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December 12, 2024

Elyse Lowe, Development Services Department Director
City of San Diego
202 C St.
San Diego, CA 92101

Dear Elyse Lowe:

RE: 970 Turquoise Street Project, San Diego – Letter of Technical Assistance

The California Department of Housing and Community Development (HCD) received a request for technical assistance regarding the application of the State Density Bonus Law (SDBL)[1] to the development project proposed at 970 Turquoise Street (Project). This letter provides technical assistance for the City of San Diego (City) and the Project applicant regarding the use of incentives and waivers under the SDBL.

Project Description and Background

HCD understands that the Project would comprise 74 dwelling units, of which five would be deed-restricted affordable to very low-income (VLI) households and another five would be deed-restricted affordable to moderate-income (MI) households, plus 139 visitor accommodation units, which are a commercial use under the City's Municipal Code.[2]

The Project's base density allows for 31 units. The Project is eligible for a 50-percent bonus (16 additional units) for the VLI units[3] and an additional 50-percent bonus (16 additional units) for MI units[4] under the SDBL. The Project is also eligible for an 11-unit bonus under the City's three-bedroom bonus provisions.

In addition, the Project is eligible for three incentives or concessions for providing the VLI units[5] and is also eligible for waivers or reductions of development standards which would have the effect of physically precluding the construction of the Project resulting from the use of those concessions or incentives.[6]

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[1] Gov. Code, § 65915.
[2] San Diego Municipal Code, § 131.0112, subd. (a)(6)(K), available at https://docs.sandiego.gov/municode/MuniCodeChapter13/Ch13Art01Division01.pdf.
[3] Gov. Code, § 65915, subd. (f)(2).
[4] Gov. Code, § 65915, subd. (v)(2).
[5] Gov. Code, § 65915, subd. (d)(2)(C).
[6] Gov. Code, § 65915, subd. (e)(1).

The Project applicant proposes to use an incentive to receive an additional 2.31 Floor Area Ratio (FAR) for the commercial component. The applicant further requests a waiver of the zoned 60-foot height limit and the 30-foot height limit under the City's Proposition D, for a proposed height of 240 feet, since those height limits would physically preclude construction of the Project with the additional 2.31 FAR.

The City has requested technical assistance on the following questions:

Question #1: The City understands that incentives and waivers may be provided for non-residential uses. Given that the waivers for height and FAR are predominantly for the non-residential use, does HCD have guidance as to what factors the City may evaluate and to what extent can those waivers and incentives be used to increase the non-residential use component?

The SDBL states that a city shall grant a requested concession or incentive unless the city makes one of three findings, one of which is particularly relevant here.[7] That finding is that the incentive or concession does not "result 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)."[8] (Emphasis added.) Section 50052.5 of the Health and Safety Code defines "affordable housing cost" for owner-occupied housing for extremely low-income (ELI), VLI, low-income (LI) and MI households. Moreover, SDBL requires that "rents for the lower-income density bonus units shall be set at an affordable rent, as defined in Section 50053 of the Health and Safety Code."[9]

In other words, the incentive or concession must not just reduce costs (i.e., support the economic feasibility of the Project); that reduction in cost must be for the purposes of *providing affordable housing for lower-income or moderate-income households.*

The statute does not provide precise direction regarding how to determine whether the benefit of a requested incentive or concession has the requisite nexus to the provision of affordable housing. However, the Legislature's intent language provides helpful direction in implementing the SDBL provisions regarding waivers and incentives. The statute reads:

> "In enacting this chapter it is the intent of the Legislature that the density bonus or other incentives offered by the city, county, or city and county pursuant to this chapter *shall contribute significantly to the economic feasibility of lower income housing* in proposed housing developments."[10] (Emphasis added.)

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[7] Gov. Code, § 65915, subd. (d)(1).
[8] Gov. Code, § 65915, subd. (d)(1)(A).
[9] Gov. Code, § 65915, subd. (c)(1)(B)(i).
[10] Gov. Code, § 65917.

Again, the Legislature has made it clear that the purpose of incentives is to support the economic feasibility *of lower-income housing* specifically. The statute further reads:

> "The Legislature finds and declares that the intent behind the Density Bonus Law is to allow public entities to reduce or even eliminate subsidies for a particular project by allowing a developer to include more total units in a project than would otherwise be allowed by the local zoning ordinance *in exchange for* affordable units. It further reaffirms that the intent is to cover at least some of the financing gap *of affordable housing* with regulatory incentives, rather than additional public subsidy."[11] (Emphasis added.)

The City could conclude that the requested incentive in this case directly facilitates the affordable housing, in which case the SDBL compels the City to approve the requested incentive and associated waiver. On the other hand, the City might conclude that the Project does not need the requested incentive to cover the cost of "provid[ing] for affordable housing costs."[12] If the City so concludes, the SDBL places the burden of proof on the City to deny the requested incentive and associated waiver by making a written finding, based on substantial evidence, that the incentive does not result in identifiable and actual cost reductions to provide for affordable housing.[13]

Question #2: What guidance does HCD have for cities to define what is an amenity eligible for density bonus and waivers compared to what is an entirely new project component?

"Amenity" is not a term used in the SDBL. The concept of an amenity has been discussed in appellate court decisions, most notably in the context of courtyards.[14] A visitor accommodation use is not an amenity but rather a separate land use in a mixed-use project. Mixed-use projects are eligible for SDBL incentives, concessions, and waivers, consistent with the information provided in response to Question #1 above.

Question #3: When evaluating a mixed-use project, is there a minimum amount of residential component to justify that the project is in fact a housing development? Are there any parameters that would prevent the applicant from providing 1 percent of the square footage for housing and 99 percent of the square footage for any non-residential use of its choice?

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[11] Gov. Code, § 65915, subd. (u)(1).
[12] Gov. Code, § 65915, subd. (d)(1)(A).
[13] Gov. Code, § 65915, subds. (d)(1)(A), (d)(4).
[14] See, for example, Wollmer v. City of Berkeley, 179 Cal.App.4th 933 (2009) [102 Cal.Rptr.3d 19] and Bankers Hill 150 v. City of San Diego, 74 Cal.App.5th 755 (2022) [289 Cal.Rptr.3d 268].

The SDBL statute does not include a definition of "mixed-use developments" and does not explicitly require a minimum residential component (other than the minimum required five residential units).[15] However, an SDBL project would be subject to a jurisdiction's zoning requirements unless it were eligible for a concession, incentive, or waiver. For this Project, the amount of non-residential use would naturally be limited by the City's zoning requirements (including FAR and height limits) unless the Project uses a concession, incentive, or waiver to increase those limits. As discussed in the response to Question #1 above, the value of the concessions, incentives, or waivers must directly facilitate the proposed quantity and depth of affordability of the affordable units. A project whose floor area is 99 percent commercial and 1 percent residential would likely be outside of these parameters and the concessions, incentives, or waivers needed to achieve that ratio would likely not be required under the SDBL.

Finally, the SDBL statute reads, "This chapter shall be interpreted liberally in favor of producing the maximum number of total housing units."[16] While the SDBL contains no explicit requirement for a minimum percentage of residential floor area in a mixed-use development,[17] an interpretation that a project with the minimum of five residential units is essentially entitled to a theoretically infinite amount of non-residential floor area could result in an absurd outcome that does not further the fundamental purpose of the SDBL.

Question #4: If visitor accommodation uses operate as a residential use with long-term stays, can visitor accommodations and vacation rentals count towards density bonus? If so, should the units be reported as permitted units on a Housing Element Annual Progress Report for purposes of tracking RHNA progress?

The answer is "no." The visitor accommodation use is deemed a commercial use in the City's municipal code. In addition, the Project has already maximized the number of housing units allowed on the site on top of the 31 units allowed under the base density. There would be no legal way for the visitor accommodation units to be added to the project as housing units. Accordingly, the visitor accommodation units are considered commercial uses, not housing units, and cannot be counted for the purposes of the SDBL, nor can they be reported as housing units on an Annual Progress Report.

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[15] Gov. Code, § 65915, subd. (i).
[16] Gov. Code, § 65915, subd. (r).
[17] In contrast, the Housing Accountability Act provides that, to qualify as a "housing development project," a mixed-use project must have "at least two-thirds of the square footage designated for residential use." (Gov. Code, § 65589.5, subd. (h)(2)(B).) Note that this definition is used in nearly every one of California's housing laws, including but not limited to the Streamlined Ministerial Approval Process (Gov. Code, § 65913.4 (m)(7)), the Housing Crisis Act of 2019 (Gov. Code, § 66300, subd. (a)(6)), the Permit Streamlining Act (Gov. Code, § 65940, subd. (d)), and the Affordable Housing and High Road Jobs Act (Gov. Code, § 65912.101, subd. (e)).

Question #5: If visitor accommodation uses operate as a residential use with long-term stays, are there additional provisions of state law that would allow the City to require a deed-restriction for affordable housing?

As discussed in the response to Question #4 above, the visitor accommodation units are considered commercial uses, not housing units. Therefore, the visitor accommodation units cannot serve as deed-restricted affordable housing units.

Conclusion

The SDBL permits the City to approve the requested incentive and associated waiver *or* to deny the requested incentive and associated waiver by making a written finding, based on substantial evidence, that the incentive does not result in identifiable and actual cost reductions to provide for affordable housing. In addition, the proposed visitor accommodation units must be considered a commercial use, not a residential use.

HCD appreciates the opportunity to provide technical assistance on this matter. If you have any questions regarding the content of this letter or would like additional technical assistance, please contact Stephanie Reyes at Stephanie.Reyes@hcd.ca.gov.

Sincerely,

Shannan West
Housing Accountability Unit Chief