



May 25, 2021

**VIA EMAIL**

City Council  
City of Cupertino  
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RE: Resolution No. 20-141 and Ordinance No. 21-2226

To the City Council:

Californians for Homeownership is a 501(c)(3) non-profit organization devoted to using impact litigation to address California's housing crisis. I am writing as part of our work monitoring local compliance with California's laws regarding density bonuses.

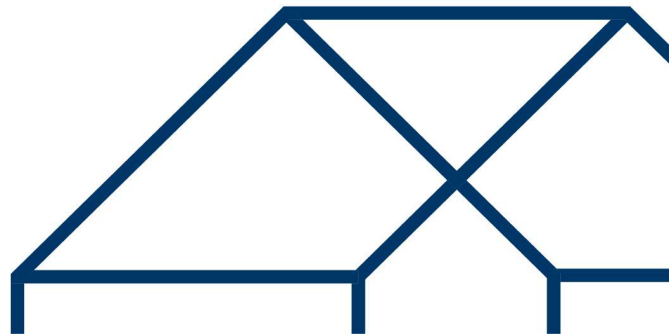
Last year, as part of its continuing effort to address the housing crisis, the Legislature passed AB 2345, Stats. 2020, c. 197. AB 2345 enhances the state's existing density bonus program by providing increased density bonus incentives. The law provides a limited exception for cities that had demonstrated a commitment to addressing the housing crisis by adopting enhanced density bonus programs prior to the end of 2020, codified at Government Code Section 65915(s).

In response to AB 2345, on December 15, 2020, the City adopted Resolution No. 20-141. Through the Resolution, the City sought to have its cake and eat it too: it adopted a nonbinding resolution—which it knew would not have legal effect—in an attempt to meet the law's deadline without committing the City to any particular course of action.

But the Resolution did not earn the City the exemption provided by Government Code Section 65915(s). The rest of this letter explains why.<sup>1</sup> If the City believes it has a valid legal basis for a contrary view, we ask that it provide that explanation to us by close of business this Friday, May 28, 2021.

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<sup>1</sup> We note that the City has also received correspondence from other public interest groups, including a December 15, 2021 letter from YIMBY Law that the City received before Resolution No. 20-141 was adopted. It also received a May 3, 2021 Technical Assistance letter from the state Department of Housing and Community Development (HCD), attached here, before it adopted Ordinance No. 21-2226.



Resolution No. 20-141 was an invalid attempt to pass a zoning ordinance by resolution.

Cupertino is a general law city and is subject to all of the provisions of the Government Code relating to the adoption of local laws. Government Code Sections 65850 *et seq.* sets forth the procedural requirements for adopting zoning ordinances. Among other things, a zoning ordinance includes any ordinance that regulates the “size of buildings and structures” or the “intensity of land use.” Gov. Code § 65850(c). Government Code Section 65854 requires that zoning ordinances only be adopted following a hearing before the City’s Planning Commission, subject to significant public notice requirements.

Courts look to the nature of an ordinance, not a local government’s characterization of it, to determine whether these procedural safeguards apply. *See People v. Optimal Glob. Healing, Inc.*, 241 Cal. App. 4th Supp. 1, 8 (2015) (ordinance setting criminal penalties related to medical marijuana businesses was a zoning ordinance despite characterization as a nuisance ordinance, and would have been subject to Section 65854 if not passed as a voter initiative).

Resolution No. 20-141 is a quintessential zoning ordinance, regulating the size of buildings and the intensity of residential land use within the City. There is nothing in the Government Code that would allow the City to adopt a modification to its density bonus rules by resolution.<sup>2</sup> Perhaps more than anything else, any argument that the Resolution was not a zoning ordinance is undermined by the City’s own conduct in later passing Ordinance No. 21-2226 as a zoning ordinance, with a fully noticed hearing before the Planning Commission.

These are not mere technical concerns. Because Resolution No. 20-141 was invalid, it could not be relied on by an applicant seeking to develop housing in the City. During the period between the adoption of Resolution No. 20-141 and the effective date of Ordinance No. 21-2226, a project opponent could successfully argue that the City is required to reject housing projects being developed under the new limits in Resolution No. 20-141, given the City’s failure to validly adopt these new limits. Ordinance No. 21-2226 will go into effect on June 3—far too late to bring the City within the ambit of the exemption provided in Government Code Section 65915(s).

We note that the City could have adopted a change to its density bonus rules through an urgency zoning ordinance under Government Code Section 65858, which (if validly adopted) would have resulted in a bona fide zoning ordinance that could bring the City within the Section 65915(s) exemption. We can only assume that the City chose not to go this route because it did not want to actually commit itself to its new density bonus rules in 2020, or because it did not believe it could comply with the substantive requirements of Section 65858.

Ordinance No. 21-2226 is invalid because it violates AB 2345.

Because Resolution 20-141 is invalid, the City is not entitled to the exemption in Government Code Section 65915(s). Accordingly, because Ordinance No. 21-2226 purports to

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<sup>2</sup> Nor is the City helped by characterizing the change as a “housing program”—a Housing Element component that would need to be adopted through an amendment to the City’s General Plan, with all of the procedures required for such an amendment.

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implement state density bonus law, it must fully comply with the current requirements in Government Code Section 65915.

It does not. Among other things, the Ordinance provides a 40 percent maximum density bonus for mixed-income projects, whereas state law requires the City to provide a 50 percent maximum bonus. Gov. Code § 65915(f)(1). Ordinance No. 21-2226 is therefore invalid.

Sincerely,



Matthew Gelfand

cc: City of Cupertino

Deborah Feng, City Manager (by email to [deborahf@cupertino.org](mailto:deborahf@cupertino.org))

Dianne Thompson, Asst. City Manager (by email to [diannet@cupertino.org](mailto:diannet@cupertino.org))

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Piu Ghosh, Planning Manager (by email to [piug@cupertino.org](mailto:piug@cupertino.org))

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