is looking at other approaches is indicative of the inherent difficulties in implementing such a program.

Land Use Regulation

Growth and development have traditionally been regulated through land use designations and zoning. Cities implement and control growth and development through their General Plans, Specific Plans and zoning and can address impacts of development through development impact fees and city regulations, such as enhanced design review regulations. Cities also enter into negotiated Development Agreements with developers, which allow for developers to obtain vested rights and for the City to negotiate desired community amenities to address the impacts of development.

Although not located in the United States, the City of Vancouver, British Columbia, Canada, has adopted a community benefits program that combines the city's ability to rezone development sites with community benefits. In Vancouver, developers are required to provide Community Amenity Contributions, or CACs, when the City Council grants development rights through rezoning. CACs are in-kind or cash contributions that are used to fund community centers, libraries, parks and other community spaces. Such a program, however, would not be workable under California law.

In California, State Planning and Zoning Law allows the local legislative bodies the authority to establish their own procedures for the processing of amendments to its General Plan. General Law cities, such as Cupertino, are limited to four (4) General Plan Amendments each year; however, cities may dictate the method used to process/evaluate any amendments.

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[3] See City Council Staff Report, Morgan Hill 2035: RDCS Update, April 1, 2015.

In addition to reviewing projects for General Plan consistency and quality of life goals, cities can also implement additional nexus fees (such as community facilities fees, transportation impact fees, utility impact fees, etc.) and additional design review guidelines to address the impacts of development.

Conclusion

The following is a summary of pros and cons of the models based on the review of the various Community Benefit Incentive Zoning (CBIZ) and Growth Allocation models:

1. Requiring community benefits (or in-lieu payments for community benefits) as an absolute condition of development, may constitute an exaction under California law, and thus the City may need to demonstrate a proportional relationship between the community benefit payment and the impact of the project.

2. Formulaic zoning incentive programs (e.g., City of San Diego Downtown Community Plan) provide very little discretion since the development incentives and community benefits are predetermined and codified by zoning.

3. Discretionary zoning incentive programs (e.g., City of Berkeley Downtown Area Plan) require protracted negotiation and discussion before the City can determine that a project applicants offer of "substantial community benefits" warrants granting of a bonus in height or floor area ratio. Also, the lack of specific criteria can lead to lack of transparency, difficulty in administering the program and lack of consistency between projects. A discretionary CBIZ program also would require updates to the City's zoning code.

4. Metering residential development annually (e.g., Morgan Hill, Brentwood, Livermore, etc.) would require changes to the Housing Element and is not advisable given the May 31, 2015 deadline for its adoption. The City would also need to ensure that any metering program would still allow its housing obligations to be met. Even if the process is implemented only for non-residential development, the program provides much less flexibility and is cumbersome to administer since it involves detailed criteria, scoring, a specific checklist of community benefits and deadlines for processing and building of development.

5. A metering approach can create a competitive process where projects can showcase community benefits in order to be considered for processing. Morgan Hill is a good example of this process. A newer example is the City of Mountain View, where proposals for a limited amount of development are being reviewed along with a community benefit approach in the North Bayshore area.

6. Growth allocation metering programs require an additional amount of planned growth in the General Plan (e.g. Brentwood and Morgan Hill.) However, these programs can work well in years in which there are projects competing for development since the quality of site plans and community benefits is high. In years where there are fewer projects competing for an allocation that is built-into the zoning or General Plan, quality of the development and/or community amenities may not be of the same quality as in competitive years.

7. A process that provides procedures for General Plan amendments can provide the most flexibility since development assumptions are not already built in and cities have more discretion about amending General Plans, except with respect to legal requirements for Housing Elements.

In considering its options to address growth, manage development and respond to the community concerns, Cupertino should consider implementing a program that achieves the following:

- Ability to achieve goals of General Plan
- Ease of implementation
- Desire for flexibility versus specific requirements (as in a General Plan or zoning)
- Ensure a diverse and vital economic base
- Ensure the City can meet its housing obligations
- Ability to achieve orderly development of the City through a managed process.
  Ensure that additional development can achieve/improve facility/service and quality of life standards for the community