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DIVISION OF HOUSING POLICY DEVELOPMENT
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March 25, 2021

Pamela Antil, City Manager
City of Encinitas
505 S. Vulcan Avenue
Encinitas, CA 92024

RE: City of Encinitas Notice of Violation, Ordinance No. 2020-09 (Density Bonus)

Dear Pamela Antil:

The California Department of Housing and Community Development (HCD) has reviewed the City's Ordinance No. 2020-09 under its authority pursuant to Government Code section 65585, which extends to State Density Bonus Law (Gov. Code, § 65915). HCD must notify the City and may notify the Office of the Attorney General when a city takes actions that violate Government Code section 65915. (Gov. Code, § 65585, subd. (j).)

On December 16, 2020, the City adopted Ordinance No. 2020-09 titled, "An Ordinance of the City Council of the City of Encinitas, California, Adopting Amendments to Chapter 30.16.020(C) (Density Bonus Regulations) of the Encinitas Municipal Code to be Consistent with State Law." HCD acknowledges receipt of correspondence dated February 1, 2021, from the City's attorneys, Goldfarb and Lipman, regarding the City's density bonus ordinance.

As described in greater detail below, HCD finds that the ordinance conflicts with State Density Bonus Law (SDBL) requirements pre- Assembly Bill (AB) 2345 by adding burdensome requirements for projects to access development concessions, incentives, and waivers, as well as changing the density calculation to effectively reduce the net number of units available to a given project. In addition, HCD finds that the ordinance does not qualify for the exemption from the new State Density Bonus Law (SDBL) standards. Accordingly, the City must process density bonus applications in accordance with current SDBL law and take immediate steps to repeal Ordinance No. 2020-09.

State Density Bonus Law Is a Critical Tool for Resolving the Housing Crisis

California is experiencing a housing crisis, and remedying that shortage is of vital statewide importance. To resolve the crisis, all levels of government must work together and do their part. (Gov. Code, § 65580.) SDBL is a critical part of the solution. Recognizing this, the Legislature recently adopted, and on September 28, 2020, the Governor signed, AB 2345 to substantially strengthen SDBL. The changes to SDBL became effective on January 1, 2021.

SDBL incentivizes affordable housing using a number of tools, including the following:

- **Density Bonus Units:** SDBL requires local agencies to grant an increase to the allowable residential density over the otherwise maximum eligible density. (Gov. Code § 65915, subds. (f), (g).) This density bonus is a foundational tool to incentivize affordable housing. However, it is generally understood that the density provision is not as effective at incentivizing affordable housing as the other provisions of SDBL, and it is purposefully complemented by other tools to incentivize affordable development.[1] 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; (2) to make it easier to get concessions, incentives, and waivers; and (3) to include parking incentives. These are described below.
- **Incentives and Concessions:** Local agencies are required to provide one or more "incentives" or "concessions" to each project that qualifies for a density bonus. A concession or incentive is defined as a reduction in site development standards or a modification of zoning code or architectural design requirements, such as a reduction in setback or minimum square footage requirements; approval of mixed-use zoning; or other regulatory incentives or concessions that result in identifiable and actual cost reductions. (Gov. Code, § 65915, subd. (k).) The number of required incentives or concessions is based on the percentage of affordable units in the project. (Gov. Code, § 65915, subd. (d).)
- **Waiver or Reduction of Development Standards:** Beyond the concessions or incentives, if any city or county development standard physically prevents the project from being built at the permitted higher density with the granted concessions/incentives, the developer may propose to have those standards waived or reduced. The city or county is not permitted to apply any development standard that physically precludes the construction of the project at its permitted density and with the granted concessions/incentives. (Gov. Code, § 65915, subd. (e).)
- **Reduced parking requirements:** Local agencies are also required to reduce parking requirements for projects that qualify for a density bonus even if the developer does not request density bonus, incentives, or waivers. (Gov. Code, § 65915, subd. (p).)

AB 2345 Substantially Strengthens SDBL by Increasing Density Bonuses as well as Reducing the Threshold for Obtaining Concessions and Incentives

AB 2345 modified the calculations for awarding density bonuses relative to the number of units of affordable housing included in the proposed project. AB 2345

[1] See, e.g., Jon Goetz and Tom Sakai, Guide to the California Density Bonus Law (Meyers Nave, January 2020), p. 2.

increased the maximum density bonus from 35 percent to 50 percent for projects with 44 percent moderate-income units, 24 percent lower-income units, or 15 percent very low-income units.

In addition to an increased density bonus, AB 2345 reduced the threshold required to qualify for incentives/concessions. The prior threshold to qualify for two incentives/concessions was 20 percent for lower-income households; as of January 1, 2021, the threshold is 17 percent. (Gov. Code, § 65915, subd. (d)(2)(B).) The prior threshold to qualify for three incentives/concessions was 30 percent for lower income households; as of January 1, 2021, the threshold is 24 percent. (Gov. Code, § 65915, subd. (d)(2)(C).)

However, where a program, ordinance, or both "that ***incentivizes the development of affordable housing*** that allows for density bonuses that exceed the density bonuses required by the [SDBL] effective through December 31, 2020," the city or county with such a program or ordinance is not required by SDBL to amend or otherwise update its ordinance or housing program to comply with certain changes 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.)

Ordinance No. 2020-09 Contravenes SDBL by Introducing New Burdensome Requirements and Changing Density Calculation

The City's proposed ordinance is impermissibly inconsistent with SBDL because it increases, rather than decreases, the costs and burdens on applicants (*Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 830 [SDBL preempts inconsistent provisions in these municipal ordinances]), including by, without limitation, imposing the following:

(1) *Report and burden of proof*: In order to obtain requested incentives or concessions, the ordinance mandates that the applicant provide a financial analysis or report to show 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)." To add to the burden of this request, the City also requires the applicant to pay for a consultant to review the report. (Municipal Code Section 30.16.020(C).) This mandate exceeds the "reasonable documentation" standard set forth in SDBL.

The requirement to include an additional "financial analysis or report" is expressly prohibited under SDBL. (Gov. Code, § 65915, subd. (a)(2) ["local government shall not condition the submission, review, or approval of an application pursuant to this chapter on the preparation of an additional *report or study*"], emphasis added.) While

early versions of SDBL required the applicant to prove that the incentives, concessions, and waivers would result in identifiable cost reductions, SDBL has long since reversed that burden. SDBL now requires that the city or county approve requested incentives, concessions, or waivers unless the city or county can find no identifiable cost reduction or other specific reasons for denying them. (Gov. Code, § 65915, subds. (d), (e).) While the applicant may have to provide a *basic explanation* showing why the application is eligible for an incentive or concession or to demonstrate the incentive or concession meets the definition set forth in subdivision (k), the city cannot require any report or study of any sort as "reasonable documentation" under subdivision (j). (Gov. Code, § 65915, subds. (a)(2), (j), (k).) The Legislature was clear that no additional studies, reports, or analysis were to be required. (See also Sen. Rules Com., Analysis of Assem. Bill No. 2501 (2015 – 2016 Reg. Sess.), as amended August 1, 2016, p. 6.) The City can require the submission of a reasonable amount of documentation, such as drawings and the like, to establish eligibility for a density bonus, incentives, concessions, waivers, reductions, or parking ratios. However, the overall intent of AB 2501 is to create a presumption that incentives and concessions provide cost reductions, and therefore contribute to affordable housing development. A municipality has the burden of proof of demonstrating that a concession or incentive would not generate cost savings.[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 ordinance, 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, subds. (a)(2), (j), (k).) The showing is not substantial: "If a development provides the required affordable housing, the applicable density bonus and reduced parking standards must be provided. There are no grounds in the statute to deny a developer's request." (Lynn E. Hutchins and Karen Tiedemann, Goldfarb & Lipman "Not Just Density Bonuses: Dealing with Demands Beyond the Bonus" (League of California Cities, 2016, at p. 2.) These requirements in the City's ordinance are contrary to SDBL and ***disincentivize*** affordable housing.

[2] This interpretation is consistent with the weight of the commentary as well. (See, e.g., Jon Goetz and Tom Sakai, Guide to the California Density Bonus Law (Meyers Nave, 2020), at pp. 3, 5; Karl E. Geier "Going for the Capillaries: Legislative Tinkering with California Planning and Zoning Laws to Address the Housing Shortage" (March 2017) 27(4) Miller & Starr, Real Estate Newsalert NL 1; David Blackwell and Timothy Hutter, "California Governor Signs Four Bills Affecting Density Bonus Projects" (September 29, 2016); City of Santa Rosa, "White Paper: Density Bonus Ordinance Update" (Undated), at pp. 16, 20, 54.)

Cost reductions resulting from incentives or concessions should be apparent from the project application, thus negating any need for a "financial analysis or report." Additionally, the City's February 1, 2021 correspondence to HCD asserts Encinitas has had a "model density bonus program" that has "incentivized more affordable and market-rate units than in the City of San Diego" and "Almost every project of 5 units or more in the City utilizes Density Bonus Law in some fashion." As such, it is unclear why the City would add burdensome requirements to what it claims was a successful program.

(2) *Documentation of other alternatives*: In order to obtain requested waivers, the ordinance mandates that the applicant provide not only reasonable documentation establishing that development standards preclude development at the allowed density, but also (1) reports, (2) drawings and elevations, (3) consultants, and (4) alternative designs. (Municipal Code Section 30.16.020(C).)

These additional requirements are not permitted under SDBL and include evidentiary showings that go well beyond SDBL's "reasonable documentation" standard. (Gov. Code, § 65915, subd. (a)(2); *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346-1347.) Courts have held, for instance, that SDBL does not require a housing development project to be void of amenities to accommodate needed densities with fewer waivers. (*Wollmer, supra*.) The project applicant need not consider various alternatives that might be accommodated on site without the concessions, incentives, or waivers. If the project meets the requirements for a density bonus, the City must waive development standards requested pursuant to section (e) that preclude development of the project as proposed. These requirements are contrary to SDBL and ***disincentivize*** affordable housing.

(3) *Change in base density calculation*: The ordinance modifies key definitions, which would have the actual effect of reducing the number of affordable units and implementing a net density that is explicitly contrary to state law. 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.

Notably, the previous version of the City's ordinance calculated density based on *gross* acres, rather than *net* acres. The City previously adopted its ordinance taking a gross acres approach 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 further ***disincentivizes*** affordable housing.

Further, the implementation of a net density standard potentially impacts the feasibility of proposed development, particularly given the absence of any grandfathering provisions for pending development applications.

The City's February 1, 2021 letter to HCD asserts that because HCD's *Housing Element Site Inventory Guidebook* allows for use of net density, it is appropriate to do so in the City's density bonus ordinance. This is faulty logic and compares apples to oranges. Calculating realistic capacity for a housing element site inventory pursuant to the provisions of Government Code section 65583.2, subdivision (c), is irrelevant to the calculations required pursuant to SDBL. SDBL has its own terms, its own definitions, and occupies a completely different chapter of Government Code. SDBL explicitly requires the use of gross acreage.

The City's February 1, 2021 letter further justifies the use of net acreage because some of its neighboring jurisdictions do so. The erroneous application of the law in one or more jurisdictions does not justify its widespread adoption. HCD appreciates the information and will be following up with those cities.

(4) *Lack of grandfathering provisions*: 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 provisions is especially troublesome when considered in combination with significant constraints such as the City's density-related definitions. The Department reminds the City of the requirements of Government Code section 65589.5, subdivision (o)(1), "… a housing development project shall be subject only to the ordinances, policies, and standards adopted and in effect when a preliminary application including all of the information required by subdivision (a) of Section 65941.1 was submitted."

(5) *Other disincentivizing impediments to affordable housing:* In other respects, the proposed ordinance includes new requirements that shift mandates, increase the time needed to prepare an application, cause regulatory confusion, and increase costs of housing development.[3] For instance, the new ordinance dictates that affordable units must be at least 75 percent of the average square footage of market rate units. SDBL does not mandate the size of either the density bonus units or the affordable units in the development. SDBL references only the requirements for replacement units, which is based upon bedroom count, not square footage. (Gov. Code, § 65915, subd. (c)(3).) The imposition of a 75 percent requirement is arbitrary—the City provided no data or other evidentiary basis for its decision. In addition, the ordinance mandates the cost of the review of reasonable documentation supporting the request of concessions or incentives, and waivers be borne by the applicant. Furthermore, the ordinance anticipates hiring a consultant to review documentation. SDBL places the burden of proof for denial of requested concessions or incentives on the City – not on the applicant. (Gov. Code, § 65915, subd. (d)(4).) SDBL allows the request of only reasonable documentation for requested concessions or incentives, and waivers. (Gov. Code, § 65915, subd. (a)(2).) The burden of developing such findings is placed squarely on the city or county.

Government Code section 65915, subdivision (r), provides, "This chapter shall be interpreted liberally in favor of producing the maximum number of total housing units." An ordinance that nominally allows slightly greater densities but that has the primary effect of increasing the costs and burdens of applying for a density bonus cannot be reasonably construed as one that maximizes the number of housing units developed. For all the reasons above, the City's Ordinance No. 2020-09 violates SDBL.

Ordinance No. 2020-09 Fails to Meet Exemption Threshold: "Incentivize the Development of Affordable Housing that Allows for Density Bonuses that Exceed the Density Bonuses Required By [SDBL] Effective Through December 31, 2020." The City argues that it is exempt from SCBL mandates because it falls within the exemption set out in Government Code section 65915, subdivision (s). As a threshold matter, the City misapprehends the scope of that exemption. 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. As a result, even if a city or county qualifies for the exemption from the new SDBL mandates, the remainder of SDBL continues to apply to the jurisdiction in 2021.

[3] These restrictions are concerning from a fair housing perspective as well: "Examples of land use practices that violate the Fair Housing Act under a discriminatory effects standard include minimum floor space or lot size requirements that increase the size and cost of housing if such an increase has the effect of excluding persons from a locality or neighborhood because of their membership in a protected class, without a legally sufficient justification." (United States Department of Justice and United States Department of Housing and Urban Development, "Joint Statement: Local Land Use Laws and Practices and the Application of the Fair Housing Act" (November 10, 2016) ("Joint Statement"), p. 5.)

In this case, however, the City appears to also err in its determination that it has satisfied the exemption. To meet the exemption threshold, the City's ordinance must be an ordinance "that incentivizes the development of affordable housing." What does it mean to incentivize in the context of the SDBL? The City asserts that its ordinance satisfies the exemption in subdivision (s) because it "allows a housing development to request a density bonus that is higher than the … 35 percent maximum" set out in SDBL in 2020, 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.)

However, the term "incentivize" in this context takes meaning from the history of SDBL, which shows that the Legislature, over time, has realized that substantial enticements beyond density bonus (additional units over zoning) are needed to incentivize the development of affordable housing. As noted above, SDBL includes several provisions beyond density bonus—such as incentives and concessions, waivers, and reduced parking standards—that have been deemed essential to incentivize affordable housing. It is generally recognized that these "other tools are even more helpful to project economics than the density bonus itself." (See, e.g., Jon Goetz and Tom Sakai, Guide to the California Density Bonus Law (Meyers Nave, January 2020, p. 2.). The subdivision (s) exemption to AB 2345 accordingly contemplates something more than simply allowing someone to request a density bonus that is only *slightly higher* than the 35 percent maximum bonus in effect at the close of 2020, while, at the same time, creating disincentives elsewhere within its ordinance that have a net negative effect on incentivizing affordable housing. Here, the ordinance substantially raises the hurdles to qualify for incentives, concessions, and waivers (by introducing new burdensome requirements) and effectively reduces the net number of units available (by moving to net density calculation instead of gross density). SDBL "shall be interpreted liberally in favor of producing the maximum number of total housing units." (Gov. Code, § 65915, subd. (r).)

In defense of its ordinance the City's February 1, 2021 letter to HCD refers to the UC Berkeley Terner Center for Housing Innovation's (Terner Center) July 2020 Policy Brief entitled "Revisiting California's Density Bonus Law: Analysis of SB 1085 and AB 2345." The City's letter states that "AB 2345 was marginally less attractive than existing density bonus law." This is an incomplete characterization of the Terner Center's conclusion as the document also states, "In addition to added density, developers may also take advantage of other incentives allowed under density bonus law that can sometimes prove just as valuable—or even more valuable than additional units." Thus, the Terner Center agrees with Goetz and Sakai that other elements of density bonus law are often more incentivizing, concluding: "Our California Residential Land Use Survey found that developers do not always choose to utilize the added density afforded by density bonus law, but other concessions are frequently received." In no way does the Terner Center advocate efforts to avoid compliance with AB 2345: "SB 1085 and AB 2345 represent a

step in the right direction for legislation that prioritizes affordability while recognizing the need for offsets to achieve financial feasibility."

The City also argues that modifications to its density bonus ordinance are justified due to its prior success with the law, citing 33 project approvals over two decades that resulted in a total of 908 new units, about 97 of which were affordable. It suggests that its density bonus ordinance is more successful than San Diego's prior to that city's adoption of a new density bonus program that served as the model for AB 2345. This appears to be incorrect, however. Between 2005 and 2017, a briefer period than Encinitas' sample, San Diego approved 36 projects with 3,959 units under its density bonus ordinance, about 454 were affordable.[4] Initial data from San Diego's implementation suggest that its new ordinance is even more successful at producing housing generally and affordable units in particular. [5]

Further, even assuming Encinitas' prior density bonus program was successful (though it is also possible that Encinitas' generally restrictive practices deterred multifamily production outside of its density bonus program), any such past successes by the City using density bonuses alone is not sufficient to trigger an exemption from SDBL now. The City complains that its ordinance resulted in too many market-rate homes and too few affordable homes. AB 2345 does not authorize the City to adopt an ordinance further disincentivizing housing generally.

Conclusion

In sum, HCD has reviewed the City's Ordinance No. 2020-09 under its authority pursuant to Government Code section 65585, which extends to State Density Bonus Law (Gov. Code, § 65915). HCD has found that Ordinance No. 2020-09, violates separate SDBL requirements by adding burdensome requirements for projects to access development concessions, incentives, and waivers, as well as by changing the density calculation to effectively reduce the net number of units available to a given project. In addition, HCD finds that the City does not meet the threshold for exemption from recent legislative changes. Accordingly, the City must apply State Density Bonus Law by processing density bonus applications in accordance with AB 2345 and take immediate steps to repeal Ordinance No. 2020-09. As noted above, HCD is hereby notifying the City of the above findings and violations pursuant to Government Code section 65585, subdivision (j).

[4] See Colin Parent, *Early Win for Affordable Homes Bonus Program* (Circulate San Diego, October 18, 2017) [Density Bonus Production Figures Data at <https://www.circulatesd.org/ahbpreport>].
[5] See Parent, *supra,* at p. 6.

If you have any questions, or would like to discuss the content of this letter, please contact Robin Huntley of our staff at Robin.Huntley@hcd.ca.gov.

Sincerely,

Megan Kirkeby
Deputy Director