

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

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December 14, 2021

Chris Burton, Director  
Planning, Building, and Code Enforcement Department  
City of San Jose  
200 E. Santa Clara Street  
San Jose, CA 95113

Dear Chris Burton:

**RE: City of San Jose – State Density Bonus Law, Letter of Inquiry and Technical Assistance**

The California Department of Housing and Community Development (HCD) is responsible for administering State Density Bonus Law (SDBL). (Gov. Code, § 65915.) HCD is aware that the City of San Jose (City) is currently reviewing a housing development application for a 271-unit affordable housing project located at 1007 Blossom Hill Road (Project). The purpose of this letter is to inquire as to the status of the Project's SDBL application and to provide technical assistance to the City regarding the application of SDBL.

**Background**

On May 10, 2021, JEMCOR Development Partners (Applicant) submitted a preliminary housing development application to the City pursuant to Chapter 654, Statutes of 2019 (Senate Bill 330). On May 17, 2021, within the 180-day timeframe outlined in statute<sup>1</sup>, the Applicant submitted a full application. The City is currently reviewing the full application.

The Project consists of 271 units (268 affordable units and three manager units). Due to the affordable units included in the Project, the applicant requests concessions, incentives<sup>2</sup>, and waivers as allowed by SDBL. Two of the requested concessions are relief from:

- General Plan (GP) Policy IP-5.12, specifically, paragraph 3: "Development that demolishes and does not adaptively reuse existing commercial buildings should substantially replace the existing commercial square footage."

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<sup>1</sup> Gov. Code, § 65941.1, subd. (d).

<sup>2</sup> The terms "concessions" and "incentives" are interchangeable. For purposes of this letter, HCD will use the term "concessions."

- City Council (CC) Policy 1-16: “The City of San Jose (the ‘City’) shall be the issuer of all bonds financing multifamily housing rental projects (a ‘Project’ or ‘Projects’) within the City except as provided...”

In the City’s September 29, 2021, correspondence to the Applicant, the City states that GP Policy IP-5.12 is ineligible as a concession under SDBL as the policy addresses a *use* requirement, not a *development standard*. [Emphasis added.] The statement implies the City believes concessions are limited to development standards. This is an incorrect interpretation of SDBL.

The September 29, 2021, correspondence is silent regarding the eligibility or approval of CC Policy 1-16 as a concession. Nor does the correspondence address whether the project falls under one of the exception categories described within the policy. The City has indicated to HCD<sup>3</sup>, “We have spoken to JEMCOR and the matter is under consideration.”

### **Under SDBL, concessions are not limited to development standards**

While waivers are restricted to development standards under SDBL,<sup>4</sup> Government Code section 65915, subdivision (k) provides a definition for concessions that is intentionally broad.

*(k) For the purposes of this chapter, concession or incentive means any of the following:*

*(1) A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission as provided in Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable and actual cost reductions, to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).*

*(2) Approval of mixed-use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and if the commercial, office, industrial, or other land uses are compatible with the housing project and the existing or planned development in the area where the proposed housing project will be located.*

*(3) Other regulatory incentives or concessions proposed by the developer or the city, county, or city and county that result in identifiable and actual cost*

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<sup>3</sup> November 18, 2011 email from Kemit Mawakana to Robin Huntley.

<sup>4</sup> Gov. Code, § 65915, subd. (e).

*reductions to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).*

The City's density bonus ordinance specifies the use of terms as they are defined in SDBL.<sup>5</sup> The SDBL definition clearly indicates that requirements beyond development standards are eligible as concessions. In subparagraph 3, the statute clearly identifies *regulatory* requirements that are proposed by the applicant and result in identifiable and actual cost reductions as eligible incentives or concessions under SDBL.

SDBL allows the City to require reasonable documentation to establish eligibility for the requested concession, including documentation that demonstrates an identifiable and actual cost reduction. It is HCD's understanding that the Applicant has provided documentation to the City demonstrating cost reduction for both requested concessions.

### **Under SDBL, concessions shall be granted**

Government Code section 65915, subdivision (d) requires cities to approve concessions unless specified written findings based on substantial evidence are made.<sup>6</sup> The only reasons to deny a concession are:

- The concession does not result in identifiable and actual cost reductions.
- The concession would have a specific, adverse impact (as defined) upon public health and safety or the physical environment or on real property listed in the California Register of Historical Resources, and there is no feasible method to mitigate or avoid the impact.
- The concession would be contrary to state or federal law.

As GP Policy IP-5.12 and CC Policy 1-16 are eligible concessions, the City may only deny the request for concessions if one of the three preceding written findings are made.

Notably, Government Code section 65915, subdivision (r) declares, "This chapter shall be interpreted liberally in favor of producing the maximum number of total housing units." Therefore, if ever in doubt regarding SDBL, the City should make the decision that facilitates housing development.

### **Potential changes to City requirements**

HCD is aware that the City is considering amending GP Policy IP-5.12. The December 14, 2021 City Council Staff Report for agenda item 10.4, on both page 5<sup>7</sup> and page 12,<sup>8</sup>

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<sup>5</sup> San Jose Municipal Code Chapter 20.190.020-Definitions, subdivision A.

<sup>6</sup> Gov. Code, § 65915, subd. (d)(1).

<sup>7</sup> "Staff noted that currently, affordable housing projects are using concessions under density bonus law to significantly reduce the amount of commercial the projects would otherwise be required to provide and concessions may further reduce the commercial requirement."

<sup>8</sup> "Staff found that projects which provide a certain level and number of affordable units can use density bonus law to reduce commercial obligations, providing flexibility under existing regulations."

confirms the eligibility of density bonus projects to use concessions to reduce the requirements of GP Policy IP-5.12. The statements imply the City has historically allowed relief from GP IP-5.12 as a concession under SDBL. Therefore, the City should not hesitate to approve a concession for relief from GP Policy IP-5.12 for the Project.

Additionally, language is proposed to exclude GP Policy IP-5.12 from eligibility under SDBL concessions or waivers.<sup>9</sup> City ordinances do not supersede state laws. Therefore, given the broader context of concessions as defined in SDBL<sup>10</sup>, relief from GP Policy IP-5.12 would continue to be eligible as a concession regardless of an ordinance's declaration to the contrary.

As a reminder, under SB 330, the City may only apply ordinances, policies, and standards adopted and in effect when a preliminary application was submitted.<sup>11</sup> Therefore, applicability of GP Policy IP-5.12 is limited to the requirements in effect on May 10, 2021.

### **Conclusion**

The City should identify GP Policy IP-5.12 and CC Policy 1-16 as eligible concessions under SDBL and deem the Project's application complete without further delay. Additionally, the City should advise the Applicant and HCD of its decisions regarding the Project.

As a reminder, AB 72 (Chapter 370, Statutes of 2017) expanded and clarified HCD's enforcement authority. Accordingly, HCD may review local government's actions and inactions to determine consistency with state law. If HCD finds that a city's act or omission does not substantially comply with state law, HCD may revoke its compliance finding for the housing element and may notify the California Office of the Attorney General that the local government is in violation of state law.<sup>12</sup>

If you have any questions, would like to discuss the content of this letter, or consult for technical assistance regarding SDBL, please contact Robin Huntley, of our staff, at [Robin.Huntley@hcd.ca.gov](mailto:Robin.Huntley@hcd.ca.gov).

Sincerely,



David Zisser  
Assistant Deputy Director  
Local Government Relations and Accountability

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<sup>9</sup> December 14, 2021 City Council Staff Report, Agenda Item 10.4, p. A-1.

<sup>10</sup> Gov. Code, § 65915, subd. (k).

<sup>11</sup> Gov. Code, § 65589.5, subd. (o).

<sup>12</sup> Gov. Code, § 65585.