

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

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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 18th 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).)¹

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).)²

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]. 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).)

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

² 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].³ 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

³ See also *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App 5th 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

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