



Housing Legislation and Status Density Bonus Law Update

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State Density Bonus Law Update
and
Significant 2022 Housing Legislation

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This paper will be presented at the 2023 Cal Cities City Attorneys Spring Conference and provides an update on recent changes to State Housing statutes, including the State Density Bonus Law (SDBL). This paper will provide a detailed summary of the SDBL, recent legislative amendments to the SDBL, 2022 case law relating to SDBL, and a summary of the most recent updates to State Housing statutes including AB 2011, SB 682 and SB 423.

I. STATE DENSITY BONUS LAW

State Density Bonus Law (SDBL), codified at Government Code section 65915 *et.seq.*, was enacted in 1979. In summary, the SDBL encourages applicants to construct affordable housing units in exchange for an increase in density in a residential or mixed-use housing project, as long as the project includes a certain percentage of affordable units at specified levels of affordability. The levels of affordability include very-low income, low-income or moderate-income households and vary from county-to-county/region to region depending upon the area median income, or AMI.

In exchange for providing affordable housing units, a local agency grants to the applicant, an increase in the otherwise “maximum allowable gross residential density” (discussed below). If requested by the applicant, a local agency shall grant concessions/incentives and/or waivers/modifications of development standards (discussed below).

Despite having been enacted over 43 years ago, it is the authors’ collective opinion that applicants have historically been reluctant to utilize the benefits of the SDBL up until the last several years. While there are a variety of reasons for this hesitancy, we believe many applicants were cautious about creating a perception that they were insensitive to the concerns of their local communities relative to size, scale and density of proposed projects. In addition, applicants were reluctant to provide financial pro formas of their projects to justify a concession (which is no longer a requirement in the law). Rather than viewing SDBL as a right created decades ago by the State legislature, our experience is that applicants —up until just recently—have relied on SDBL sparingly to increase the number of units for their projects.

Through recent amendments to the SDBL, the legislature has made it easier for applicants to secure greater density or housing development projects and to request concessions and waivers of development standards without having to provide detailed financial information and by shifting the burden to substantiate a denial of a requested waiver or concession to the local agency.

The SDBL is first summarized below as it existed on December 31, 2022, and the paper continues with a discussion of amendments from the 2022 legislative session.

A. State Density Bonus Law as of 2022

Generally, the SDBL requires cities and counties to grant a density bonus (or an increase in the density of the development project), based on a specified formula, when an applicant for a housing development, which includes at least five units, agrees to construct a project that contains at least one of the following:

- a) Ten percent of the total units of a housing development for low-income households.
- b) Five percent of the total units of a housing development for very low-income households.
- c) A senior citizen housing development or age-restricted mobile home park.
- d) Ten percent of the units in a common interest development (CID) for moderate-income households provided the units are available for public purchase.
- e) Ten percent of the total units for transitional foster youth, disabled veterans, or homeless persons.
- f) Twenty percent of the total units for lower income students in a student housing development, as specified.

Government Code section 65915 (b) (1).

While it varies, in our experience, most market rate and affordable housing developers provide either ten percent of a project's units for low-income households or five percent of a project's units for very-low households, or some combination thereof. Given current market conditions, we see fewer market rate developers seeking entitlements for a common-interest development, even though only ten percent of the units are required to be set aside for moderate income households.

1. Concessions/Incentives and Waivers/Modifications

One of the most powerful aspects of the SDBL is an applicant's ability to apply for concessions/incentives and/or waivers/modifications to local development standards. In order to increase the density of a project, it is frequently necessary to increase the size and mass of the structure that requires and encompasses that increase in unit count. As a result, the SDBL allows a density bonus applicant to apply for a modification to (or elimination of) zoning standards on the following bases.

An applicant can request a "concession" or "incentive" of a development standard (e.g., site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio; see *Government Code section 65915 (o) (1)*) in order to facilitate the construction of the development including the density bonus or "extra" units. *Government Code section 65915 (k) and (l)*. To deny a concession or incentive, the local agency must find, based upon substantial evidence, that the requested concession or incentive: 1) does not result in identifiable and actual cost savings to the project to provide for the affordable housing costs; or 2) would have a specific adverse impact on public health, safety or on property which is listed on the state Register of Historical Resources and there is no feasible method to satisfactorily mitigate the specific adverse impact without making the project unaffordable to the affordable households; or 3) would be contrary to state or federal law. *Government Code section 65915 (d) (1)*.

The local agency has the burden of proving a denial of a requested concession or incentive. This is a high standard to meet and appears to make it very difficult for agencies to make the requisite findings based upon substantial evidence standard.

Prior to a Court of Appeals decision in 2021, local agencies routinely required a density bonus applicant to submit detailed financial pro-formas in order to justify a requested concession or incentive. Following Schreiber v. City of Los Angeles (69 Cal. App. 5th (2021)), local agencies can no longer require pro-formas to demonstrate project economic feasibility.

An applicant is also authorized by SDBL to request waivers or modifications of development standards that would have the effect of physically precluding the construction of the project including the affordable units. The most typical standards are height limits and setbacks. As with requested concessions or incentives, a local agency can only deny the requested waiver if it finds, based upon substantial evidence, that the waiver would have a specific adverse impact on public health or safety or on property which is listed on the state Register of Historical Resources and where there is no feasible method to satisfactorily mitigate the specific adverse impact or, is contrary to state or federal law.

Importantly, SDBL authorizes the award of attorneys' fees and costs if a court finds that the refusal to grant the requested waiver is in violation of the SDBL. *Government Code section 65915(e)*.

It is also important to keep in mind that an applicant may request an unlimited number of waivers in addition to being authorized to request the following number of incentives or concessions of development standards:

- (a) **One incentive or concession** for projects that include:
 - (i) At least 10 percent of the total units for lower income households;
 - (ii) At least 5 percent for very low-income households; or
 - (iii) At least 10 percent for moderate income persons and families in a development in which units are for sale.
 - (iv) At least 20 percent of the units for lower income students in a student housing development.
- (b) **Two incentives or concessions** for projects that include:
 - (i) at least 17 percent of the total units for lower income households;
 - (ii) at least 10 percent for very low-income household; or
 - (iii) at least 20 percent for moderate income persons and families in a development in which units are for sale.
- (c) **Three incentives or concessions** for projects that include:
 - (i) at least 24 percent of the total units for lower income household;

- (ii) at least 15 percent for very low-income households;
- (iii) or at least 30 percent for moderate income persons and families in a development in which the units are for sale.

(d) **Four incentives or concessions** for a project with at least 80 percent of the total units for lower income households and no more than 20 percent of the total units for moderate income households.

Government Code section 65915 (d) (2).

SDBL defines “maximum allowable residential density” as the density allowed under the zoning ordinance and land use element of a local agency’s general plan. If there is a density range, the maximum allowable residential density means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. If there is a conflict between the density allowed under the zoning ordinance and the land use element of the general plan, the general plan density prevails. *Government Code section 65915 (o) (5).*

Applicants for a density bonus are entitled to the following maximum density bonus depending upon the level of affordability provided by the developer:

- (a) 50% bonus for 15% of the units set aside for very-low-income households;
- (b) 50% bonus for 24% of the units set aside for low-income households; and
- (c) 50% bonus for 44% of the units set aside for moderate income households but which such units must be for sale only.

Government Code section 65915 (f).

Just because a applicant applies for a density bonus, does not mean the applicant is required to use all or any of the bonus units authorized under the SBDL. *Government Code section 65915 (f).* We have a number of clients that actually leave some amount of increased density on the table.

2. Parking Requirements

SDBL provides that, upon the applicant’s request, the local government may not require parking standards greater than the following (including parking for disabled persons and guests):

- (a) Zero to one bedroom: one onsite parking space per unit.
- (b) Two to three bedrooms: one and one-half onsite parking spaces per unit.
- (c) Four or more bedrooms: two and one-half parking spaces per unit.

Government Code section 65915 (p).

In the event the total number of parking spaces is a fractional number, the number is required to be rounded up to the next whole number. A developer can request parking

concessions and incentives in excess of those listed above and such a request for further reductions in parking requirements does not impact the number of concessions or incentives to which the developer is otherwise entitled.

Government Code section 65915 (p).

Additionally, if a rental project contains at least 80 percent of units for lower income residents and no more than 20 percent of units for moderate income residents, then, upon the request of a developer, a local government must eliminate parking minimums if the development is:

(a) Located within one-half mile of a “major transit stop” to which there is unobstructed access. “Major transit stop” is separated defined in Public Resources Code section 21155, which generally, requires there be bus or transit service with no greater than a 15-minute headway.

(b) Rental housing for persons who are 62 years of age or older, or a special needs rental housing development for lower income households, with paratransit service or unobstructed access, within one-half mile, to a fixed bus route that operates at least eight times per day.

(d) A supportive housing development of rental units for lower income households.

In order to qualify as “unobstructed access” to a major transit stop, the route must be free of natural or constructed impediments or obstacles such as freeways, rivers, mountains and bodies of water.

Government Code section 65915 (p).

2022 Amendments to State Density Bonus Law

Following is a summary of the bills passed in the 2022 legislative session amending the SDBL.

1. AB 2334 (Wicks)

This amendment allows a housing development project to achieve increased height and unlimited density if it is located in an urbanized area, with very low vehicle travel in specified counties, so long as 80% of the units are restricted to lower income households and no more than 20% are for moderate-income households.

“Very low vehicle travel area” is defined to mean an urbanized area where the existing residential development generates vehicle miles traveled (VMT) in a designated county. *Government Code section 65915 (o) (9).*

This bill also expands the following provisions, which currently apply to housing developments within one-half mile of a major transit stop that restrict 100 percent of units to

either low income or moderate-income households, to developments that are located in a very low vehicle travel area:

- (a) A height increases of up to three additional stories, or 33 feet.

Government Code section 65915 (d) (2) (D).

- (b) No imposition of maximum controls on density by the local government.

Government Code section 65915 (f) (3)(D) (ii).

The bill also adds “a minimum lot area per unit requirement” to the list of items considered a development standard *Government Code section 65915 (o) (2)*. The amendments further revise the definition of “maximum allowable residential density” to require density to be determined using the dwelling units per acre adopted by the local agency through either a zoning ordinance, specific plan or the land use element of the general plan. If a local agency does not have a dwelling units per acre standard, then “the maximum allowable density” must be calculated using the floor area ratio, lot size or other similar standard, and adopted by the local agency. *Government Code section 65915 (o)(6)*.

The amendment also mandates that greater density prevails if there is an inconsistency in the density between zoning ordinances and general plans (including specific plans). *Government Code section 65915 (o)(6)*.

2. AB 682 (Bloom)

This amendment prohibits a local agency from requiring any minimum unit size requirements or minimum bedroom requirements in conflict with the SDBL’s provisions with respect to a shared housing building eligible for a density bonus under these provisions. This approach seeks to maximize the number of units within permitted square footage by creating a new "shared housing" category within SDBL by automatically conferring two concessions to shared housing projects, such that these projects would not need to meet local requirements regarding minimum unit size and minimum bedroom requirement.

“Shared housing building” means a residential or mixed-use structure, with five or more shared housing units and one or more common kitchens and dining areas that are designed for permanent residence of more than 30 days by its tenants. The kitchens and dining areas within the shared housing building must adequately accommodate all residents. Such a “shared housing building” may include other dwelling units that are not shared housing units, so long as those dwelling units do not occupy more than 25 percent of the floor area of the shared housing building. A shared housing building may include 100 percent shared housing units.

“Shared housing unit” is defined to mean one or more habitable rooms, not within another dwelling unit, which includes a bathroom, sink, refrigerator, and microwave, and is used for permanent residence.

Government Code section 65915 (o) (7).

3. AB 1551 (Santiago)

Previously existing law, until January 1, 2022, required a city, county, or city and county to grant a commercial developer a “development bonus” when an applicant for approval of a commercial development had entered into an agreement for partnered housing with an affordable housing developer to contribute affordable housing through a joint project or 2 separate projects encompassing affordable housing.

AB 1551 added Government Code section 65915.7 which revives the above-described provisions regarding the granting of development bonuses to certain projects. The bill would require a city or county to annually submit to the Department of Housing and Community Development information describing an approved commercial development bonus.

“Development bonus” is defined to include the following:

- (1) Up to a 20-percent increase in maximum allowable intensity in the General Plan.
- (2) Up to a 20-percent increase in maximum allowable floor area ratio.
- (3) Up to a 20-percent increase in maximum height requirements.
- (4) Up to a 20-percent reduction in minimum parking requirements.
- (5) Use of a limited-use/limited-application elevator for upper floor accessibility.
- (6) An exception to a zoning ordinance or other land use regulation.

Government Code section 65915.7 (b).

II. 2022 CASE LAW REGARDING DENSITY BONUS LAWS

***Bankers Hill 150 v. City of San Diego*, 74 Cal.App.^{5th} 755, 289 Cal.Rptr. 3d 268 (2022). The granting of a concession or waiver shall not be required or interpreted to require a general plan amendment, zone change, or amendment to development standards.**

In *Bankers Hill 150 v. City of San Diego*, the court rejected a challenge by Park West Community Association (Association) that a 204-unit, 20-story mixed-use project in downtown San Diego was inconsistent with the city's land use regulations. The Association argued that the project was inconsistent with the city polices because it was too dense, too tall, improperly obstructed views, and towered over smaller adjacent buildings.

In seeking project approval, the developer sought a density bonus under the SDBL (Gov. Code §65915 et seq.). With this density bonus, the developer sought to exceed the maximum capacity of 147 units, increase height, avoid street setbacks, reduce driveway widths, eliminate two on-site loading spaces for trucks, and reduce the number of private storage areas for residents.

The Association argued that the city abused its discretion in approving the project because it was inconsistent with development standards and policies set forth in the City's General Plan and the Uptown Community Plan. The Association asserted the building's design improperly obstructed views, failed to complement neighboring Balboa Park, and towered over adjacent smaller-scale buildings. The Association argued that the City could not reasonably approve the project given its inconsistencies with the standards for development in the community.

The court noted that the Association did not take into account the developer's use of the SDBL. SDBL incentivizes the construction of affordable housing by allowing a developer to add additional housing units beyond the land use designation and secure other "incentives" in exchange for a commitment to provide affordable units. When a developer meets the requirements of the SDBL, a local government is *obligated* to approve projects with increased density, and grant waivers and/or concessions from development standards unless certain limited exceptions apply.

The court recognized that concessions may be rejected if the city can establish the concession would not result in identifiable and actual cost reductions to provide for affordable housing costs. The only other exceptions to the requirement to grant concessions or waivers and reductions of standards require a city to find, based on substantial evidence, that doing so (1) would have "a specific, adverse impact . . . upon public health and safety," (2) would have an adverse impact on any historic resource, or (3) would be contrary to state or federal law.

The court held that the developer was entitled to a waiver of *any* development standard that would have the effect of physically precluding the construction of the project at the permitted density and with the requested incentive unless the city could make the specified findings to warrant an exception from the SDBL.

III. QUESTIONS FOR DISCUSSION

- A.** If a local ordinance requires affordable unit to be integrated with market rate units, can concessions/waivers be used to allow affordable units to be in a separate building or parcel than market rate units?
- B.** How is "maximum allowable residential density" defined? Does the project need to provide maximum density required in the General Plan before it can seek concessions/waivers?
- C.** What type of documentation is required in denying a concession or waiver? Are findings required to be made and what evidence should be presented?
- D.** Does the SDBL require deed restrictions on affordable units (for sale or rental)?
- E.** Can a local agency's inclusionary housing ordinance requirements be counted toward affordable units to achieve a density bonus?

- F. What are some specific development standards that a local agency can legally deny?

IV. 2022 HOUSING LAWS

Following are the most significant changes made to the Housing Laws in the 2021-2022 legislative session.

1. SB 897 (Wieckowski) – Accessory Dwelling Units

This bill, codified at Government Code section 65852.2 (a) (1) (B) requires that the standards imposed on accessory dwelling units (ADUs) be objective. “Objective standard” is defined as a standard that involves no personal or subjective judgment by a public official and is uniformly verifiable, as specified. The bill would also prohibit a local agency from denying an application for a permit to create an accessory dwelling unit due to the correction of nonconforming zoning conditions, building code violations, or unpermitted structures that do not present a threat to public health and safety and are not affected by the construction of the accessory dwelling unit.

This bill would increase the maximum height limitation that may be imposed by a local agency on an accessory dwelling unit to 18 feet if the accessory dwelling unit is within $\frac{1}{2}$ mile walking distance of a major transit stop or a high-quality transit corridor, as those terms are defined, or if the accessory dwelling unit is detached and on a lot that has an existing multifamily, multistory dwelling, as specified. The bill would increase the maximum height limitation that may be imposed by a local agency on an accessory dwelling unit to 25 feet if the accessory dwelling unit is attached to a primary dwelling, except as specified.

This bill would change the height limitation applicable to an accessory dwelling unit subject to ministerial approval to 18 feet if the accessory dwelling unit is within $\frac{1}{2}$ mile walking distance of a major transit stop or a high-quality transit corridor, as those terms are defined, or if the accessory dwelling unit is detached and on a lot that has an existing multifamily, multistory dwelling, as specified. The bill would change the height limitation applicable to an accessory dwelling unit subject to ministerial approval to 25 feet if the accessory dwelling unit is attached to a primary dwelling, except as specified. The bill, if the existing multifamily dwelling exceeds applicable height requirements or has a rear or side setback of less than 4 feet, would prohibit a local agency from requiring any modification to the existing multifamily dwelling to satisfy these requirements. The bill would prohibit a local agency from rejecting an application for an accessory dwelling unit because the existing multifamily dwelling exceeds applicable height requirements or has a rear or side setback of less than 4 feet.

This bill would also prohibit a local agency from imposing any parking standards on an accessory dwelling unit that is included in an application to create a new single-family dwelling unit or a new multifamily dwelling on the same lot, provided that the accessory dwelling unit meets other specified requirements.

This bill would require a permitting agency to return in writing a full set of comments to the applicant with a list of items that are defective or deficient and a description of

how the application can be remedied by the applicant, if the permitting agency denies an application for an accessory dwelling unit or junior accessory dwelling unit.

2. AB 2011 (Wicks) – Ministerial Process for Housing on Property Designated for Office and Retail

Effective July 1, 2023, AB 2011 (which amends Government Code section 65400) creates a CEQA-exempt, ministerial approval process for multifamily housing developments on sites within a zone where office, retail or parking are the principally permitted use, not unlike SB 35. The law provides for two different qualifying criteria: (1) for 100-percent affordable projects; and (2) for mixed-income projects (typically 15% affordability) located "commercial corridors." AB 2011 projects must pay prevailing wages to construction workers and participate in apprenticeship programs

The expedited approval process allows for qualifying projects to be approved within 90 days for projects with less than 150 units or 180 days for projects with more than 150 units. If an AB 2011 application is deemed inconsistent with qualifying criteria, a local agency has 60 days for projects with less than 150 units, or 90 days for projects with more than 150 units, the local agency must identify those areas of inconsistency.

While a local agency may conduct design review, it must take place within the above-mentioned timeframes and be based only on objective standards.

AB 2011 mandates the affordable units be deed restricted to 55 years for rental units or 45 years for owner-occupied for both the 100-percent affordable housing projects in commercial zones and the mixed income housing projects along commercial corridors. For the mixed-income projects along commercial corridors, rental projects must include either 8% very low-income units and 5% extremely low-income units or 15% lower income. For owner-occupied projects, either 30% of the units must be reserved for moderate income households or 15% low income.

The law also provides densities at various levels (between 20 dwelling units/acre to 80 dwelling units/acre) in the commercial corridors depending on whether the project is located in a metropolitan area or not, the project site's size and its proximity to major transit. Development must meet objective standards for the closet zone in the city that permits multi-family residential use at the residential densities permitted under AB 2011; if no such zone exists, the project is permitted to carry the highest density within the city. Potential height limits can range from 35 feet to 65 feet. For these mixed-use commercial corridor projects, no parking can be required, except for EV parking spaces or accessible parking spaces.