



Memorandum

TO: HONORABLE MAYOR
AND CITY COUNCIL

FROM: Planning Commission

SUBJECT: SEE BELOW

DATE: April 20, 2018

SUBJECT: PP14-036: AN ORDINANCE OF THE CITY OF SAN JOSE ADDING A NEW CHAPTER 20.190 TO TITLE 20 OF THE SAN JOSE MUNICIPAL CODE AND AMENDING SECTION 5.08.450 OF CHAPTER 5.08 OF THE SAN JOSE MUNICIPAL CODE TO IMPLEMENT CALIFORNIA GOVERNMENT CODE SECTIONS 65915 ET SEQ. (STATE HOUSING DENSITY BONUSES AND INCENTIVES LAW) AND PROVIDE AFFORDABLE HOUSING INCENTIVES CONSISTENT WITH THE SAN JOSE GENERAL PLAN

RECOMMENDATION

The Planning Commission vote 7-0-0 to recommend that the City Council consider the Determination of Consistency with the Final Program Environmental Impact Report for the Envision San Jose 2040 General Plan (the FEIR) and Addenda thereto, and adopt the recommended changes to Title 20 of the Municipal Code to implement California Government Code Sections 65915 et seq. (State Housing Density Bonuses and Incentives Law) and provide affordable housing incentives consistent with the San Jose General Plan.

OUTCOME

If adopted by City Council, Chapter 20.190 of Title 20 of the San Jose Municipal Code will implement California Government Code Sections 65915 et. seq. (State Housing Density Bonuses and Incentives Law) by establishing procedures for consideration of requests for density bonuses, and development incentives and waivers for development projects that include restricted affordable housing units. Failure to adopt this ordinance or a similar ordinance does not relieve the City from complying with the State Housing Density Bonuses and Incentives Law.

BACKGROUND

On March 21, 2018, the Planning Commission conducted a public hearing on the proposed amendments to the Zoning Ordinance. The Commission voted to remove the item from the Consent Calendar and the item was heard under Public Hearing. While there was no public testimony on the item, the Planning Commission asked staff to comment on the March 20, 2018, letter from Dennis Martin on behalf of the Building Industry Association (BIA). Specifically, Commissioner Abelite asked about the level of community staff had with the BIA. Staff noted that significant community outreach had been conducted on the proposed Zoning Ordinance changes. A community meeting was held May 02, 2016. Staff provided the BIA with an update of the proposed Zoning Ordinance changes in June 2016. Subsequently, the BIA submitted a comment letter with suggested changes. Staff considered these changes, and a refined proposed Ordinance was presented at the January 27, 2017, Developers and Construction Roundtable. The item was also presented at the March 16, 2018 Developers and Construction Roundtable. No other communication was received from BIA until March 20, 2018, one day prior to the Planning Commission public hearing. Staff has since met with Mr. Martin and Ms. Sausedo on April 6, 2018, to review their comment letter.

Commissioner Abelite inquired whether Mr. Martin correctly noted that the Density Bonus Ordinance violates state law. Staff stated that Mr. Martin's letter incorrectly identifies areas of the Density Bonus Ordinance as being in conflict with state law. Specifically, staff responded that Mr. Martin's letter incorrectly states that the City limits the developer's ability to ask for other incentives or concessions not prescribed by the Ordinance because proposed Section 20.190.060(D) states that other incentives will be granted, unless the requested incentive would not: 1) reduce the cost of construction for the project 2) have an adverse impact as defined by the state law; or 3) the incentive is contrary to state or federal law. Mr. Martin's letter is further incorrect in asserting that the City placed the burden of proof on the applicant to prove whether a waiver or modification of a development standard is necessary to build a proposed project. Staff noted that Section 20.190.090(C)(3) specifically identifies the *City* as the party with the burden to prove that a requested incentive, concession, or waiver cannot be approved.

Commissioner Abelite inquired about the urgency of considering the ordinance and asked whether staff would be willing to meet with the BIA to discuss raised in their letter. Staff noted that there is no pressing legal requirement to adopt the ordinance, but that the Zoning Code changes have been an outstanding item in the City's Housing Element since 2015; adopting an ordinance would help streamline the density bonus process for the development community as more affordable housing projects would likely be proposed in the City. Staff indicated that they were willing to meet with BIA members; subsequently a meeting was held on April 6, 2018.

City Attorney Todorov clarified that the letter from Mr. Martin was correct in that there were some discrepancies between the City's Inclusionary Housing Ordinance and the proposed Density Bonus Ordinance. The City's Inclusionary Ordinance, which has not been updated since its approval in 2010, intends to state that if a project meets the type of housing required for a density bonus under state law, and the project has the percentage of housing required for that type of housing to qualify for a density bonus, the project can be granted a density bonus even

though the qualifying units are already required under the inclusionary ordinance. There were also incentives included in the inclusionary ordinance that were not incentives required by the state law at that time. Those incentives no longer reflect state law. After the Planning Commission hearing, staff updated the draft ordinance to amend Section 5-.8.450 of the Municipal Code to clarify that an inclusionary project is entitled to a density bonus, and will be granted the bonus, and any concessions or incentives to which the project is entitled under State law as set forth in Title 20.

ANALYSIS

A complete analysis of the issues regarding the Zoning Ordinance changes is contained in the attached Planning Commission Staff Report.

EVALUATION AND FOLLOW UP

If the proposed Zoning Ordinance amendments are approved by Council, the new Ordinance will be effective 30 days after the second reading.

PUBLIC OUTREACH/INTEREST

Public outreach for this proposal complies with the City Council's Public Outreach Policy and the Municipal Code. A public hearing notice including the Planning Commission and City Council hearing dates was published in the San José Post-Record and emailed to a list of interested groups and individuals. Staff posted the hearing notice, staff report and draft ordinance on the PBCE Department website. Staff has been available to discuss the proposal with interested members of the public.

City staff presented the highlights of the proposed ordinance at a Developer's Ratable meeting on January 27, 2017. Those in attendance were generally supportive of the new Ordinance and did not provide specific comments.

Staff met with Dennis Martin and Pat Sausedo of the BIA on April 6, 2018, to discuss the March 20, 2018, letter sent to the Planning Commission. It was discussed that many of the BIA concerns were related to how the staff report was written and not the actual proposed Ordinance. However, Mr. Martin and Ms. Saucedo shared that they would like to see a more liberal interpretation of state law to encourage the development of affordable housing. Specifically, staff was asked to expand the types of automatic incentives offered in the Ordinance, eliminate the requirement for unit disbursement, and include a provision that all density calculation resulting in fractional units be rounded up to the next whole number, as required by state law.

Staff is currently not proposing any other automatic incentive option, as the majority of projects coming in to the City requesting an incentive or concession have asked for a reduced setback. The City's automatic incentive addresses the most popular request of developer to date.

Staff is also not proposing to amend section 20.190.050 to remove the Development Standards related to the disbursement of affordable units throughout the project. The Development Standards ensure that the affordable units have a similar appearance as the market-rate units, and that these units are dispersed throughout the building. These Design Standards do not prevent the construction of a project. Finally, while the proposed Ordinance does not specifically indicate that state law will be followed for the density bonus unit calculation, the proposed Ordinance does not preclude rounding up fractional units. State Density Bonus law has changed frequently in the last few years. In order to minimize the need for future updating, the proposed Ordinance clearly states that state law will be followed, rather than repeating current law.

COORDINATION

The preparation of the proposed ordinance and this staff report were coordinated with the Housing Department and the City Attorney's Office.

CEQA

Determination of Consistency with the Final Program Environmental Impact Report for the Envision San Jose 2040 General Plan (the FEIR) and Addenda thereto was prepared for this ordinance.

/s/

ROSALYNN HUGHEY, SECRETARY
Planning Commission

For questions please contact Lea Simvoulakis, Supervising Planner, at (408) 535-7837.

Attachments: Planning Commission Staff Report and Attachments



Memorandum

TO: PLANNING COMMISSION

FROM: Rosalynn Hughey

SUBJECT: SEE BELOW

DATE: March 21, 2018

SUBJECT: PP14-036: AN ORDINANCE OF THE CITY OF SAN JOSE ADDING CHAPTER 20.190 TO TITLE 20 OF THE SAN JOSE MUNICIPAL CODE TO IMPLEMENT CALIFORNIA GOVERNMENT CODE SECTION 65915 ET SEQ (STATE HOUSING DENSITY BONUSES AND INCENTIVES LAW) AND PROVIDE AFFORDABLE HOUSING INCENTIVES CONSISTENT WITH THE SAN JOSE GENERAL PLAN

RECOMMENDATION

Recommend the Planning Commission consider the Determination of Consistency with the Final Program Environmental Impact Report for the Envision San Jose 2040 General Plan (the FEIR) and Addenda thereto, and recommend that the City Council approve an ordinance adding Chapter 20.190 to Title 20 of the San Jose Municipal Code to implement California Government Code Sections 65915 et seq (State Housing Density Bonuses and Incentives Law) and provide affordable housing incentives consistent with the San Jose General Plan.

OUTCOME

If adopted by City Council, Chapter 20.190 of Title 20 of the San Jose Municipal Code will help the City implement California Government Code Sections 65915 et. seq (State Housing Density Bonuses and Incentives Law) by establishing procedures for consideration of requests for density bonuses, and development incentives and waivers for development projects that include restricted affordable housing units. Failure to adopt this ordinance or a similar ordinance does not relieve the City from complying with the State Housing and Density Bonuses and Incentives Law.

BACKGROUND

Brief Legislative History

The California State Density Bonus Law, Government Code Section 65915, was first enacted in 1979. This legislation was passed to address the state's lack of affordable housing and incentivize its development. By providing incentives for developers to include affordable housing units within their projects, developers are granting increased density for their projects, and allotted other development benefits. Over the course of several decades the law has been modified to be more prescriptive about the granting of density bonuses and incentives. Prior to 2004, developers could get a 25 percent increase in density in exchange for the inclusion of 10 to

20 percent affordable housing units within a project. After 2004, the proportion of affordable units needed to obtain a density bonus decreased, and the maximum bonus increased to 35 percent. Since this major shift in 2004, the statute has been amended to include everything from an increase in the duration of affordability restrictions, to a reduction in parking requirements for projects near transit stops. The passage of the most recent assembly bills by Governor Brown in 2016 clarify and strengthen the California Legislature's intent to encourage affordable development by further incentivizing affordable and senior housing.

Adopting the recommended Density Bonuses and Incentives Ordinance will facilitate the implementation of state law. The recommended ordinance offers specific incentives and concession to encourage the construction of affordable homes while remaining sufficiently flexible to respond to market conditions across the City, as analyzed below

ANALYSIS

New Chapter 20.190 of Title 20 of the San Jose Municipal Code

Density Bonus Provisions

New Chapter 20.90 confirms that that the City will grant density bonuses required by State law when an applicant requests a bonus and agrees to execute and record a Regulatory Agreement for the construction and maintenance of restricted affordable units or senior citizen housing development uses. Per State law, new Chapter 20.190 requires that a density bonus be selected by the applicant from only one of the below categories and provides a maximum 35 percent bonus.

Density Bonus Percentages				
Restricted Affordable Units or Category	Minimum Percentage of Restricted Affordable Units	Percentage of Density Bonus Granted	Additional Bonus for Each 1% Increase in Restricted Affordable Units	Percentage of Restricted Affordable Units Required for Maximum 35% Density Bonus
Very Low Income	5%	20%	2.5%	11%
Lower Income	10%	20%	1.5%	20%
Moderate Income	10%	5%	1%	40%
Senior Citizen Housing	100% (senior)	20%	-----	-----
Qualifying Mobile Park	100% (senior)	20%	-----	-----

A density bonus can be applied to residential projects of five or more units that provide affordable or senior housing. The greater the affordability levels, the greater the density bonus to allow more dwelling units (up to 35 percent) than otherwise allowed on the site by the applicable General Plan and Zoning District designation. The density bonus may be approved only in conjunction with a

development permit. As required by State law, new Chapter 20.190 also identifies bonuses in response to certain donations of land and the inclusion of childcare centers in some developments.

State Parking Incentives

The State Housing Density Bonus and Incentives Law requires reduced parking requirements for projects that qualify for a density bonus even if the developer does not request a density bonus, incentive, or waiver. New Chapter 20.90 confirms that the City will apply the parking ratios set forth in state law, if requested by the applicant. The modified parking requirements under state law are:

State Law Parking Incentives	
0 to 1 bedroom units	1 parking space
2 to 3 bedroom units	2 parking spaces
4 and more bedroom units	2.5 parking spaces
Further reductions in parking for certain restricted affordable projects located within 1/2 mile of, and having unobstructed access to, a major transit stop.	

City Incentives and Concessions

New Chapter 20.90 confirms that that the City will grant up to three incentives (from a collection of five options) as required by State law, when an applicant who would be eligible for a density bonus agrees to execute and record a Regulatory Agreement for the construction and maintenance of restricted affordable units or senior citizen housing development. The five incentives to choose from are:

1. A reduction in required parking spaces per state law, as noted above;
2. Front setback reduction up to five feet;
3. Rear setback reduction up to five feet;
4. Rear corner setback reduction up to five feet;
5. Additional parking reduction beyond the state-mandated reduced parking that may result in no required parking for some affordable-housing projects.

The allowed setback reduction ranges from 1-5 feet, depending on the percentage of restricted affordable units and the category of affordability (very-low, low or moderate income unit.). The ordinance parking reductions are listed below:

Parking Reduction		
Restricted Affordable Units or Category	Reduced No. of Parking Spaces Required (if a reduction results in a negative number then the required number of parking spaces will be zero.)	
Very Low Income	0 to 1 bedroom unit	0
	2 to 3 bedroom unit	0.25
	4 or more bedroom unit	0.5
Lower Income	0 to 1 bedroom unit	0.25
	2 to 3 bedroom unit	0.5
	4 or more bedroom unit	0.75
Moderate Income	0 to 1 bedroom unit	0.5
	2 to 3 bedroom unit	0.75
	4 or more bedroom unit	1

The benefit of selecting specific incentives narrows the scope of potential incentives that the City will have to grant, and provides more certainty and predictability to developers. State law does not identify which incentives a developer can ask for, making it difficult to know if the City will be willing to grant a requested incentive. By setting specific requirements to achieve an incentive, findings for approval or denial of incentives becomes easier.

It is the applicant's responsibility to demonstrate that the requested incentive will result in identifiable and actual cost reduction necessary to offset the costs of building the affordable units. If a developer requests other incentives besides the ones listed above, the City must grant the incentive unless the incentive would not result in an identifiable and actual cost reduction, or if the incentive would have an adverse impact on public health, safety welfare, or contrary to state or federal law.

Waivers

New Chapter 20.90 also confirms that, per State law, an applicant may apply for a waiver or "modification" of a development standard that will have the effect of physically precluding the construction of a project at the increased density or with allowable incentives permitted by Chapter 20.190. Waivers can be granted in addition to the incentives discussed above. It is the applicant's responsibility to prove that the Development Standard requested to be waived or

modified will have the effect of physically precluding the construction of the affordable project at the specific density requested with the granted incentives.

Findings

New Chapter 20.90 also confirms that, per State law, the responsible City decision maker must make the following findings, based on evidence in the record, before approving an application for a density bonus, incentive or waiver:

1. The Housing Development is eligible for a Density Bonus and any Incentives, waivers or modifications requested;
2. If the Density Bonus is based all or in part on donation of land, all the requirements for a land transfer density bonus that are specified in the State Housing Density Bonus and Incentives Law will be met;
3. If the Density Bonus or Incentive request is based all or in part on the inclusion of a Child Care Facility, all the requirements for a Child Care Facility Density Bonus that are specified in the State Housing Density Bonus and Incentives Law will be met;
4. If the Incentive includes a request for approval of Mixed-Use development, all the requirements for a Mixed Use Incentive development approval that are specified in the State Housing Density Bonus and Incentives Law have been met;
5. If the Incentive includes a request for approval of condominium conversion, all the requirements for a condominium conversion Incentive that are specified in the State Housing Density Bonus and Incentives Law have been met.

New Chapter 20.90 also confirms that the City will only deny an application for a density bonus, incentive, or waiver, as allowed by State law, and only upon making the findings required by State law for such denial.

General Plan: Housing Element Objectives

The State Department of Housing and Community Development (HCD) certified the City's Housing Element for the 2014-2023 planning period on April 30, 2015. Part of the Housing Element's objective is to provide housing throughout the City in a range of residential densities and types to address the needs of an economically diverse population. Goal H-2 states that the General Plan's goal is to increase the affordable housing supply such that 15% or more of the new housing stock developed is affordable to low, very low, and extremely low income households. Policy IP-5.1 also establishes an Urban Village goal that, with full build out of the planned housing capacity of any given Village, 25% or more of the units built would be deed restricted affordable housing, with 15% of the units targeting households with income below 30% of the Area Median Income. Policy H-2.4 of the General Plan encourages the use of density bonuses as described by state law and the City's local ordinance to increase densities beyond the maximum density allowed under the Land Use/Transportation Diagram. This ordinance will help the city achieve Goal H-2 and implement Policy IP-5.1. Adoption of a Density Bonus Ordinance was identified as an action item in the Implementation section of the General Plan and in the Housing Element.

The General Plan aims to create vibrant, complete communities with a mix of commercial, retail, civic, and residential uses. A major challenge to maximizing this type of environment is ensuring that there are housing options for a range of household incomes. A density bonus ordinance, like the one proposed, with incentives, concessions, and waivers will encourage the development of affordable units so that future and existing communities will accommodate all levels of income.

Conclusion

Approval of this ordinance will help facilitate the City's implementation of the State Density Bonus law and incentivize affordable housing projects. As more affordable units are built, the City will be able to maintain its status as an economically diverse place to live.

PUBLIC OUTREACH/INTEREST

Public outreach for this proposal complies with the City Council's Public Outreach Policy and the Municipal Code. A public hearing notice including the Planning Commission and City Council hearing dates was published in the San José Post-Record and emailed to a list of interested groups and individuals. Staff has posted the hearing notice, staff report and draft ordinance on the PBCE Department's website and has been available to discuss the proposal with interested members of the public.

City staff presented the highlights of the proposed ordinance at a Developer's Routable meeting on January 27, 2017. The developers present were supportive of the new Ordinance and did not have any comments.

COORDINATION

The preparation of the proposed ordinance and this staff report were coordinated with the Housing Department and the City Attorney's Office.

CEQA

Determination of Consistency with the Final Program Environmental Impact Report for the Envision San Jose 2040 General Plan (the FEIR) and Addenda thereto was prepared for this ordinance.



ROSALYNN HUGHEY, ACTING DIRECTOR
Planning, Building and Code Enforcement

For questions, please contact Lea C. Simvoulakis, Supervising Planner at 408-535-7837.

Attachments: Draft Ordinance

**DETERMINATION OF CONSISTENCY WITH THE
ENVISION SAN JOSÉ 2040 GENERAL PLAN FINAL ENVIRONMENTAL IMPACT
REPORT AND SUPPLEMENTAL PROGRAM ENVIRONMENTAL IMPACT
REPORT (SCH# 2009072096) AND ADDENDA THERETO**

Pursuant to Section 15168(c)(2) of the CEQA Guidelines, the City of San José has determined that the project described below is pursuant to or in furtherance of the Final Program Environmental Impact Report (Final Program EIR) and Supplemental Program Environmental Impact Report (Supplemental Program EIR) for the Envision San José 2040 General Plan and addenda thereto, and does not involve new significant impacts beyond those analyzed in the above EIRs. Therefore, the City of San José may take action on the project as being within the scope of both the Final and Supplemental Program EIRs.

File Number and Project Name: PP14-036, Chapter 20.190 Affordable Housing Density Bonus and Incentives Ordinance

An Ordinance of the City of San José adding Chapter 20.190 to Title 20 of the San José Municipal Code to implement California Government Code Section 65915 (State Housing Density Bonus and Incentives Law) and provide affordable housing incentives consistent with the San José General Plan.

The purpose of this chapter is to establish procedures to grant density bonuses, development incentives, waivers, and reduce parking ratios to development projects that include affordable housing units.

Location: Citywide.

Council District: All Council Districts.

The environmental impacts of this project were addressed by a Final Program EIR entitled, "Envision San José 2040 General Plan Final EIR," adopted by City Council Resolution No. 76041 on November 1, 2011, and addenda thereto; and Supplemental Program EIR entitled, "Envision San José 2040 General Plan Supplemental EIR," adopted by City Council Resolution No. 77617 on December 15, 2015, and addenda thereto. The Final Program EIR and Supplemental Program EIR were prepared for the comprehensive update and revision of all elements of the City of San José General Plan, including an extension of the planning timeframe to the year 2035. The following impacts were reviewed and found to be adequately considered by the EIRs:

- | | | |
|---------------------------------------------------------------|---------------------------------------------------------------------|------------------------------------------------------------------|
| <input checked="" type="checkbox"/> Transportation | <input checked="" type="checkbox"/> Land Use | <input checked="" type="checkbox"/> Noise and Vibration |
| <input checked="" type="checkbox"/> Air Quality | <input checked="" type="checkbox"/> Biological Resources | <input checked="" type="checkbox"/> Geology and Soils |
| <input checked="" type="checkbox"/> Hydrology & Water Quality | <input checked="" type="checkbox"/> Hazardous Materials and Hazards | <input checked="" type="checkbox"/> Public Facilities & Services |
| <input checked="" type="checkbox"/> Cultural Resources | <input checked="" type="checkbox"/> Aesthetics | <input checked="" type="checkbox"/> Energy |
| <input checked="" type="checkbox"/> Population and Housing | <input checked="" type="checkbox"/> Greenhouse Gas Emissions | <input checked="" type="checkbox"/> Public Facilities & Services |

☒ Cumulative Impacts
☒ Mineral Resources

☒ Growth Inducing Impacts
☒ Hazardous Materials and Hazards

☒ Agriculture
☒ Public Facilities & Services

Background

In September 2016, the California State Legislature passed a number of bills that amended the residential housing density bonus statutes found in California Government Code Section 65915. The approved bills were signed into law by Governor Brown with the enacted laws taking effect January 1, 2017. Section 65915(d)(3) mandates that cities establish procedures for dealing with incentive or concession requests. Consistent with this government code section, Chapter 20.190 of Title 20 of the San José Municipal Code provides incentives for the production of housing for very low income, low income, and moderate income households. This ordinance also identifies incentives and concession for senior citizen projects and qualifying mobile home projects.

Project Description

The proposed project consists of adding Chapter 20.190 to Title 20 of the San José Municipal Code to implement California Government Code Section 65915 (State Housing Density Bonus and Incentives Law) and provide affordable housing incentives consistent with the San José General Plan.

ANALYSIS

The Envision San José 2040 General Plan maintains a commitment to meeting regional housing obligations by requiring the production of an adequate supply of high-quality affordable housing throughout the city. As the City grows through 2040, its largest population growth segments will be seniors ages 65+ and the 20-34 age group. As such, the Envision San José 2040 General Plan requires that the city preserve and improve San José's existing affordable housing stock and increase its supply such that 15% or more of the new housing stock developed is affordable to low, very low, and extremely low income households. The State Department of Housing and Community Development (HCD) requires that cities identify how they will meet their affordable housing requirements in a certified Housing Element. The HCD certified the City's Housing Element for the 2014-2023 planning period on April 30, 2015. Adoption of a Density Bonus was identified as an action item in the Implementation section of the General Plan's Housing Element. A density bonus ordinance, along with other affordable housing programs administered through the City's Department of Housing, are aligned with the General Plan's goals and policies related to addressing the production of affordable housing in the city.

The proposed new chapter to the Zoning Code will not have the potential to create new negative impacts to the environment beyond those previously analyzed in the Final Program EIR and Supplemental Program EIR for the Envision San José 2040 General Plan, and Addenda thereto. Although the proposed code changes would allow increased residential densities beyond those specifically contemplated in the General Plan Land Use/Transportation Diagram, the Housing Element in the General Plan contemplated providing housing throughout the City in a range of residential densities and includes goals and policies to increase affordable housing through increases in density beyond those contemplated in the Land Use/Transportation Diagram. This

range can be increased with each individual project, and the specific impacts of those projects will be analyzed during project level environmental review.

Goal H-2.4 of the General Plan encourages the use of density bonuses as described by state law and the City's local ordinance to increase densities beyond the maximum density allowed under the Land Use/Transportation Diagram. Currently the General Plan aims to create vibrant, complete communities with a mix of commercial, retail, civic, and residential uses. A major challenge to maximizing this type of environment is ensuring that there are housing options for a range of household incomes. A density bonus ordinance, like the one proposed, with incentives, concessions, and waivers will encourage the development of affordable units so that future and existing communities will accommodate all levels of income.

3/9/2018
Date

Rosalynn Hughey, Interim Director
Planning, Building and Code Enforcement

Meenaxi R. P.
Deputy

Meenaxi R. Panakkal, AICP
Supervising Environmental Planner

ORDINANCE NO.

**AN ORDINANCE OF THE CITY OF SAN JOSE ADDING A
NEW CHAPTER 20.190 TO TITLE 20 OF THE SAN JOSE
MUNICIPAL CODE TO IMPLEMENT CALIFORNIA
GOVERNMENT CODE SECTIONS 65915 ET SEQ. (STATE
HOUSING DENSITY BONUSES AND INCENTIVES LAW)
AND PROVIDE AFFORDABLE HOUSING INCENTIVES
CONSISTENT WITH THE SAN JOSE GENERAL PLAN**

WHEREAS, pursuant to Section 15168 of the CEQA Guidelines, the City of San José has determined that the proposed Ordinance is pursuant to, in furtherance of and within the scope of the previously approved program evaluated in the Final Program Environmental Impact Report for the Envision San José 2040 General Plan (the "FEIR"), for which findings were adopted by City Council through its Resolution No. 76041 on November 1, 2011, and Supplemental EIR Resolution No. 77617, adopted by City Council on December 15, 2015, and Addenda thereto and does not involve new significant impacts beyond those analyzed in the FEIR or the Supplemental EIR;

NOW, THEREFORE, BE IT ORDAINED BY THE COUNCIL OF THE CITY OF SAN JOSE:

A new chapter is added to Title 20 of the San José Municipal Code, to be numbered, entitled and to read as follows:

CHAPTER 20.190

AFFORDABLE HOUSING DENSITY BONUSES AND INCENTIVES

20.190.010 Purpose

The purpose of this Chapter is to:

- A. Specify how the City will implement the requirements of California Government Code Section 65915 *et seq.* ("State Housing Density Bonuses and Incentives Law"); and
- B. Facilitate the development of affordable housing consistent with the goals, objectives, and policies of the City's General Plan Housing Element as may be amended from time to time.

20.190.020 Definitions

- A. All terms used in this Chapter that are defined in the State Housing Density Bonuses and Incentives Law shall have meaning established by the State Housing Density Bonuses and Incentives Law, as the same may be amended from time to time. As of date of publication of the ordinance adopting this Chapter 20.190, the following terms are defined in the State Housing Density Bonuses and Incentives Law: Affordable Rent; Affordable Housing Cost; Child Care Facility; Density Bonus; Housing Development; Development Standard; Incentive; Low, Very Low, or Moderate Income; Maximum Residential Density; Qualifying Mobilehome Park; and Senior Citizen Housing Development.
- B. All terms used in this Chapter that are defined in Chapter 20.200 of this Code shall have the meaning established in Chapter 20.200. Where terms that are defined in the State Housing Density Bonuses and Incentives Law are inconsistent with the definitions of the same terms set forth in Chapter 20.200 of this Code, the meaning of the terms in the State Housing Density Bonuses and Incentives Law shall prevail.
- C. Whenever the following terms are used in this Chapter, they shall have the meaning established by this Section:

1. "Applicant" means any person, firm, partnership, association, joint venture, corporation, or any entity or combination of entities who seeks a Discretionary Approval from the City for a Housing Development and also includes the owner of the property if the Applicant does not own the property on which the Housing Development is proposed.
2. "Approval Authority" means the person or body within the City that is authorized to provide initial Discretionary Approval of a Housing Development.
3. "Density Bonus Units" means those dwelling units granted pursuant to the provisions of this Chapter that exceed the otherwise Maximum Residential Density for a Housing Development Site that are established in the City's General Plan.
4. "Director" means the Director of Planning, Building and Code Enforcement.
5. "Discretionary Approval" means any approval related to a Housing Development that requires the exercise of judgment or deliberation by the Approval Authority including, but not limited to, development exceptions, variances, Development Permits, general plan and specific plan approvals and amendments, zoning ordinances and amendments, and tentative maps.
6. "Non-Restricted Unit" means any dwelling unit within a Housing Development excluding the Restricted Affordable Units.

7. "Regulatory Agreement" means a recorded and legally binding agreement on a form approved by the City, executed by the Applicant and ensuring that the requirements of this Chapter are satisfied. A Regulatory Agreement, among other things, shall establish: the number of Density Bonus Units and Restricted Affordable Units, their size, location, terms and conditions of affordability or age restrictions for Senior Citizen Housing Development units, the identity of any Incentives and the development production schedule, and provision for the payment of the City's cost of monitoring compliance with the Regulatory Agreement and this Chapter.
8. "Restricted Affordable Unit" means a dwelling unit within a Housing Development that will be available at an Affordable Rent or Affordable Housing Cost as specified in the State Housing Density Bonuses and Incentives Law.
9. "State Housing Density Bonuses and Incentives Law" means Government Code Section 65915 *et seq.* and all amendments and additions thereto, now or hereinafter enacted, that impose requirements applicable to the City related to the provision of housing Density Bonus(es) and Incentives.
10. "Unobstructed Access" means having a path of travel that is always publicly accessible.

20.190.030 Density Bonuses

A. Density Bonus Units

The City will grant Density Bonus(es) if required by the State Housing Density Bonuses and Incentives Law when an Applicant timely requests such a Density Bonus for a Housing Development and agrees to execute and record a Regulatory Agreement providing for the construction and maintenance of Restricted Affordable Units or Senior Citizen Housing Development units as specified by the State Housing Density Bonuses and Incentives Law.

B. Density Bonus Calculations

The number of required Restricted Affordable Units, Senior Citizen Housing Development units and permitted Density Bonus Units shall be calculated in accordance with the State Housing Density Bonuses and Incentives Law.

C. Replacement of Pre-Existing Very Low or Low Income Units

1. An Applicant shall be ineligible for a Density Bonus or any other Incentives or waiver or modification of Development Standards under this Chapter if the Housing Development is proposed on any property that includes a parcel or parcels on which rental dwelling units are or, if the dwelling units have been vacated or demolished in the five (5) year period preceding the application, have been subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of Low or Very Low Income; or subject to any other form of rent or price control through a public entity's valid exercise of its police power; or occupied by Low or Very Low Income households, unless the proposed

Housing Development replaces those units, and either of the following applies:

- a. The proposed Housing Development, inclusive of the units replaced pursuant to this paragraph, contains Restricted Affordable Units at the percentages specified in the State Housing Density Bonuses and Incentives Law.
 - b. Each unit in the Housing Development, exclusive of a manager's unit or units, is affordable to, and occupied by, either a Low or Very Low Income household.
2. For the purposes of Subsection C.1, "replace" shall mean either of the following:
- a. If any dwelling units described in Subsection C.1. are occupied on the date of submission of the application for a Housing Development, the proposed Housing Development shall provide at least the same number of units of equivalent size or type, or both, to be made available at Affordable Rent or Affordable Housing Cost to, and occupied by, persons and families in the same or lower income category as those households in occupancy. For unoccupied dwelling units described in Subsection C.1, in a development with occupied units, the proposed Housing Development shall provide units of equivalent size or type, or both, to be made available at Affordable Rent or Affordable Housing Cost to, and occupied by, persons and families in the same or lower income category in the same proportion of affordability as the occupied units. All replacement calculations resulting in fractional

units shall be rounded up to the next whole number. If the replacement units will be rental dwelling units, these units shall be subject to a recorded affordability restriction for at least fifty-five (55) years. If the proposed development is for-sale units, the units replaced shall be subject to Section 20.190.100.C.5.

- b. If all dwelling units described in Subsection C.1 have been vacated or demolished within the five (5) year period preceding the Application, the proposed Housing Development shall provide Restricted Affordable Units equal to or greater than the maximum number of Units of equivalent size or type, or both, as existed at any point in time in the five (5) year period preceding the Application, to be made available at Affordable Rent or Affordable Housing Cost to, and occupied by, persons and families in the same or lower income category as those persons and families in occupancy at that time, if known. If the incomes of the persons and families in occupancy at that time is not known, then one-half of the required units shall be made available at Affordable Rent or Affordable Housing Cost to, and occupied by, Very Low Income persons and families and one-half of the required units shall be made available for rent at Affordable Housing Cost to, and occupied by, Low Income persons and families. All replacement calculations resulting in fractional units shall be rounded up to the next whole number. If the replacement units will be rental dwelling units, these units shall be subject to a recorded affordability restriction for at least fifty-five (55) years. If the proposed development is for-sale units, the units replaced shall be subject to 20.190.100.C.5.

20.190.040 Additional Density Bonuses and State Incentives

A. Land Donation and Transfer for Very Low Income Units

The City will grant additional Density Bonuses if required by the State Housing Density Bonuses and Incentives Law for land donation and transfer for Very Low Income Restricted Affordable Units, when an Applicant requests an additional Density Bonus, the Applicant donates and transfers to the City, or a housing developer approved by the City, land that is acceptable to the City for the development of Very Low Income Restricted Affordable Units in accordance with the requirements of the State Housing Density Bonuses and Incentives Law.

B. Condominium Conversion

If required by the State Housing Density Bonuses and Incentives Law, the City will grant a Density Bonus, or at the City's option, provide other Incentives of equivalent financial value, for the conversion of apartments to condominiums, if no prior Density Bonus was awarded for the apartments, the Applicant agrees to pay for the reasonably necessary administrative costs incurred by the City pursuant to this Subsection B, and the Applicant: 1) is seeking approval to convert apartments to a condominium project; 2) requests an additional Density Bonus; and 3) agrees to provide Restricted Affordable Units as specified by the State Housing Density Bonuses and Incentives Law and this Chapter 20.190. Nothing contained in this Section shall be construed to require the City to approve a proposal to convert apartments to condominiums.

C. Child Care Facility

The City will grant an additional Density Bonus, if required by the State Housing Density Bonuses and Incentives Law, when an Applicant provides a Child Care Facility as specified in the State Housing Density Bonuses and Incentives Law, or at the City's option, provide an additional Incentive that contributes significantly to the economic feasibility of the construction of the Child Care Facility, unless the City finds, based upon substantial evidence, that the community has adequate Child Care Facilities. The Child Care Facility shall be required to remain in operation for a period of time that is as long as, or longer than, the period of time during which the Density Bonus Units are required to remain affordable and the Child Care Facility shall meet or exceed the attendance percentages for children of Very Low, Low and Moderate Income as specified in the State Housing Density Bonuses and Incentives Law.

D. Maximum Parking Ratios

Upon the request of the Applicant, the City will apply the maximum parking ratios set forth in the State Housing Density Bonuses and Incentives Law for vehicular parking, inclusive of parking for people with disabilities and guest parking, in a Housing Development that qualifies for a Density Bonus, except where the City is allowed to impose a higher parking ratio under the State Housing Density Bonuses and Incentives Law, based on either an area-wide, or jurisdiction-wide, parking study conducted within the seven (7) years prior to the date of the request.

20.190.050 Development Standards for Restricted Affordable Units

A. Concurrent Construction

Restricted Affordable Units shall be constructed concurrently with Non-Restricted Units unless both the City and the Applicant agree within the Regulatory Agreement to an alternative schedule for construction.

B. Design Standards

Restricted Affordable Units shall be built on-Site and be dispersed within the Housing Development, except as approved by the City and expressly permitted in the Regulatory Agreement. The design, square footage, appearance and general quality of the Restricted Affordable Units shall be compatible with the design of the Non-Restricted Units in the Housing Development. In order to achieve compatibility, Restricted Affordable Units shall be located so as not to create a geographic concentration of Restricted Affordable Units within the Housing Development; the quality of exterior design and overall quality of construction of the Restricted Affordable Units shall be consistent with the exterior design of all Non-Restricted Units in the Housing Development; the design, square footage, appearance, finishes, features and general quality of the Restricted Affordable Units shall be functionally equivalent to the Non-Restricted Units; Restricted Affordable Units shall have functionally equivalent parking to Non-Restricted Units; and except as may be modified pursuant to a Regulatory Agreement, shall meet all Site, design, and construction standards included in Title 17 (Buildings and Construction), Title 19 (Subdivisions), and Title 20 (Zoning) of this Code, and shall also comply with all design guidelines included in applicable specific plans or otherwise adopted by the City Council, and all

administrative regulations adopted pursuant to Section 20.190.110 for the implementation of this Chapter 20.190.

20.190.060 City Density Development Incentives

A. General

In addition to the parking Incentive required by the State Housing Density Bonuses and Incentives Law, the City will provide up to three (3) Incentives as specified in this Section 20.190.060 to an Applicant for a Housing Development that qualifies for a Density Bonus based on the provision of Affordable Restricted Units, if required by the State Housing Density Bonuses and Incentives Law.

B. Parking and Setback Incentives

If an Applicant for a Housing Development that qualifies for a Density Bonus based on the provision of Restricted Affordable Units, requests one of the following Incentives, the grant of the Incentive will be deemed to be required in order to provide the Affordable Restricted Units and, in the absence of substantial evidence to the contrary, will be deemed not to have a specific adverse impact upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and not to be contrary to state or federal law:

1. The following reduction in the number of parking spaces required under Chapter 20.90 of this Code, if over and above the reduction that is required under the State Housing Density Bonuses and Incentives Law:

TABLE 20-290

Restricted Affordable Units or Category	Reduced No. of Parking Spaces Required (if a reduction results in a negative number then the required number of parking spaces will be zero.)	
Very Low Income	0 to 1 bedroom unit	0
	2 to 3 bedroom unit	0.25
	4 or more bedroom unit	0.5
Low Income	0 to 1 bedroom unit	0.25
	2 to 3 bedroom unit	0.5
	4 or more bedroom unit	0.75
Moderate Income	0 to 1 bedroom unit	0.5
	2 to 3 bedroom unit	0.75
	4 or more bedroom unit	1

2. The following reduction in the Setback Area, Front that would otherwise be required under Chapter 20.30 of this Code:

TABLE 20-300

Housing Type	
Very Low Income	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 5% Restricted Affordable Units; 1 additional foot reduction for each additional 2% increase in the number of Restricted Affordable Units; to a maximum 5 foot reduction.
Low Income	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 10% Restricted Affordable Units; 0.5 additional foot reduction for each additional 2.5% increase in the number of Restricted Affordable Units; up to a maximum 5 foot reduction.
Moderate income	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 10% Restricted Affordable Units; 0.5 additional foot reduction for each additional 7% increase in the number of Restricted Affordable Units; up to a maximum 5 foot reduction.

3. The following reduction in the Setback Area, Rear Interior that would otherwise be required under Chapter 20.30 of this Code:

TABLE 20-310

Housing Type	
Very Low Income	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 5% Restricted Affordable Units; 1 additional foot reduction for each additional 2% increase in the number of Restricted Affordable Units; to a maximum 5 foot reduction.
Low Income	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 10% Restricted Affordable Units; 0.5 additional foot reduction for each additional 2.5% increase in the number of Restricted Affordable Units; to a maximum 5 foot reduction.
Moderate income	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 10% Restricted Affordable Units; 0.5 additional foot reduction for each additional 7% increase in the number of Restricted Affordable Units; to a maximum 5 foot reduction.

4. The following reduction in the Setback Area, Rear Corner that would otherwise be required under Chapter 20.30 of this Code:

TABLE 20-320

Housing Type			
Zone	R-1-8, R-1-5, R-1-2, R-1-1, R-1-1-RR, R-2	R-M	R-MH
Very Low Income	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 5% Restricted Affordable Units; additional 1 foot reduction for each additional 2% increase in the number of Restricted Affordable Units; to a maximum 5 foot reduction.	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 5% Restricted Affordable Units; additional 1 foot reduction for each additional 1% increase in the number of Restricted Affordable Units; to a maximum 5 foot reduction.	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 5% Restricted Affordable Units; additional 1 foot reduction for each additional two percent 2% increase in the number of Restricted Affordable Units; to a maximum 3 foot reduction.

Low Income	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 10% Restricted Affordable Units; additional 0.5 foot reduction for each additional 2.5% increase in the number of Restricted Affordable Units; to a maximum 5 foot reduction.	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 10% Restricted Affordable Units; additional 1 foot reduction for each additional 2% increase in the number of Restricted Affordable Units; to a maximum 5 foot reduction.	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 10% Restricted Affordable Units; additional 1 foot reduction for each additional 5% increase in the number of Restricted Affordable Units; to a maximum 3 foot reduction.
Moderate income	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 10% Restricted Affordable Units; additional 0.5 foot reduction for each additional 7% increase in the number of Restricted Affordable Units; to a maximum 5 foot reduction.	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 10% Restricted Affordable Units; additional 1 foot reduction for each additional 3% increase in the number of Restricted Affordable Units; to a maximum 5 foot reduction.	A 1 foot reduction in the otherwise applicable setback for a Housing Development with 10% Restricted Affordable Units; additional 0.5 foot reduction for each additional 15% increase in the number of Restricted Affordable Units; to a maximum 3 foot reduction.

5. Reduction in the number of vehicle parking spaces required under Chapter 20.90 of this Code, over and above the reduction that is required under the State Housing Density Bonuses and Incentives Law, as follows:

TABLE 20-330

	Vehicle Parking Required
SRO facilities within ½ mile of an existing major transit stop as defined in the California Public Resources Code Section 21064.3 as may be amended or an existing stop along a high-quality transit corridor as defined in the California Public Resources Code Section 21155 as may be amended - for each Very Low and Low Income Unit	0
SRO facilities not within ½ mile of existing transit stop - for each Very Low and Low Income Unit	.25 per unit

D. Other Incentives

If an Applicant requests any Incentive(s) other than those specified in Subsection B above and provides the Incentive information required in Section 20.190.080.B.3 below, the Incentive will be granted unless the Approval Authority makes a written finding, based upon substantial evidence, of any of the following:

1. The Incentive would not result in identifiable and actual cost reductions to provide for Affordable Housing Costs or Affordable Rents for the Restricted Affordable Restricted Units; or
2. The Incentive would have a specific adverse impact, as defined in paragraph (2) of subdivision (d) of Government Code Section 65589.5, upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid

the specific adverse impact without rendering the Housing Development unaffordable to Low- and Moderate-Income households.

3. The Incentive would be contrary to state or federal law.

E. Limitation on Total Number of Incentives Allowed

If any type of incentive has been granted for Restricted Affordable Units under any other provision of this Code, including but not limited to incentives for Inclusionary Units under Chapter 5.08 of this Code, such other incentives shall be counted toward the number of Incentives required under this Chapter 20.190.

20.190.070 Waiver or Modification of Development Standards

An Applicant may apply for a waiver or modification of Development Standards that will have the effect of physically precluding the construction of a Housing Development at the densities or with the Incentives permitted by this Chapter. The Applicant bears the burden of proving that the Development Standard(s) that is/are requested to be waived or modified will have the effect of physically precluding the construction of a Housing Development with the Density Bonus or Incentive requested under this Chapter.

20.190.080 Application Requirements and Timing

A. General

Any Density Bonus, Incentive, waiver, or modification sought by an Applicant shall be made pursuant to this Chapter.

B. Timing of Application and Information to be Submitted

1. An application for a Density Bonus, Incentive, waiver or modification of Development Standard shall be submitted to the Approval Authority and processed by the Approval Authority concurrently with the earliest date after the effective date of the ordinance adopting this Chapter 20.190 of the following requests for Discretionary Approval:
 - a. A request for an increase in general plan maximum housing density or approval of a change in use to allow residential development;
 - b. An application for zoning change or zoning amendment that would affect maximum housing density;
 - c. The first application for a Development Permit for a Housing Development; or
 - d. An application for subdivision map approval for a Housing Development.
2. No application or Density Bonus, Incentive, waiver or modification of Development Standard shall be deemed received until the following have been provided:
 - a. All fees for the application as set forth in the schedule of fees established by resolution of the City Council have been paid. No fee shall be deemed received until any negotiable instrument has been cleared and funds deposited on the City's account.

- b. All documents specified in this Chapter or on the application form have been filed.
- 3. The application shall be on a form prescribed by the Director and shall include the following information:
 - a. A brief description of the proposed Housing Development, including the total number of dwelling units, Restricted Affordable Units, and Density Bonus Units proposed.
 - b. The current zoning district(s) and general plan land use designation(s) and assessor's parcel number(s) of the project Site, and a description of any Density Bonus, Incentive, or waiver/ modification requested.
 - c. A vicinity map and preliminary Site plan, drawn to scale, including building footprints, driveway and parking layout.
 - d. If an Incentive is requested, a brief explanation as to the actual cost reduction achieved through the Incentive and how the cost reduction would result in identifiable and actual cost reductions to provide for Affordable Housing Costs or Affordable Rents for the Restricted Affordable Units.
 - e. If modification or waiver of a Development Standard is requested, an explanation of how the Development Standard would have the effect of physically precluding the construction of a Housing Development at the densities or with the Incentives permitted by this Chapter.

- f. A Site plan showing location of Non-Restricted Units, Restricted Affordable Units, and Density Bonus Units within the proposed Housing Development.
- g. Level of affordability of the Restricted Affordable Units and proposed method to ensure affordability.
- h. For Incentives that are not included within Subsection B. of Section 20.190.060, the Application must include:
 - i. Reasonable documentation that each requested Incentive will result in identifiable and actual reductions to provide the Restricted Affordable Units. Such evidence may include the submittal of the project pro forma to the Approving Authority, providing evidence that the requested Incentives would result in identifiable, financially sufficient, and actual cost reductions.
 - ii. The cost documentation shall include all of the following items:
 - a) The actual cost reduction achieved through the Incentive;
 - b) Evidence that the cost reduction will result in identifiable and actual reductions to provide the Restricted Affordable Units; and

- c) Such other information as may be requested by the Director of the Planning, Building and Code Enforcement Department or the Director of the Housing Department, or their designee(s), which additional financial information may include, but is not limited to, information regarding capital costs, equity investment, debt service, projected revenues, operating expenses, and such other information as either Director deems necessary to allow the Approving Authority to evaluate the financial information submitted by the Applicant.
 - d) If the application is for approval of Mixed Use where Mixed Use would not otherwise be allowable, evidence that the proposed non-residential use will reduce the cost of the Housing Development, and that the non-residential use is compatible with the proposed Housing Development and other existing or planned development in the area where the proposed Housing Development will be located.
- 4. If an Incentive, or waiver or modification of Development Standard is requested, submittal of information sufficient to allow the Approving Authority to assess whether any requested Incentive, or waiver or modification of Development Standard will have a specific adverse impact, or on any real property that is listed in the California Register of Historical Resources, or if there is such an impact, an analysis of potential methods to satisfactorily mitigate or avoid the specific adverse impact without

rendering the Housing Development unaffordable to Low-and Moderate-Income households, and the feasibility of such methods.

5. If an Incentive, or waiver or modification of Development Standard is requested, submittal of environmental information sufficient to allow the Approving Authority to assess whether any requested Incentive, or waiver or modification of Development Standard would have a specific adverse impact, as defined in paragraph (2) of subdivision (d) of Government Code Section 65589.5, and to analyze whether there are feasible potential methods to satisfactorily mitigate or avoid the specific adverse impact without rendering the Housing Development unaffordable to Low- and Moderate-Income households. Submittal of such environmental information as is required for a project subject to the California Environmental Quality Act ("CEQA"), Public Resources Code Section 21000 *et seq.*, and the CEQA Guidelines shall be submitted in satisfaction of this requirement, even if the Housing Development would otherwise be exempt from CEQA.
6. If a waiver or modification of a Development Standard is requested, submittal of evidence that the Development Standard for which the waiver is requested will have the effect of physically precluding the construction of the Housing Development with the Density Bonus and Incentives requested.
7. If a Density Bonus or Incentive is requested for a land donation, the application shall identify the location of the land to be dedicated and shall include proof of Site control and evidence that all of the conditions for a land transfer Density Bonus that are specified in the State Housing Density Bonuses and Incentives Law will be met.

8. If a Density Bonus or Incentive is requested for a Child Care Facility, the application shall identify the location and square footage of the Child Care Facility and include evidence that all of the conditions for a Child Care Facility Density Bonus or Incentive that are specified in the State Housing Density Bonuses and Incentives Law will be met.
9. If a Density Bonus or Incentive is requested for a condominium conversion, the Applicant shall provide evidence that all of the conditions for a condominium conversion Density Bonus that are specified in the State Housing Density Bonuses and Incentives Law will be met.

20.190.090 Application Review and Approval Process

A. General

An application for a Density Bonus, Incentive, waiver or modification of Development Standards shall be acted upon by the Approval Authority. The granting of a Density Bonus or Incentive shall not be deemed approval of the entire project, nor to affect or constrain the exercise of discretion for any subsequent approval that may be required for the project. No application shall be accepted for a Density Bonus for a Site on which a prior Density Bonus has been approved, unless the Applicant waives any right to proceed with the project as approved with the prior Density Bonus.

B. Conditions of Approval

Before approving an application for a Density Bonus, Incentive, waiver or modification of Development Standards the Approval Authority must make the following findings based on evidence in the record, as applicable, that:

1. The Housing Development is eligible for a Density Bonus and any Incentives, waivers or modifications requested.
2. If the Density Bonus is based all or in part on donation of land, a finding that all of the requirements for a land transfer Density Bonus that are specified in the State Housing Density Bonuses and Incentives Law have been or will be met.
3. If the Density Bonus or Incentive request is based all or in part on the inclusion of a Child Care Facility, a finding that all of the requirements for a Child Care Facility Density Bonus that are specified in the State Housing Density Bonuses and Incentives Law have been or will be met.
4. If the Incentive request is for a Mixed-Use development, a finding that all the requirements for a Mixed-Use Incentive development approval that are specified in the State Housing Density Bonuses and Incentives Law have been or will be met.
5. If the Incentive includes a request for approval of condominium conversion, a finding that all the requirements for a condominium conversion Incentive that are specified in the State Housing Density Bonuses and Incentives Law have been or will be met.

C. Conditions for Denial

1. The Approval Authority may deny an application for a Density Bonus if the findings required by Subsection B.1 above, as applicable, cannot be made.
2. The Approval Authority may deny an application for an Incentive other than the Incentives specified in Section 20.190.060 based on a written finding based on substantial evidence that the Incentive will not result in identifiable and actual cost reductions to provide for Affordable Rent or Affordable Housing Cost.
3. The Approval Authority may deny an application for a waiver or modification of a Development Standard based on a written finding based on substantial evidence that application of the Development Standard will not have the effect of physically precluding the construction of the Housing Development at the densities or with the Incentives permitted by the State Housing Density Bonuses and Incentives Law.
4. The Approval Authority may deny an application for Incentive, waiver or modification if one of the following written findings is made, supported by substantial evidence:
 - a. The Incentive, waiver or modification of Development Standard would have a specific, adverse impact, as defined in Government Code Section 65589.5 (d)(2), upon public health or safety or the physical environment or on real property listed in the California Register of Historic Resources, and there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without

rendering the Housing Development unaffordable to households of Low and Moderate Income. For the purpose of this Subsection, "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 that the application for the Housing Development was deemed complete; or

- b. The Incentive, waiver or modification of Development Standard is contrary to state or federal law.
- 5. Nothing in this Chapter 20.190 limits the City's right to deny an affordable housing project under Government Code Section 65589.5.
- 6. Nothing in this Chapter 20.190 shall be construed to require the City to grant a Density Bonus or Incentive or any Site or portion of a Site that is designated in the General Plan Land Use/Transportation Diagram for non-residential use.

20.190.100 Regulatory Agreement

A. General

Applicants for a Density Bonus, Incentive, waiver or modification of Development Standards shall enter into a Regulatory Agreement with the City. The terms of the draft Regulatory Agreement shall be reviewed and revised as appropriate by the Director and the City Attorney. The final Regulatory Agreement, as approved by the City Attorney, shall be executed by the Applicant and forwarded to the Approval Authority for final approval.

B. Timing of Agreement Approval

Approval of the Regulatory Agreement by the Approval Authority shall take place concurrently with the Discretionary Approval that is being processed with the Density Bonus application.

C. Agreement Terms and Conditions

The Regulatory Agreement shall include at a minimum all of the following:

1. The total number of dwelling units approved for the Housing Development, including the number of Restricted Affordable Units and/or Senior Citizen Housing Development units;
2. A description of the household income group to be accommodated by the Restricted Affordable Units, and the standards for determining the corresponding Affordable Rent or Affordable Housing Cost;
3. The location, dwelling unit sizes (square feet), and number of bedrooms of the Restricted Affordable Units and/or Senior Citizen Housing Development units;
4. Term of use restrictions for Restricted Affordable Units and/or Senior Citizen Housing Development units for the minimum period(s) of time, and age restrictions if applicable, specified in the State Housing Density Bonuses and Incentives Law;

5. Requirements to ensure that the initial occupants of all for-sale units that qualified the Applicant for the award of the Density Bonus are persons and families of Very Low, Low, or Moderate Income, as required, and that the units are offered at an Affordable Housing Cost, as that cost is defined in Section 50052.5 of the Health and Safety Code and/or meet the requirements for Senior Citizen Housing Development units as specified in the State Housing and Density Bonuses and Incentives Law. The Regulatory Agreement for for-sale Restricted Affordable Units shall include the following equity sharing provisions, unless it is in conflict with the requirements of another public funding source or law:
 - a. Upon resale, the seller of the unit shall retain the value of any improvements, the down payment, and the seller's proportionate share of appreciation. The City shall recapture any initial subsidy, as defined in Subsection 5.d., and its proportionate share of appreciation, as defined in Subsection 5.c., which amount shall be used within five (5) years for any of the purposes described in subdivision (e) of Section 33334.2 of the Health and Safety Code that promote home ownership.
 - b. For purposes of this Section 20.190.100, the City's initial subsidy shall be equal to the fair market value of the home at the time of initial sale minus the initial sale price to the moderate-income household, plus the amount of any down payment assistance or mortgage assistance. If upon resale the market value is lower than the initial market value, then the value at the time of the resale shall be used as the initial market value.

- c. For purposes of this Section 20.190.100, the City's proportionate share of appreciation shall be equal to the ratio of the City's initial subsidy to the fair market value of the home at the time of initial sale.
- 6. A schedule for completion and occupancy of the Restricted Affordable Units;
- 7. A description of any Incentive, waiver or modification of Development Standards, if any, being provided by the City;
- 8. A description of remedies for breach of the Regulatory Agreement, including at the City's option, the identification of tenants or qualified purchasers as third party beneficiaries under the Regulatory Agreement;
- 9. A termination provision stating that any granted Density Bonus and Incentive(s) shall terminate with the demolition, destruction or other removal of the structure receiving the Density Bonus and/or Incentive(s);
- 10. A provision stating that the Regulatory Agreement shall be binding to all future owners and successors in interest; and
- 11. Other provisions to ensure implementation and compliance with this Chapter.

D. Recordation

Following execution of the Regulatory Agreement, the Regulatory Agreement shall be recorded on the property subject to the Regulatory Agreement.

20.190.110 Regulations

The Director is hereby authorized to promulgate forms, policies and regulations for the implementation of this Chapter, including but not limited to, applications for additional Incentives, waiver or modification of Development Standards, terms and conditions for the Regulatory Agreement as approved by the City Attorney, and applications for modification of the Regulatory Agreement.

PASSED FOR PUBLICATION of title this _____ day of _____, 2018, by the following vote:

AYES:

NOES:

ABSENT:

DISQUALIFIED:

SAM LICCARDO
Mayor

ATTEST:

TONI J. TABER, CMC
City Clerk

The following
items were
received after
packets were
distributed.



March 20, 2018

Chairman Pham and Planning Commissioners
City of San Jose Planning Commission
San Jose City Hall
200 E. Santa Clara St.
San José, CA 95113
TRANSMITTED VIA EMAIL

RE: March 21, 2018 Planning Commission Agenda Item #4a – Density Bonus Ordinance

Dear Chair Pham and Commissioners,

Please accept this BIA Bay Area letter of comment regarding the City of San Jose's Draft Density Bonus Ordinance. BIA has been tracking and submitting comment on this issue for nearly two years, and it fell off the radar for a long while before suddenly reappearing in this Draft Ordinance. BIA emphasizes to the Commission, Council and Staff that this legislation is of keen interest to our members. No opportunity to meaningfully engage during the completion of the Draft Ordinance, and we are astounded that it's been scheduled on the Planning Commission Consent Calendar.

Despite BIA efforts to inform Staff of the builders' perspective and engage in this issue, ultimately the product is disappointing. In its Housing Element the City committed to adopt a Density Bonus Ordinance that conforms to the State DBL by 2015. With this draft two years overdue, the building community is still waiting for a visionary policy.

Rather than viewing this over lengthy legislative process as an opportunity to cut red tape and harness the DBL statute as a vital policy that would incentivize affordable housing by the private sector, the Draft Ordinance is just more of the same old resistance from San Jose to the easing of any its strict discretion in the housing approval process even if that means adopting a weak, unimaginative DBL ordinance.

Attached to this letter we include a prior June 1, 2016 letter of comment. Staff has at no time responded to any of BIA's suggestions to the ordinance. We urge the Planning Commission to defer this item from the Consent Calendar and provide Staff with meaningful feedback that will bring the Ordinance in alignment with the State DBL.

Staff Report - Legislative History

The Staff report should have included the actual findings and declarations that the Legislature made when it adopted the DBL statute, we include them here for your consideration of this ordinance.

In 1979—almost 40 years before the 2017 Housing Package—the Legislature made the following findings and declarations as part of the original enactment of the state's Density Bonus Law:

Sec. 1. The Legislature finds and declares that the present supply of housing in California is less than present demand, and that under present circumstances and law, imbalance between supply and demand is likely to increase in the foreseeable future. This problem is general in nature, and does and will exist in urban, suburban, and rural areas, and with regard to market rate housing and to housing which requires subsidization in order to be affordable to segments of the state's population. This situation creates an absolute present and future shortage of supply in relation to demand, as expressed in terms of housing needs and aspirations, and also creates inflation in the cost of housing, by reason of its scarcity, which tends to decrease the relative affordability of the state's housing supply for all of its residents.

Sec. 2. The Legislature further finds and declares that:

- (a) It is a matter of urgent public necessity that the housing supply shortfall in California be eliminated.
- (b) It is essential to address and remedy the basic causes of the problem rather than its symptoms, and that these causes include the following:
 - (1) Insufficient availability of land suitable and capable of being developed for the purpose of housing.
 - (2) Increases in the time and uncertainty for completion of housing development and construction, largely attributable to processing requirements, which significantly increase the cost of the completed housing and delay its availability to the public.
 - (3) Increases in costs relating to community objectives and services, placed directly upon new residential construction.
 - (4) Government statutes, regulations, and policies which are insensitive to housing needs, or which individually or collectively, tend to frustrate and production of housing.
- (c) For all these and other reasons, a chaotic housing marketplace now exists in California, in which enough housing cannot be produced in some areas at any price to meet the demand, while in others, costs and uncertainties have combined to make essential new and existing housing stock unattractive to capital investment.

Sec. 3. The Legislature further finds and declares that:

- (a) In order to meet California's statutory objectives relative to housing, the state must immediately embark on a comprehensive housing supply development program and maintain that program until the balance between supply and demand is restored, and thereafter to the extent necessary to avoid future imbalance.
- (b) In so doing, the state must and should rely primarily:
 - (1) On the private sector to produce and otherwise provide and maintain the necessary increase in both market rate units, and nonmarket rate units.
 - (2) On general purpose local government to guide the manner in which these units should be made available; provided, that such local discretion and powers not be exercised in a manner to frustrate the purposes of this act....

Sec. 4. The Legislature further finds and declares that the purpose of this act is to bring the supply of housing back into balance with demand as rapidly as possible, and within a predictable future period of time....

Sec. 6. The Legislature further finds and declares that if the state does not adopt these policies, and engage in a systematic program, as set forth in this act, to carry out its purpose and achieve objectives:

- (a) Present trends responsible for the imbalance of supply and demand will not be reversed and are likely to accelerate the imbalance and its consequences.
- (b) The imbalance will become institutionalized as a permanent part of the state's housing situation, rather than being a temporary maladjustment.
- (c) The state's statutory housing objectives will become unattainable.
- (d) The citizens of this state will be forced to unnecessarily accept further limitations on their personal aspirations, their social and economic mobility, and their physical comfort and well-being.

Draft Ordinance Section 20.190.010 Purpose

State density bonus law preempts local policies, goals or objectives. BIA points to language now included in the Purpose statement that the ordinance will be drafted to facilitate affordable housing "consistent with the goals, objectives, and policies of the City's General Plan Housing Element." State density bonus law has its own legislative intent and policy purposes and this state legislation preempts any inconsistent local policies, goals or objectives even if found in the Housing Element. The "Purpose" section should summarize the Legislature's purpose in the DBL statute (not just San Jose's.)

Draft Ordinance Section 20.190.050 Development Standards for Restricted Affordable Units

BIA believes the "design standards" language in 20.190.050 is inconsistent with the intent of the Density Bonus statute. If ANY of these purported requirements violates 65915 (e) it is preempted and invalid:

(e) (1) 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. An applicant may submit to a city, county, or city and county a proposal for the waiver or reduction of development standards 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 under this section, and may request a meeting with the city, county, or city and county.

(2) A proposal for the waiver or reduction of development standards pursuant to this subdivision shall neither reduce nor increase the number of incentives or concessions to which the applicant is entitled pursuant to subdivision (d).

Draft Ordinance Section 20.190.060 City Density Development Incentives

BIA objects to the "menu" of incentives and concessions. They are actually hindering, not incentivizing the DBL statute and the cause of providing affordable housing. Setbacks variously for corner, rear, and side yards of between 1 and 5 feet are a paltry expression of the Density Bonus statute. The staff report gives the game away:

"New Chapter 20.90 confirms that the City will grant up to three incentives (from a collection of five options) as required by state law...The benefit of selecting specific incentives narrows the scope of potential incentives that the City will have to grant and provides more certainty and predictability to developers. State law does not identify which incentives a developer can ask for, making it difficult to know if the City will be willing to grant a requested incentive. By setting specific requirements to achieve an incentive, findings for approval or denial of incentives becomes easier. It is the applicant's responsibility to demonstrate that the requested incentive will result in identifiable and actual cost reduction necessary to offset the costs of building the affordable units."

On the contrary:

- The DBL statute forbids cities from limiting the type of incentives in any manner. Thus, the staff's attempt to write the ordinance in a way that gives the impression that these (non) incentives are in any way the only ones the city can or must approve is in conflict with state law and city cannot create any sort of presumption against whatever incentive the applicant requests;

- The DBL statute requires the city to GRANT any incentive proposed by the applicant UNLESS the city makes a written finding supported by substantial evidence:
- The DBL statute does not, contrary to the staff report, allow the city to demand that the applicant "demonstrate" that the requested incentive is necessary. That policy is flipping the DLB statute on its head. The City MUST GRANT the incentive unless it produces substantial evidence that the incentive is NOT NECESSARY.
- The DBL statute provides that the city bears the burden of proof in any challenge to the denial of an incentive:

d) (1) An applicant for a density bonus pursuant to subdivision (b) may submit to a city, county, or city and county a proposal for the specific incentives or concessions that the applicant requests pursuant to this section, and may request a meeting with the city, county, or city and county. The city, county, or city and county shall grant the concession or incentive requested by the applicant unless the city, county, or city and county makes a written finding, based upon substantial evidence, of any of the following:

(A) The concession or incentive does not result in identifiable and actual cost reductions, consistent with subdivision (k), 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).

(B) The concession or incentive would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact without rendering the development unaffordable to low-income and moderate-income households.

(C) The concession or incentive would be contrary to state or federal law.

(2) The applicant shall receive the following number of incentives or concessions:

(A) One incentive or concession for projects that include at least 10 percent of the total units for lower income households, at least 5 percent for very low income households, or at least 10 percent for persons and families of moderate income in a common interest development.

(B) Two incentives or concessions for projects that include at least 20 percent of the total units for lower income households, at least 10 percent for very low-income households, or at least 20 percent for persons and families of moderate income in a common interest development.

(C) Three incentives or concessions for projects that include at least 30 percent of the total units for lower income households, at least 15 percent for very low-income households, or at least 30 percent for persons and families of moderate income in a common interest development.

Burden of Proof provisions are inconsistent with DBL

Provisions in the Draft Ordinance purporting to require the applicant to bear the burden of "proving" that a waiver or modification of a development standard will physically preclude the project is inconsistent with the DBL statute. The language of DBL section (e) flatly prohibits the city from applying any such development standard and that prohibition is not contingent on the applicant "proving" anything to the city's satisfaction.

e) (1) 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. An applicant may submit to a city, county, or city and county a proposal for the waiver or reduction of development standards 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 under this section, and may request a meeting with the city, county, or city and county.

20.190.080 Application Requirements and Timing

BIA points to several of the provisions of the application and timing process that are also invalid, in particular those that purport to codify a heightened information and analysis requirement for any concession not in the list of (non) concessions identified in the "menu" (i.e., the applicant "prove" or "demonstrate" that an incentive or concession will result in an identifiable or actual cost reduction); also the provisions that purport to require the applicant to submit evidence regarding modification of development standards. Again, the DBL statute says the city MUST GRANT a waiver or modification unless it can prove that it has the discretion to deny it based on certain limited factors.

Provide that City mandated Inclusionary Units must be counted

BIA urges inclusion of a provision directing that locally required affordable housing units (IHO) must be counted as affordable units for purposes of determining whether a project meets the affordability thresholds for triggering the minimum density bonus and other provisions of state law. *Latinos Unidos Del Valle de Napa y Solano v. County of Napa (2013) 217 Cal.App.4th 1160.*

When asked at a recent Developers Roundtable meeting if this provision to include required units would be included in the Ordinance, Staff replied that this was "being studied". Considering that this Draft Ordinance is over two years overdue this explanation is unsatisfactory.

BIA strongly advocates that the City's density bonus ordinance should be drafted to advance to the fullest extent both the letter and intent and the policy goals of the State DBL legislation. The stakes for the City and indeed the Bay Area should be viewed as very high. Anything less than a progressive City statute will represent a failure to grasp an excellent opportunity for San Jose to aggressively address one of the most severe housing supply and affordability crises in its history.

We urge the Planning Commission to take action by removing this Ordinance from the Consent Calendar, give direction to Staff to return with an Ordinance consistent with State Law, and schedule a public hearing that will allow for this important issue to receive the thorough deliberation it deserves.

Please feel free to contact me to discuss any of the policies or specific proposals recommended in this letter. I look forward to working with you to develop a robust density bonus ordinance.

Yours truly,

Dennis Martin
BIA Bay Area Government Affairs

cc: Rosalynn Hughey
Lea C. Simvoulakas

Encl: BIA comments on Density Bonus Ordinance 6.1.2016



June 1, 2016

Jenny Nussbaum, Project Manager
City of San Jose Planning Dept.
200 E. Santa Clara St.
San José, CA 95113

RE: Adding a new chapter to the Title 20 Zoning Code to implement California Government Code Section 66915 (State Housing Density Bonus Incentives Law) and provide affordable housing incentives

Dear Ms. Nusbaum,

On behalf of BIA Bay Area, I want to express my thanks to you and planning staff for turning your attention to the matter of updating San Jose's density bonus incentive ordinance. Because the state statute is such an important policy for promoting the construction of affordable housing, BIA advocates that the City of San Jose use this process to craft a potent law that takes full advantage of the opportunity the state density bonus legislation provides.

Here are some of the principles, policy, and specific points that BIA would strongly recommend be reflected in the new ordinance:

Embrace the importance of the state statute and commit vigorously to density bonus law incentives for developers to produce new affordable housing units

"The state density bonus law is a powerful tool for enabling developers to include very-low, low- and moderate-income housing units in their subdivisions.... The purpose of this law is to encourage municipalities to offer incentives to housing developers that will 'contribute significantly to the economic feasibility of lower income housing in proposed housing developments.'" *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, 1339.

The statute reflects "an important state policy to promote the construction of low income housing and to remove impediments to the same...The entire aim of Section 65915 is to provide incentives to developers to construct housing for seniors and low income families." *Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 823-824.

Establish that the state density bonus is a minimum

State density bonus law sets forth the minimum density bonus and incentives for qualifying projects. Local governments retain the ability to go beyond these minimums and provide higher density bonuses and additional incentives. *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 823.

Stress that the state minimum density bonus is mandatory and unconditional

A "city or county must grant the developer one or more itemized concessions **and** a 'density bonus.'" *Wollmer v. City of Berkeley* at 1339; *Lagoon Valley v. City of Vacaville* at 824-825. The City's density bonus implementation language found in the Inclusionary Zoning ordinance is inconsistent with state law

on this point. Code Section 5.08.450 purports to allow the City to deny a density bonus if the City finds that it would cause an adverse impact to public health, safety, or welfare.

Provide that City mandated inclusionary units must be counted

Locally required affordable housing units must be counted as affordable units for purposes of determining whether a project meets the affordability thresholds for triggering the minimum density bonus and other provisions of state law. *Latinos Unidos Del Valle de Napa y Solano v. County of Napa* (2013) 217 Cal.App.4th 1160.

Senior housing

The ordinance should be clear that when senior housing is constructed as provided in the state statute, the minimum density bonus is mandated based on the total number of units in the project—including non senior units. *Lagoon Valley v. City of Vacaville* at 833-834.

Incentives must be clearly indicated and non-exclusive

The ordinance should be clear that pursuant to §65915(d), the city is required to grant between 1 and 3 incentives or concessions requested by the developer (depending on the level and amount of affordability the developer proposes).

Also, the ordinance should be clear that whatever specific incentives are identified in the ordinance, they represent a non-exclusive list and that whatever incentive or incentives a developer requests, the city must approve that requested incentive unless the city makes a written finding, based on substantial evidence, pursuant to (d)(1)(A)(B) or (C). This clarification is especially important in light of the inconsistent density bonus implementation language the City currently has as part of its Inclusionary Zoning Ordinance. Code Section 5.08.450 purports to limit the incentives that the City will consider granting to those “listed in Section 5.080.450.” The existing implementation language is also inconsistent with state law in that it purports to deny requested incentives based on findings other than those strictly set forth and limited to (d)(1)(A)(B) or (C).

Developer stakeholder outreach is vital to crafting an effective ordinance

Because the purpose of the state density bonus statute is to offer incentives to developers “that ***will contribute significantly*** to the economic feasibility of lower income housing in proposed developments,” the City should seek developer input on the types of incentives that generally speaking will advance that purpose, and identify those incentives in the ordinance. As part of the process, the City should work with the development community to identify and analyze the economic and planning hurdles that currently exist to including lower income housing units in projects.

Baseline density should be the maximum allowable in the general plan

The ordinance should clearly reference the baseline density against which the bonus shall apply and acknowledge that the density bonus must at a minimum be calculated based on the maximum allowable density in the general plan if the zoning in place does not currently contemplate that much density. *Wollmer* at 1344-1345.

Waiver of development standards are not dependent on economic feasibility

The ordinance should clearly state that with respect to requests for a waiver of development standards under 65915(c), applicants are not required to show that the waiver is necessary to render the project economically feasible. *Wollmer* at 1346.

Use of rental subsidies do not disqualify projects

The ordinance should be clear that projects that receive rent subsidies such as Section 8 do not disqualify an affordable housing unit from triggering the density bonus statute. *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329

Senior housing

The ordinance should be clear that when senior housing is constructed as provided in the state statute, the minimum density bonus is mandated based on the total number of units in the project—including non-senior units. *Lagoon Valley v. City of Vacaville* at 833-834.

Restrictive language contained in City Notice of Proposed Amendments Title 20 (Notice)

The Notice states: “A density bonus must be selected by the Applicant from only one category up to a maximum of 35% of the maximum residential density.”

BIA fails to see the reason why this language was included in the notice. Does San Jose believe this it is mandated by the statute? *Wollmer* indicates it is not based on its holding that the state statute provides a minimum level of density bonus and in that instance the city approved two versions of the same project on the same site—one a mixed use project with 20% affordable and the other a senior housing project. The city approved a single use permit allowing both uses so the developer could respond to market conditions.

State density bonus law preempts local policies, goals or objectives

The Notice also states that the ordinance will be drafted to facilitate affordable housing “consistent with the goals, objectives, and policies of the City’s General Plan Housing Element.” State density bonus law has its own legislative intent and policy purposes and this state legislation preempts any inconsistent local policies, goals or objectives even if found in the Housing Element.

BIA believes that it is inappropriate to specify at the staff level that the City won’t go beyond the lowest maximum state density bonus of 35%. The cases cited here make clear cities can be more aggressive in promoting affordable housing by allowing higher maximum density bonuses.

BIA strongly advocates that the City’s density bonus ordinance should be drafted to advance to the fullest extent both the letter and intent and the policy goals of the state legislation. The stakes for the City and indeed the Bay Area should be viewed as very high. Anything less than a progressive City statute will represent a failure to grasp an excellent opportunity for San Jose to aggressively address one of the most severe housing supply and affordability crises in its history.

Please feel free to contact me to discuss any of the policies or specific proposals recommended in this letter. I look forward to working with you to develop a robust density bonus ordinance.

Yours truly,
Dennis Martin
BIA Bay Area Government Affairs