

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT**

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May 20, 2022

Ruth Cueto, Planning Division
City of San Jose
200 E. Santa Clara Street
Tower, 3rd Floor
San Jose, CA 95113

Dear Ruth Cueto:

RE: 675 East Santa Clara Street – Letter of Technical Assistance

The purpose of this letter is to provide technical assistance to the City of San Jose (City) regarding a 100-percent affordable residential infill project to be located at 675 East Santa Clara Street. The proposed project would result in the creation of 559 deed-restricted affordable units on an existing vacant site located near downtown. The City requested technical assistance from the California Department of Housing and Community Development (HCD) regarding the interpretation of the State Density Bonus Law (SDBL) (Gov. Code, § 65915) in the context of a proposed development that does not seek an increase in density. Specifically, the City seeks guidance on how to appropriately consider requests for development standard waivers when a project does not seek an increase in density (i.e., the proposed project is consistent with the zone's existing maximum allowable residential density). Note this letter uses the term “base density” as a synonym for “maximum allowable residential density” as defined in the SDBL.

A Density Bonus is Not Required for a Project to be Eligible for a Waiver

The SDBL provides that an applicant need not request an increase in density for a project to enjoy the benefits and protections provided by the SDBL if the project meets the eligibility requirements described in subdivision (b) of Government Code section 65915. Specifically, the SDBL provides that:

For the purposes of this chapter, “density bonus” means a density increase over the otherwise maximum allowable gross residential density as of the date of application by the applicant to the city, county, or city and county, or, if elected by the applicant, a lesser percentage of density increase, including, but not limited to, *no increase in density*.

(Gov. Code, § 65915, subd. (f). Emphasis added.)

Development Standard Waivers May Be Used to Achieve the Intended Density

Development standard waivers (Gov. Code, § 65915, subd. (e)) can be used by an applicant to achieve either the number of units allowed by the base density or the number of units allowed via a density bonus. The SDBL provides the following:

In no case may a city, county, or city and county apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the *densities* or with the concessions or incentives *permitted by this section*.

(Gov. Code, § 65915, subd. (e). Emphasis added.)

The word “densities” italicized in the statutory excerpt above refers to both higher densities achieved via the granting of an increase in density or to base density when an applicant does not seek an increase in density. As described in the first part of this letter, both are “permitted by” Government Code section 65915.

In the case of an applicant pursuing an increase in density, the waivers should be applied to the project as a whole – without a distinction made as to whether a particular waiver serves specifically to accommodate the bonus units rather than “base density” units. See, *Wollmer v. City of Berkeley*, 193 Cal.App. 4th 1329, 1346 (holding that “[s]tandards may be waived that physically preclude construction of a housing development meeting the requirements for a density bonus, period.”)

Consider the following hypothetical example: A project is proposed on a site whose base density would allow 100 units, and the applicant pursues a 25-percent density bonus. The resulting project would contain 125 units (100 “base density” units and 25 bonus units). When the local agency reviews the applicant’s request for development standard waivers, the local agency should evaluate the provided justification as it applies to the entire project (i.e., units 1-125) and not only the bonus units (i.e., units 101-125). Naturally, this holistic approach would also apply to projects not seeking an increase in density (e.g., the subject application). A contrary reading of this statutory provision would result in the absurd outcome that applications not seeking an increase in density are categorically ineligible for development standard waivers.

A Waiver May Be Used to Facilitate an Incentive/Concession

It is apparent that the legislature contemplated a situation wherein the granting of an incentive/concession would necessitate a development standard waiver. The SDBL provides the following:

In no case may a city, county, or city and county apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities *or with the concessions or incentives permitted by this section*.

(Gov. Code, § 65915, subd. (e). Emphasis added.)

For example, the granting of a concession to remove a requirement for ground floor commercial space for a residential development in a mixed-use zoning district may in turn necessitate a development standard waiver for ground floor transparency requirements. The rationale would be that ground floor transparency requirements (e.g., store windows allowing passersby to window shop) would be incompatible with ground floor residential uses. These derivative waivers should be considered and approved in a perfunctory manner by the local agency.

Conclusion

HCD respects the challenges inherent in infill development and applauds the creation of such a substantial number of affordable housing units in San Jose. If you have questions or need additional information, please contact Brian Heaton at Brian.Heaton@hcd.ca.gov.

Sincerely,

A handwritten signature in black ink that reads "Shannan West". The signature is written in a cursive, flowing style.

Shannan West
Housing Accountability Unit Chief