

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

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May 3, 2021

Deborah Feng, City Manager
City of Cupertino
10300 Torre Avenue
Cupertino, CA 95014-3202

RE: City of Cupertino Resolution No. 20-141 and Ordinance No. 21-2226 (Density Bonus) – Letter of Technical Assistance

Dear Deborah Feng:

The California Department of Housing and Community Development (HCD) is aware of the City of Cupertino's (City) actions at its December 15, 2020 City Council meeting adopting Resolution No. 20-141 and subsequent action at its April 20, 2021 City Council meeting approving Ordinance No. 21-2226. It is HCD's understanding that Ordinance No. 21-2226 is scheduled for its second reading at the City Council's May 4, 2021 meeting.

HCD's opinion is that Resolution No. 20-141 and Ordinance No. 21-2226 are insufficient to meet the exemption provisions set forth in Government Code section 65915, subdivision (s), and that the City should apply current State Density Bonus Law (SDBL) as amended by Assembly Bill (AB) 2345 (Chapter 197, Statutes of 2020). HCD offers the following technical assistance to help inform decision-makers.

The intent of AB 2345 is that it would apply statewide with limited exceptions.

When drafting AB 2345, the Legislature referred to successful density bonus programs in the Cities of San Diego¹ and Los Angeles. With the intent to create a provision allowing programs currently successful in incentivizing housing development to continue as implemented,² the bill included the exemption process provided for in Government Code section 65915, subdivision (s).

(s) Notwithstanding any other law, if a city, including a charter city, county, or city and county has adopted an ordinance or a housing program, or both an ordinance and a housing program, that incentivizes the development of affordable housing

¹ "The City of San Diego took steps to enhance the state's existing (density bonus) program and generated significant interest to build additional affordable and market-rate housing. Communities across California can take a page from the lessons learned in San Diego." Assembly Floor Analysis, 08/31/2020, p. 2

² "The amendments also ensure that cities like Los Angeles with programs like the Transit Oriented Communities (TOC) Affordable Housing Incentive Program that have created effective super density bonus programs are not impacted by this bill." Assembly Floor Analysis, 08/31/2020, p. 2.

that allows for density bonuses that exceed the density bonuses required by the version of this section effective through December 31, 2020, that city, county, or city and county is not required to amend or otherwise update its ordinance or corresponding affordable housing incentive program to comply with the amendments made to this section by the act adding this subdivision, and is exempt from complying with the incentive and concession calculation amendments made to this section by the act adding this subdivision as set forth in subdivision (d), particularly subparagraphs (C) and (D) of paragraph (2) of that subdivision, and the amendments made to the density tables under subdivision (f).

The City's actions on Resolution No. 20-141 and Ordinance No. 21-2226 clearly indicate the City's intent to implement the exemption process provided in paragraph (s). However, the City's actions fall short of the successful programs envisioned by the Legislature.

The City's resolution failed to create a program.

As a matter of law, adoption of a resolution is nonbinding and does not create a program. Therefore, the City's adoption of Resolution 20-141 on December 15, 2020, failed to create a housing program as required by subdivision (s). On its face, the resolution only committed the City to adopting an ordinance at some point in the future, but that commitment is nonbinding. Unlike a housing element program (see Gov. Code, § 65583, subd. (c)), the nonbinding commitment in the resolution does not require the City to implement a new policy. It is merely a statement of the City's intent to adopt a new policy in the future. Therefore, the SDBL as amended by AB 2345 is in effect in Cupertino, and Cupertino must comply with the formulas for density bonuses and concessions and incentives that AB 2345 provides.

The City's resolution fails to incentivize beyond the requirements in place on December 31, 2020, and limits access to the concessions and incentives allowed by AB 2345.

Over time, the Legislature has realized that substantial enticements beyond density bonus units are needed to incentivize the development of affordable housing. Provisions such as incentives and concessions, waivers, and reduced parking standards have been deemed essential to incentivize affordable housing. It is generally recognized that these "other tools are even more helpful to project economics than the density bonus itself."³

Accordingly, the subdivision (s) exemption to AB 2345 contemplates something more than simply allowing a developer to request a density bonus that is only slightly higher than the 35 percent maximum bonus in effect on December 31, 2020, without providing additional mechanisms that incentivize development. This conclusion is further supported by Government Code section 65915, subdivision (r), which provides, "This chapter shall be interpreted liberally in favor of producing the maximum number of total housing units."

³ See, e.g., Jon Goetz and Tom Sakai, Guide to the California Density Bonus Law (Meyers Nave, January 2020, p.2).

Resolution No. 20-141 and Ordinance No. 21-2226 fail to provide for the reduced threshold requirements to qualify for incentives and concessions pursuant to AB 2345,⁴ nor do they provide for other mechanisms that incentivize housing development beyond the SDBL requirements in place on December 31, 2020.

Conclusion

HCD has reviewed the City's Resolution No. 20-141 and Ordinance No. 21-2226 under its authority pursuant to Government Code section 65585, which extends to State Density Bonus Law (Gov. Code, § 65915). HCD has found that neither Resolution 20-141 nor Ordinance No. 21-2226 meet the threshold for exemption from recent legislative changes. Accordingly, the City must apply State Density Bonus Law by processing density bonus applications in accordance with AB 2345 and take no further steps to adopt Ordinance No. 21-2226.

If you have any questions or would like to discuss the content of this letter, please contact Robin Huntley of our staff at Robin.Huntley@hcd.ca.gov.

Sincerely,

A handwritten signature in black ink, appearing to read "Shannan West", written in a cursive style.

Shannan West
Land Use and Planning Unit Chief

⁴ AB 2345 reduced the threshold from 20 percent to 17 percent lower-income units to receive two incentives/concessions and from 30 percent to 24 percent lower-income units to receive three incentives/concessions. (Gov. Code, § 65915, subds. (d)(2)(B-C).)