

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

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December 16, 2020

Mayor Catherine Blakespear and Councilmembers
City of Encinitas
505 S. Vulcan Avenue
Encinitas, CA 92024

Dear Mayor and Councilmembers:

RE: Review of the City of Encinitas' Proposed Density Bonus Ordinance – Letter of Technical Assistance

The Department of Housing and Community Development (Department or HCD) understands the City of Encinitas is proposing to update its density bonus ordinance in an effort to comply with recent amendments to State Law. While the Department acknowledges the City's efforts, the ordinance appears contrary to the intent of State Density Bonus Law (SDBL) and potentially other housing laws and negatively impacts the feasibility of pending development. **HCD recommends the City pull the ordinance from its consent calendar** to facilitate a full discussion of an appropriate ordinance for adoption. HCD offers the following technical assistance that addresses some of HCD's early observations.

State Density Bonus Law: Incentivizing Affordable Housing

The SDBL was adopted in 1979 to address California's affordable housing needs. As originally enacted, the SDBL sought to increase the production of affordable housing by requiring local agencies to grant an increase to the maximum allowable residential density over the otherwise maximum eligible density. The law has been strengthened over time as early versions were not deemed to be sufficiently incentivizing. Thus, it was amended (1) to require progressively more "concessions or incentives" and "waivers" in addition to a density bonus and (2) to make it easier to get concessions, incentives, and waivers.

The current version of the law applicable during 2020 is substantially more incentivizing of affordable housing than earlier iterations. The density bonus that is authorized is set on a sliding scale based upon the percentage of affordable units in the project, ranging from 5% to 35% additional units over the number ordinarily permitted. Likewise, the law provides for a progressive approach to incentives or concessions, allowing up to four incentives or concessions in some cases. (Gov. Code, § 65915, subd. (d)(2).) It also includes incentivization in the form of waivers from development standards, which do not count as incentives or concessions, and are unlimited (Gov. Code, § 65915, subd. (e)) and limits on parking requirements (*id.* at subd. (p)). For projects located near

transit stops, additional concessions are afforded under the SDBL. (See, e.g., *id.* at subds. (f)(3)(D)(ii), (p)(2), (p)(3)(A)).

Importantly, the law has reversed the burden of proof from the applicant to the city or county for incentives and concessions, and waivers; whereas before the applicant had to prove that they would result in identifiable cost reductions, now the city or county must approve requested incentives or concessions unless the city can find no identifiable cost reduction or other specific reasons for denying it. (Gov. Code, § 65915, subd. (d).) While the applicant may have to provide a basic explanation showing why the application is eligible for an incentive or concession with reasonable documentation under subdivision (k), the city cannot require any report or study of any sort to support this. (Gov. Code, § 65915, subds. (a)(2), (j), (k).)

AB 2345: Requirements and Exemption

On September 28, 2020, the Governor signed into law Assembly Bill (AB) 2345, which made significant changes to the SDBL and housing law generally with an effective date of January 1, 2021. In key part, the bill modifies the calculations for awarding density bonuses relative to the number of units of affordable housing included in the proposal. AB 2345 includes a maximum density bonus of up to 50% for projects with 44% moderate income units, 24% lower income units, and 15% very low-income units. In addition to an increased density bonus, AB 2345 reduces the threshold required to qualify for incentives/concessions. The current threshold to qualify for two incentives/concessions is 20 percent for lower income households, and as of January 1, 2021 the threshold will be reduced to 17 percent. The current threshold to qualify for three incentives/concessions is 30 percent for lower income households, and as of January 1, 2021 the threshold will be reduced to 24 percent.

That said, the law allows flexibility for cities and counties that have already or are interested in adopting creative programs or ordinances to incentivize the development of affordable housing. Where those programs or ordinances “***incentivizes*** the development of affordable housing that allows for density bonuses that exceed the density bonuses required by the Density Bonus Law effective through December 31, 2020” the city or county with such a program is not required to amend or otherwise update its ordinance or housing program to comply with the amendments made in AB 2345 and is exempt from complying with the incentive and concession calculation amended by AB 2345. (Gov. Code, § 65915, subd. (s), emphasis added, effective date January 1, 2021.) Thus, in 2021, Government Code section 65915, subdivision (s), will provide:

(s) Notwithstanding any other law, if a city, including a charter city, county, or city and county has adopted an ordinance or a housing program, or both an ordinance and a housing program, that ***incentivizes*** the development of affordable housing that allows for density bonuses that exceed the density bonuses required by the version of this section effective through December 31, 2020, that city, county, or city and county is not required to amend or otherwise update its ordinance or corresponding affordable housing incentive program to comply with the amendments made to this section by the act adding this subdivision, and is exempt

from complying with the incentive and concession calculation amendments made to this section by the act adding this subdivision as set forth in subdivision (d), particularly subparagraphs (C) and (D) of paragraph (2) of that subdivision, and the amendments made to the density tables under subdivision (f).

What does it mean to incentivize in the context of the State Density Bonus Law?

The City asserts that its ordinance would “incentivize” affordable housing consistent if it “allows a housing development to request a density bonus that is higher than the current 35 percent maximum” set out in SDBL now, and accordingly “the City would not be required to implement the amendments contained in AB 2345 with respect to the increase in density bonus (50 percent maximum) or incentive/concessions.” (Nick Zornes, City of Encinitas, Agenda Report Item #10A, December 9, 2020, p. 5.) In the context of SDBL, “incentivize” means more than allowing someone to request a bonus higher than 35 percent.

Incentivize means “to provide with an incentive” (Merriam-Webster, online). It is something that boosts, encourages, incites, or goads or similar. It is more than “allow,” which means to “permit” or “to fail to restrain or prevent.” An expansive reading of this term is consistent with the directives of statute that SDBL “shall be interpreted liberally in favor of producing the maximum number of total housing units.” (Gov. Code, § 65915, subd. (r).) The meaning of “incentivize” in this context takes meaning from the history of density bonus law noted above. The history shows that the Legislature over time has realized that substantial incentives beyond density bonus are needed to induce the development of affordable housing. As noted above, SDBL includes several provisions beyond density bonus—such as incentives and concessions, waivers, and parking incentives—that have been deemed necessary already to incentivize affordable housing.

The subdivision (s) exemption to AB 2345 clearly contemplates something more than “allowing” or permitting an applicant to request more units. HCD recommends the City revisit its proposal to evaluate ways in which the City could incentivize affordable housing.

Subdivision (s) does not excuse cities and counties from compliance with SDBL.

Even if a city or county qualifies for the exemption set out in Government Code section 65915, subdivision (s), it is important to remember that the remainder of SDBL still applies to the jurisdiction in 2021. *If* a jurisdiction has a program or ordinance that *actually* incentivizes affordable housing beyond what is authorized in 2020, then the city or county can utilize that program or ordinance in lieu of modifying its Density Bonus Ordinance to comply with the AB 2345 provisions. Nothing in AB 2345 frees the city from complying with SDBL as it is written in 2020.

The City's draft ordinance as currently written does not appear to incentivize affordable housing.

Government Code section 65915, subdivision (s), does not authorize a city or county to replace its SDBL mandates with a wholesale new ordinance that supplants the established mandates of SDBL. Those provisions still apply. To the extent that the City's proposed ordinance is impermissibly inconsistent with SDBL to increase the costs and burdens on applicants, the ordinance ***disincentivizes*** affordable housing.

- (1) *Report and Burden of Proof:* In order to obtain requested incentives or concessions, the ordinance would mandate that the applicant provide a financial analysis or report. Proposed revisions to Municipal Code Section 30.16.020(C) would include the following new requirement:

Except where mixed-use zoning is proposed as an incentive, reasonable documentation to show that any requested incentive or concession will result in identifiable and actual cost reductions to provide for affordable housing costs or rents, including submittal of a financial analysis or report providing reasonable documentation that the requested concessions and incentives will: 1) result in identifiable and actual cost reductions; and 2) are required in order to provide for affordable housing costs as defined in Health and Safety Code Section 50052.5, or for rents for the affordable units to be set as specified in Government Code Section 65915(c). The cost of reviewing any required financial information, including, but not limited to, the actual cost to the City for hiring a consultant to review the financial data, shall be borne by the applicant.

The requirement to include an additional "financial analysis or report" is specifically prohibited under the current density bonus law. (Gov. Code, § 65915, subd. (a)(2).) Further, the ordinance substantially heightens the demonstration required to obtain a concession or incentive in the city, contrary to SDBL. Under the city's proposed law, an applicant would have to show that an incentive or concession would (1) result in identifiable and actual cost reductions *and* (2) that such reductions "***are required*** in order to provide for affordable housing costs as defined in Health and Safety Code Section 50052.5, or for rents for the affordable units to be set as specified in Government Code Section 65915(c)." SDBL merely requires that such cost reductions help free up funds for affordable housing, not that they are essential to the provision of affordable housing. (Gov. Code, § 65915, subd. (k).) These requirements are contrary to SDBL and ***disincentivize*** affordable housing.

- (2) *Change in Base Density Calculation:* The proposed ordinance would modify key definitions which would have the actual effect of reducing the number of affordable units. In particular, the City proposes to include the following definitions:

“Maximum Allowable Residential Density” means the density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. If the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail. In Encinitas, maximum allowable residential density allowed in the General Plan is based on net acreage.

“Maximum Allowable Gross Residential Density” means the maximum number of dwelling units allowed under the General Plan per net acre of land.

The current version of the City’s ordinance calculates density based on gross acres, rather than net acres. The City adopted gross acres on the advice of its counsel that this was mandated by SDBL. Indeed, SDBL refers to gross density, not net density. (Gov. Code, § 65915, subd. (f).) Accordingly, “the City has since 2017 consistently used gross acreage to calculate base density for density bonus purposes.” (Nick Zornes, City of Encinitas, Agenda Report Item #10A, December 9, 2020, p. 10.) The City cites no legal basis for changing its ordinance in this manner, and indeed the City’s own attorney advises against the change. For these reasons, HCD advises that this change is contrary to SDBL (Gov. Code, § 65915, subds. (f) and (r)) and **disincentivizes** affordable housing.

The ordinance as currently adopted appears to lack grandfathering provisions for developments currently in the entitlement process, including developments that are proposed on sites recently rezoned as a result of housing element requirements. The lack of grandfathering provisions impacts the feasibility of development and adds additional timing delays. The lack of grandfathering provision is especially troublesome when considered in combination with significant constraints such as the City’s density-related definitions.

In other respects, the proposed ordinance includes new requirements which shifts mandates, increase the time to prepare an application, cause regulatory confusion, and increase costs on the applicant. For instance, the new ordinance dictates that affordable units must be at least 75% of the average square footage of market rate units. While HCD has not reviewed these provisions in every respect against SDBL, the Department notes that an ordinance that nominally allows greater densities but that has the primary effect of increasing the costs and burdens of applying for a density bonus cannot be reasonably be construed as one that *incentivizes* affordable housing.

HCD recommends that the City reevaluate the proposed ordinance to eliminate these new barriers to affordable housing so that the overall effect of the ordinance would be, as required by subdivision (s), one that clearly incentivizes affordable housing.

The Department is committed to assist the City in addressing all statutory requirements of State Density Bonus Law. If you have any questions or need additional technical assistance, please contact Robin Huntley, of our staff, at (916) 263-7422 or robin.huntley@hcd.ca.gov.

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Sincerely,

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

Shannan West
Land Use & Planning Unit Chief