DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT
DIVISION OF HOUSING POLICY DEVELOPMENT
651 Bannon Street, Suite 400
Sacramento, CA 95811
(916) 263-2911 / FAX (916) 263-7453
www.hcd.ca.gov

March 12, 2025

Brian Warwick
Housing Manager
City of Chula Vista
276 4th Ave
Chula Vista, CA 91910

Dear Brian Warwick:

RE: 1405 First Avenue, Chula Vista – Letter of Technical Assistance

The California Department of Housing and Community Development (HCD) received a request from the applicant regarding whether existing units can be used in State Density Bonus Law (SDBL) calculations for projects that have already built the maximum total units allowed by the site's zoning. "Total units" refers to the number of units before any bonus units are added. In other words, the only new construction would be bonus units achieved through use of the SDBL.

HCD understands that the project proposed at 1405 First Avenue (Project) has an existing 12 units on site. The site is zoned R-3 Residential and allows for a maximum base density of 12 units. The Project proposes to deed restrict two out of the 12 units (17 percent) for very low-income (VLI). A 50-percent density bonus is achieved, facilitating the construction of six new market-rate bonus units. The existing units would not be physically altered.

Question: Can a project already at maximum density qualify for bonus units under the SDBL by deed restricting existing units?

Currently, the SDBL does not explicitly consider whether existing units should be counted for purposes of determining a project's "total units."[1] The law neatly addresses the development of vacant sites and those that include the demolition of housing,[2] but does not provide guidance on the treatment of project sites that contain, and will continue to contain, existing housing units. Given the absence of statutory clarity, HCD provided prior guidance that this determination depends on the degree of involvement of the existing units in the new project proposal.[3]

[1] Gov. Code, § 65915, subd. (o)(8).
[2] Gov. Code, § 65915, subd. (c)(3).
[3] HCD Technical Assistance Letter to the City of El Cajon, February 16, 2024, available at https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/el-cajon-hau484-ta-02162024.pdf.

HCD previously described the concept of "independent" and "dependent" projects under the SDBL. A dependent project refers to a scenario where any of the existing units are being physically modified or deed restricted as part of the proposal. For dependent projects, all the existing units are considered a part of the "total units" of the project. Independent projects, in contrast, are projects where the existing units are not being modified physically or legally as part of the proposed housing development project.

This concept extends to all projects that physically modify or deed restrict existing units, even when no new units are being proposed as part of the "total unit" count. Since the Project at hand deed restricts existing units, all existing units would count toward density bonus calculations. Therefore, it is possible to have the newly constructed units only be bonus units achieved through the SDBL.

HCD encourages the City to consider the scenario where instead of the existing proposal, the applicant proposes to demolish all existing units and start from scratch. In this scenario, the project would be permitted 12 total units and six bonus units, where two of the total units are deed restricted to VLI. The result is the same number of units as the Project, but with the additional impacts associated with demolition. These impacts include displacement of tenants, increased time and cost of development, and increased greenhouse gas emissions. This concept is therefore consistent with the SDBL's goal of being liberally in favor of producing the maximum number of total housing units.[4] An opposing view results in either no additional units (including deed restricted units) or the demolition scenario outlined above, each of which are contrary to the SDBL's stated objective.

HCD would also like to address the concerns of City staff in their letter to HCD (Attachment) about potential displacement of tenants under the proposal. HCD is aware of the important impacts of displacement and would like to reiterate the guidance provided in the technical assistance letter to El Cajon.[5] To alleviate concerns of displacement, HCD explained that by floating the deed restrictions, the newer units can serve as affordable units as needed and existing units can serve as affordable units as they turn over. This provides flexibility to reduce displacement as tenants move or graduate to different income levels. HCD understands deed restrictions do not typically specify which individual units are restricted; instead, they indicate the number of units by bedroom count and affordability level for the entire development. Property managers must be able to demonstrate that a tenant of the specific income level is always occupying an appropriate affordable unit somewhere within the development, but it is not required that it always be satisfied by the same units. Overall, this more permissive approach of allowing existing units to be deed restricted for the purposes of State Density Bonus projects may result in more overall deed restricted units, while the concept of floating units will alleviate displacement concerns.

---

[4] Gov. Code, § 65915, subd. (r).
[5] HCD Technical Assistance Letter to the City of El Cajon, February 16, 2024, available at https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/el-cajon-hau484-ta-02162024.pdf.

Compliance with Existing Housing Element Programs

The approach described in this letter reinforces the City's existing Housing Element goals to preserve units and reduce governmental constraints and costs for projects proposing affordable units, while maintaining compliance with state law. In particular, the approach supports the following programs:

<u>Chula Vista Housing Element Program 3.5</u>: "*The City will identify and evaluate constraints to affordable housing development and propose specific methods and strategies to address and remove the identified regulatory constraints to facilitate production of affordable housing."* The City's current policy, if implemented, would represent a government restraint as it would require the needless demolition and reconstruction of existing units – ultimately resulting in a dramatic increase in the per-unit construction cost of the Project.

<u>Chula Vista Housing Element Program 3.6</u>: *"The City is required to apply current state law regardless of when the local amendments are adopted…. The City will continue to review and approve requests under State Density Bonus law (including requests for incentives, concessions, waivers, and parking reductions) so that projects that qualify are not prevented from developing at the densities to which they are entitled...."* The Project is entitled to 18 units under the SDBL (12 base units, plus six bonus units). Implementing the SDBL in accordance with the technical assistance provided in this letter facilitates the development of the site at the density to which it is entitled.

Conclusion

HCD acknowledges the challenges inherent in applying the SDBL in the context of infill projects that seek retain existing housing units and appreciates the City's concerns and feedback. It is HCD's hope that the technical assistance provided in this letter will clarify the options available under the SDBL and assist the City as it applies the SDBL as a tool to achieve its affordable and market rate housing production goals and to balance the needs of current low-income residents.

If you have any questions regarding the content of this letter or would like additional technical assistance, please contact Bentley Regehr at bentley.regehr@hcd.ca.gov.

Sincerely,

Shannan West
Housing Accountability Unit Chief

Attachment: City's letter to HCD

June 5, 2024

Attn: Shannan West, Housing Accountability Unit Chief
Department of Housing and Community Development
Division of Housing Policy Development
2020 W. El Camino Avenue, Suite 500
Sacramento, CA 95833

RE: 1405 FIRST AVENUE DENSITY BONUS

Dear Ms. West:

The City of Chula Vista ("City") is providing this letter for consideration by HCD during its preparation of a letter of technical assistance regarding a proposed density bonus application for a project (the "***Project***") to be constructed on the property located at 1405 First Avenue in Chula Vista (the "***Property***").

The City supports the efforts of the Housing Accountability Unit ("***HAU***") of the California Department of Housing and Community Development ("***HCD***") to ensure that cities throughout California follow state law and do their part to build housing for people at all income levels. The City has consistently built more housing per capita than any other city in the San Diego region, as shown in the attached chart. Three years into our current Housing Element cycle, we have issued permits for more than 80% of our above-moderate Regional Housing Needs Allocation ("***RHNA***") target, and we are excited to have more than two hundred units of deeply affordable housing currently under construction or presently being considered for City funding. We are committed to the hard work of refining our zoning, permitting, and review processes to facilitate even more housing development, and regularly consult with the developer community on key policy questions. On May 21, 2024, the City Council passed a comprehensive housing package that included several actions intended to facilitate housing development, including an inclusionary housing update, an update to our local density bonus ordinance, and an administrative exemption of parkland fees for affordable projects.

A number of recent developments in Chula Vista have proceeded with the assistance of State Density Bonus Law as codified in California Government Code Section 65915 et seq. ("***SDBL***"). The City has applied SDBL without controversy in its review and approval of these projects, and City staff has continued to closely track updates to SDBL and other key state housing legislation. For this reason, we are concerned about what appears to be an overreaching and incorrect interpretation by HCD of SDBL with regards to the Project.

Proposed Project

The Project currently has an existing 12-unit building on the Property, which is located in a zone where the maximum number of units allowed by zoning is 12. The Project's developers submitted a pre-application in February 2024 to build six additional units of housing on the site with the use of SDBL, restricting two of the six new units to Very Low-Income households. After reviewing the submittal, City staff informed the developer that the project is not eligible to receive a density bonus, since the Property has no remaining zoning capacity to meet the minimum threshold for SDBL. City staff met with the developer on April 22, 2024, and provided a more in-depth explanation of its reasoning behind the decision. Staff also provided information about possible alternate pathways to developing additional units on the site, such as utilizing Accessory Dwelling Unit ("***ADU***") laws.

The developer submitted a request for technical assistance to HCD with regards to the Project, and the City subsequently arranged a meeting with Bentley Regehr, Senior Housing Policy Analyst, on Thursday, May 30, 2024. In our meeting, City staff were surprised to learn that a letter of technical assistance was being drafted that would potentially endorse a novel interpretation of SDBL in order to allow additional units at the Project site. Mr. Regehr indicated that the developers could trigger access to a density bonus through a modification to the existing Project by performing rehabilitation on the original building or even simply deed-restricting existing units in the original building, even though the Project is at the maximum zoning capacity.

SDBL Housing Development Definition
California Government Code Section 65915(i) defines a "***Housing Development***" under SDBL as follows [emphasis added]:

> "Housing development", as used in this section, means a development project for *five or more residential units*, including mixed-use developments. For the purposes of this section, "housing development" also includes a subdivision or common interest development, as defined in Section 4100 of the Civil Code, approved by a city, county, or city and county and consists of residential units or unimproved residential lots and either a project to substantially rehabilitate and convert an existing commercial building to residential use *or the substantial rehabilitation of an existing multifamily dwelling, as defined in subdivision (d) of Section 65863.4, where the result of the rehabilitation would be a net increase in available residential units.* For the purpose of calculating a density bonus, the residential units shall be on contiguous sites that are the subject of one development application, but do not have to be based upon individual subdivision maps or parcels. The density bonus shall be permitted in geographic areas of the housing development other than the areas where the units for the lower income households are located.

The Project as proposed does not satisfy the criteria for a Housing Development as defined above. SDBL is very clear that the density bonus applies specifically to the Housing Development which is being applied for.

The developer has represented to the City that the Project will not involve rehabilitation of the existing 12-unit multifamily building on the Property. Therefore, in accordance with the plain language of SDBL, the Housing Development the City is allowed to consider is specifically limited by the SDBL to the proposed 6-unit Project the owner desires to construct on a portion of the Property, which is separate and apart from the existing 12-unit multifamily building.

As previously stated, the property's zoning allows a maximum of 12 units on the Property. Since the SDBL compels the City to consider the Housing Development only (i.e., the proposed 6-unit Project, rather than the Property in its entirety) the Property would need to have unused available density in order to utilize the SDBL. Because the Property does not have unused zoning capacity, the Project does not meet the definition of a Housing Development.

Prior HCD Technical Assistance

On November 12, 2020, HCD provided a letter of technical assistance to the City of Foster City (attached). In that letter, HCD states that, "State Density Bonus Law applies to new units being constructed, including any replacement units" and "State Density Bonus Law applies to the construction of the new units (as referenced in Question #3), and not the retained units." It goes on to state that such retained units "are not considered new construction and therefore ought not be part of the calculation for affordability requirements." This letter demonstrates a common understanding that SDBL applies only to new units being constructed and excludes existing units.

During the City's May 30, 2024 meeting with HCD, Mr. Regehr referenced a letter of technical assistance provided to the City of El Cajon on February 16, 2023, as a basis for a potential interpretation of SDBL with regards to the Project. We believe the project under consideration in El Cajon does not provide a relevant factual basis for the Project submitted to the City of Chula Vista. The letter refers to "projects that do not exhaust the maximum allowable residential density or base density nor request a density bonus." This is not the case for the Property, which does indeed exhaust the base density.

Further, we believe that the letter to El Cajon stretches the applicability of SDBL far beyond the intent of the legislature. El Cajon's technical assistance letter sets forth new definitions, "dependent" and "independent" projects, that do not exist within the text of the statute and have no basis in case law. The El Cajon letter sketches out a scenario in which the existing project can be incorporated into the Housing Development by deed-restricting existing units. This is an unprecedented interpretation of SDBL; deed-restricting existing units is an entirely different action than rehabilitating existing units for the purposes of creating a net increase in the number of units. There is nothing in SDBL to support HCD's position that restriction of existing units in a separate physical building would cause those existing units to become a “dependent” part of the housing development.

The letter goes even further by suggesting that if some portion of existing units are deed-restricted or rehabilitated, *all* existing units could be counted towards the Base Density of a Housing Development. This is a convoluted line of reasoning, which may be why the letter incorrectly calculates the total units as defined within SDBL. Because HCD deems the El Cajon project a “Dependent Project”, it states that the “‘total units’ would include both the existing and proposed units (i.e., *ten* units).” This calculation includes the density bonus units, which should be excluded from the total unit count under SDBL. Even according to the internal logic of the letter, the project as approved would consist of eight units and two bonus units.

Policy Considerations
In addition to the City’s position regarding the Project’s eligibility under SDBL, the proposed interpretation of SDBL would raise numerous difficult administrative and policy questions about the interaction between SDBL, equity, and tenant protections.

The prospect of using SDBL to deed-restrict existing units presents a host of unresolved policy questions with respect to existing tenants:

- Can occupied units be deed-restricted, or would they remain unrestricted until turnover?
- If occupied, would the existing tenants need to be notified and provide their consent to a deed restriction?
- On what basis would the existing units be selected for deed-restriction?
- What happens if existing tenants do not consent to the deed restriction, or do not meet the eligibility requirements? Would the unit be restricted against the tenant’s wishes, and the tenant be evicted?
- The City’s action to deed restrict existing units may constitute a displacement via government action that may trigger extensive relocation costs, affordable housing waitlist priority, and other complex systems for tenant protections.

The use of existing units to meet affordability requirements without any rehabilitation also raises concerns about long-term maintenance of deed restricted units and equity between affordable (old) and market rate (new) units.

In addition to statewide rent control under The Tenant Protection Act of 2019 (California Civil Code Section 1946.2) (“***Tenant Protection Act***”), many jurisdictions in California have long-established local rent control programs. Deed-restricting a unit as affordable would eliminate rent control provisions under the Tenant Protection Act as well as under most local ordinances. This process of converting rent-controlled housing to deed-restricted affordable housing would essentially switch the units from one housing affordability program to another. This would be highly controversial among housing advocates and create a number of concerns:

- Rent control programs often have more robust tenant protections, such as just cause provisions, than restrictive covenants.
- Rent control programs have a more established institutional framework for petitioning the City to adjudicate tenant/landlord disputes.
- Tenants' rights attorneys and organizations are generally more versed in rent control than in affordability covenants and have an established framework for providing review and counsel services to tenants.
- Units may often have lower rent through an applicable rent control program than via the applicable limit under SDBL. This holds especially true for longtime tenants, which are often senior citizens on fixed incomes and other residents vulnerable to displacement.
- Rents under SDBL can potentially increase faster than through rent control. Some jurisdictions limit rent increases to as low as 60% of the Consumer Price Index ("***CPI***"), whereas rents under SDBL are tied to area median income. In rapidly gentrifying regions, median incomes can increase much faster than CPI.
- Rent control offers greater security of tenure than SDBL restrictions. Tenants occupying deed-restricted units may face eviction if their income increases beyond the applicable maximum for the unit, whereas rent-controlled tenants have no income requirements.
- SDBL imposes compliance requirements upon tenants that are not required under rent control. Tenants who do not regularly disclose their income and assets risk eviction, and tenants must also accommodate regular unit inspections by the City or regulatory jurisdiction. Tenants may find these compliance requirements intrusive and unwelcome.
- In the experience of City staff, tenants tend to have a greater degree of trust and knowledge about rent control programs than SDBL agreements and may prefer to remain under rent control for this reason.

Tenant advocacy and legal aid organizations such as the Alliance of Californians for Community Empowerment (ACCE Action) and Housing and Economic Rights Advocates (HERA) have been vocal about their desire to prevent conversion of rent-controlled units to deed-restricted affordable units. In 2021, the City of Oakland proposed to carry out a transaction that would have converted rent-controlled units to deed-restricted low-income units; as this Oaklandside article reports, the proposed transaction ran into significant community opposition and was ultimately cancelled. Many of the concerns cited above were raised by tenant advocates while the transaction was being considered.

The City of Chula Vista, along with many other jurisdictions, has in recent years adopted tenant protections for no-fault terminations of tenancy. Deed-restricting existing units could unintentionally accelerate no-fault terminations of tenancy, contrary to the intentions of these laws.

The City contacted El Cajon staff regarding how it was administering deed restrictions for existing units on its proposed project. El Cajon staff responded that they had not yet determined how to proceed, nor has the developer provided a path to mitigating impacts on existing tenants. Clearly, many open questions remain on how such a deed-restriction program would be administered. Without guidance from the State, it is likely that conversions of existing units would be enacted inconsistently across jurisdictions. Yet administrative regulations for conversion of existing units to deed-restricted affordable units are not contemplated by SDBL, and it is beyond the purview of HCD to adopt such regulations.

HCD's Purview

The California legislature has not delegated rulemaking authority to HCD under the California Government Code. HCD nevertheless appears to be asserting rulemaking authority by defining terms and establishing a regulatory framework not contemplated in SDBL.

During the May 30, 2024 meeting with HCD, Mr. Regehr affirmed that the department is weighing policy concerns and wishes to protect existing tenants as it prepares its letter of technical assistance. While well-intentioned, this evaluation of policy considerations further indicates that HCD may be overstepping its role as a neutral administrator of law as adopted by duly elected officials.

SDBL is now amended almost annually by our State legislature. The legislature could at any point enact legislation to redefine a Housing Development to include existing units. If HCD believes that this would be good policy, the appropriate course of action would be to advocate for such an amendment. It is inappropriate for HCD to instead use its leverage as a State department to pressure Chula Vista into accepting a tenuous and controversial interpretation of SDBL.

Conclusion

HCD's potential interpretation of SDBL is not consistent with the Project scope that was submitted to the City; has never been applied to any other density bonus project in California; is not authorized under SDBL; and raises numerous difficult questions about how it would be administered without displacing tenants. City staff, its in-house counsel, and outside counsel are concerned about the myriad unintended consequences that may result from a technical memo that promotes an untested and experimental interpretation of SDBL for not only our City, but for jurisdictions throughout California. If the HAU follows through in issuing guidance that we believe is inconsistent with the text of SDBL, the City will explore all legal remedies to ensure an equitable solution.

We thank you for your consideration of the City's feedback into this matter, and for your ongoing efforts to keep cities accountable to State law. We respectfully request to be included in any additional conversations prior to the issuance of a technical assistance letter on this Project. Should you have any questions in the meantime, please do not hesitate to contact me at mkachadoorian@chulavistaca.gov.

Sincerely,

Maria Kachadoorian
City Manager
City of Chula Vista

Enclosures: Technical Assistance Letter to El Cajon
Technical Assistance Letter to Foster City
Housing Permits Issued Per Capita, 2021-2023 (San Diego Region)

cc: Tiffany Allen, Assistant City Manager
Courtney Chase, Deputy City Manager
Stacey Kurz, Director of Housing and Homeless Services
Brian Warwick, Housing Manager
Chris Stanley, Senior Planner
Laura C. Black, Director of Development Services
Megan McClurg, Assistant City Attorney
Bentley Regehr, Senior Housing Policy Analyst, HCD

Attachment A

Housing Permits Issued Per 100,000 Residents, 2018-2022 (San Diego region)