

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

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December 29, 2022

Kate Conner, LEED AP  
Manager Priority Projects and Process  
Current Planning Division  
City and County of San Francisco  
49 South Van Ness Avenue, Suite 1400  
San Francisco, CA 94103

Dear Kate Conner:

**RE: 3832 18<sup>th</sup> Street Project – Notice of Violation**

This letter serves as a follow-up to the recent communication between the California Department of Housing and Community Development (HCD) and the City/County of San Francisco (City/County) regarding the conditional approval of a 19-unit group housing project located at 3832 18<sup>th</sup> Street (Project).

**Background**

In proposing the Project, the project sponsor invoked State Density Bonus Law (SDBL) to allow additional group housing units above the base density, utilize waivers from specific development standards to facilitate construction of the project, and provide on-site affordable housing as set forth under the SDBL. At a public hearing on October 14, 2021, the Planning Commission approved the Project but included a condition that the project sponsor “shall provide a building design that is consistent with Planning’s recommended alternative design of a project that is five (5) stories in height.”<sup>1</sup> This condition was imposed despite the project sponsor’s legitimate SDBL waiver request to waive the 40-foot height standard and provide a building height of six stories to accommodate the Project’s 19 group housing units. At an appeal hearing on March 15, 2022, the Board of Supervisors upheld the Planning Commission’s project approval as conditioned with the five-story “alternative design.”

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<sup>1</sup> October 14, 2021, San Francisco Planning Commission Motion No. 21016, Condition #13 regarding Project Modifications.

On August 11, 2022, HCD sent a Letter of Inquiry (enclosed) to the City/County identifying HCD's concern that the conditional approval conflicts with the SDBL, specifically Government Code section 65915, subdivision (e)(1), pertaining to waivers from development standards proposed by SDBL project sponsors. In the letter, HCD provided statutory interpretation supported by discussion of relevant, settled case law, and requested that the City/County elaborate on the Planning Commission's decision by providing written findings that reconcile how the required re-design of the project (specifically, the reduction in height) was legally consistent with the above-referenced SDBL provisions.

On October 13, 2022, HCD received a response letter from the City/County, which included a copy of the Planning Commission's approval motion and findings for approval. While HCD appreciates the City/County's response, it failed to address the request to provide findings consistent with the above-described legal justification. Absent a sufficient legal justification, HCD finds that in failing to grant the project sponsor's waiver request, the City/County violated the SDBL provisions set forth under Government Code section 65915, subdivision (e)(1).

### **Failure to Grant the Requested Waiver Violates the State Density Bonus Law**

As detailed in HCD's previous letter, under the SDBL, a local agency is not permitted to apply any development standard that physically precludes the construction of a qualifying density bonus project at its permitted density, and with the granted concessions/incentives, where applicable. (Gov. Code, § 65915, subd. (e).)<sup>2</sup> Once a project qualifies for a density bonus, "the law provides a developer with broad discretion to design projects with additional amenities even if doing so would conflict with local development standards." *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App 5th 755, 774-75 [289 Cal.Rptr.3d 268, 282]. Similarly, once a project qualifies for a density bonus, the SDBL does not authorize a local agency to deny a proposed waiver, including by way of a required re-design, based on the idea that the project conceivably could be redesigned to accommodate the same number of units without amenities. *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1346-47 [122 Cal.Rptr.3d 781, 793].

As previously noted, a local agency may refuse a proposed waiver or reduction of development standards only "if the waiver or reduction would have a specific, adverse impact . . . upon health, safety, or the physical environment," would have "an adverse impact" on an historic resource, or "would be contrary to state or federal law." (Gov. Code, § 65915, subd. (e)(1).) In this context, specific adverse impact "means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." (Gov. Code, § 65915, subd. (e)(1).)

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<sup>2</sup> See also *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 556 [284 Cal.Rptr.3d 587, 593].

HCD again emphasizes that the manner in which the City/County conditionally approved the Project directly conflicts with this settled SDBL interpretation. Specifically, the Planning Commission imposed a condition of approval requiring the project sponsor to re-design the building to a height of five stories, instead of the proposed six stories, based on the idea that such a re-design could accommodate the same number of units by making modifications elsewhere to the project design (i.e., by significantly reducing and eliminating proposed on-site amenities and relocating sixth floor units to the ground floor). The approval motion did not include the SDBL health and safety findings referenced above, which would have been required to legally substantiate the effective denial of the requested waiver. Accordingly, the City/County violated the SDBL pursuant to Government Code section 65915, subdivision (e)(1).

### **Conclusion and Next Steps**

Under Government Code section 65585, subdivision (i), HCD must give the City/County a reasonable time, no longer than 30 days, to respond to these findings. HCD provides the City/County until January 28, 2023, to provide a written response to these findings. In its response, the City/County should include, at a minimum, a specific plan and timeline for corrective action that allows the Project to move forward with the design and waiver proposed by the project sponsor without further delay or demonstrate that legally sufficient health and safety findings were made pursuant to Government Code section 65915, subdivision (e)(1). Failure to do so may result in further actions.

If you have questions or would like to discuss the contents of this letter, please contact Lisa Frank at [Lisa.Frank@hcd.ca.gov](mailto:Lisa.Frank@hcd.ca.gov).

Sincerely,

A handwritten signature in blue ink, appearing to read 'D. Zisser', with a long horizontal flourish extending to the right.

David Zisser  
Assistant Deputy Director  
Local Government Relations and Accountability

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August 11, 2022

Kate Conner, LEED AP  
Manager Priority Projects and Process  
Current Planning Division  
City and County of San Francisco  
49 South Van Ness Avenue, Suite 1400  
San Francisco, CA 94103

Dear Kate Conner:

**RE: City and County of San Francisco – Letter of Inquiry**

The purpose of this letter is to seek information on a housing project which is located at 3832 18<sup>th</sup> Street (Project) and to provide technical assistance to the City and County of San Francisco (City/County) regarding the application of State Density Bonus Law (SDBL). The California Department of Housing and Community Development (HCD) has become aware of the conditional approval of the Project and is concerned that the City/County's actions may run counter to the statutory provisions of SDBL.

**Project Description**

HCD understands the proposed Project is a six-story, 19-unit group housing development including three low-income units to achieve a 35-percent density bonus above the base density of 14 group housing units. The project applicant requested waivers from three development standards: height, rear-yard setback, and dwelling unit exposure. HCD understands the Project was determined to be exempt from California Environmental Quality Act (CEQA) review on May 24, 2021. HCD further understands the Planning Commission had scheduled the Project for hearing on July 15, 2021, but continued the item until October 14, 2021. At the October hearing, the Planning Commission granted a conditional use authorization (CUA) to the Project, which granted up to five stories in height, exceeding the existing 40-foot height limit, but below the 60-foot height requested by the Project sponsor as a waiver under SDBL. Finally, HCD understands the Board of Supervisors upheld the approval of the CUA during an appeal hearing conducted on March 15, 2022.

## Analysis

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 (i.e., no density bonus requested) 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)(1).)

Under the SDBL, a project is entitled to an unlimited number of waivers from development standards. Specifically, the City/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).)<sup>1</sup>

Under SDBL:

- The applicant may propose to have such standards waived or reduced. (Gov. Code, § 65915, subd. (e).)
- The City may require the applicant to provide reasonable documentation to establish eligibility for the waiver. (Gov. Code, § 65915, subd. (a)(2).)
- The City may deny waivers only under limited conditions. (Gov. Code, § 65915, subd. (e)(1).)<sup>2</sup>

Once a project qualifies for a density bonus, “the law provides a developer with broad discretion to design projects with additional amenities even if doing so would conflict with local development standards.” *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App 5<sup>th</sup> 755, 774-75 [289 Cal.Rptr.3d 268, 282]. A local agency may refuse the waiver or reduction only “if the waiver or reduction would have a specific, adverse impact . . . upon health, safety, or the physical environment,” would have “an adverse impact” on an historic resource, or “would be contrary to state or federal law.” (Gov. Code, § 65915, subd. (e)(1).) In this context, specific adverse impact “means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete.” (Gov. Code, §§ 65915, subd. (e)(1), and 65589.5, subd. (d)(2).)

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<sup>1</sup> See also *Schreiber v. City of Los Angeles* (2021) 69 Cal.App.5th 549, 556 [284 Cal.Rptr.3d 587, 593].

<sup>2</sup> Waivers may be denied only if the project has an adverse impact on health and safety that cannot be mitigated or avoided, the project has an adverse impact on a property in the California Register of Historic Properties, or approving the waiver would be contrary to State or Federal law. (Gov. Code, § 65915, subd. (e)(1).)

This provision does not authorize the City/County to condition a project based on the theory that another project with a similar number of units without amenities might conceivably be designed differently and accommodated without waivers. *Wollmer v. City of Berkeley* (2011)193 Cal.App.4th 1329, 1346-47 [122 Cal.Rptr.3d 781, 793].<sup>3</sup> The courts have made it clear that if a project qualifies under SDBL, and if waivers are needed to physically allow that project to go forward with the incentives and concessions granted, the waivers must be granted. The City/County may not deny a waiver based on the possibility that the project could be redesigned without amenities.

Thus, qualified SDBL project applicants need not consider various alternatives that might be plausible on the site without waivers. Accordingly, the City/County must waive the development standards requested pursuant to Government Code section 65915, subdivision (e). *Wollmer*, supra, 193 Cal.App.4th at pp. 1346-47 [122 Cal.Rptr.3d 781]. The only exception is where a local jurisdiction can make findings about specific adverse impacts, as noted above.

In conditionally approving the Project, the Planning Commission granted it up to five stories in height. However, the Project applicant requested a waiver of the site's 40-foot height limit and proposed a height of 60 feet to accommodate the Project's six stories. The redesigned Project would remove community amenity spaces and bicycle parking and relocate two units from the sixth floor to the ground floor. HCD is concerned that this action would not grant the Project the requested height restriction waiver to which it is entitled, potentially constituting an effective denial of a waiver under SDBL by conditioning the Project to remove the sixth floor and limiting the overall height to less than 50 feet.

For this reason, HCD requests that the City/County provide the written findings to HCD reconciling the approval of the CUA and SDBL provisions under Government Code Section 65915, subdivision (e), within 30 days (by September 11, 2022), explaining the legal justification and the evidence behind these decisions.

## **Conclusion**

As stated above, HCD is concerned that the Project has been improperly conditioned under SDBL. The State of California is in a housing crisis, and the provision of housing is a priority of the highest order. HCD has enforcement authority over SDBL (Gov. Code, § 65585). HCD encourages the City/County to reevaluate the CUA approved by the Planning Commission, and approve the Project as originally proposed by the Project applicant. In conditionally approving this project, the Planning Commission potentially

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<sup>3</sup> See also *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App 5<sup>th</sup> 755 [289 Cal.Rptr.3d 268].

failed to make required findings under SDBL to deny a waiver that was originally requested by a project applicant. HCD encourages the City/County to remain mindful of its obligations under the SDBL.

If you have questions or need additional information, please contact Kevin Hefner at [Kevin.Hefner@hcd.ca.gov](mailto:Kevin.Hefner@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