



**DATE:** February 9, 2021

**CATEGORY:** Public Hearing

**DEPT.:** Community Development

**TITLE:** **Density Bonus Ordinance**

### **RECOMMENDATION**

Introduce an Ordinance of the City of Mountain View to Repeal, in its Entirety, Division 11 of Article IV of Chapter 36 of the Mountain View City Code and Add Division 8 to Article XVI of Chapter 36 of the Mountain View City Code Related to Density Bonus, to be read in title only, further reading waived, and set a second reading for March 9, 2021 (Attachment 1 to the Council report).

### **BACKGROUND**

The State Density Bonus Law is intended to incentivize the development of affordable housing for lower- and moderate-income households, seniors, students, foster youth, homeless individuals, or disabled veterans. Specifically, a project that qualifies for a density bonus may receive:

1. A Density Bonus: A density increase above the maximum density that is otherwise permitted;
2. Incentives/Concessions: Modifications to City regulatory or development standards that result in actual and identifiable cost reductions to provide for affordable housing costs or rents;
3. Waivers: Modifications to development standards that would physically preclude the construction of a development at the density permitted with the incentives/concessions allowed with a density bonus; and
4. Parking Reductions: Defined parking ratios that apply to all proposed residential uses in a qualifying project.

Cities are required to implement State Density Bonus Law (Government Code Section 65915, *et seq.*) and must adopt a local ordinance that specifies how compliance with State Density Bonus Law will be implemented. The City adopted a density bonus in 2013 (Attachment 2); however, there have been a number of amendments to State law in recent years that necessitate updates to the City's program.

Beginning in 2017, Governor Gavin Newsom has signed into law several bills (including AB 2732, AB 2797, AB 1227, AB 2735, AB 1763, and AB 2345) amending State Density Bonus Law, and they are all currently in effect. These bills have modified eligibility criteria, maximum density bonuses, and thresholds for incentives/concessions and parking, primarily to facilitate project feasibility for 100 percent affordable projects and projects delivering a significant number of affordable units. See the table in Attachment 4 for more information.

In recent years, the City has experienced an increase in the number of projects that have utilized or seek to utilize the Density Bonus Program. Issues surfaced when reviewing these projects primarily on how to determine base density, how to assess the reasonableness of a waiver, and what documentation is needed to consider a concession/incentive. The environment under which a project is reviewed continues to be more and more complex as project considerations include density bonus eligibility criteria, Below-Market-Rate (BMR) Program requirements, and SB 330 replacement requirements. Within this environment, staff explored opportunities to coordinate State and local programs and have affordable housing requirements for residential projects be determined as efficiently and as clearly as possible.

### **Previous Public Hearings**

#### *Environmental Planning Commission Public Hearing*

On January 20, 2021, the Environmental Planning Commission (EPC) held a public hearing to discuss the proposed replacement Density Bonus Ordinance in Chapter 36 (Attachment 5 – Environmental Planning Commission Staff Report – January 20, 2021).

The EPC voted unanimously to recommend the City Council adopt the proposed replacement Density Bonus Ordinance, with modification to provide clarifying language in Section 36.48.75(g) (inadvertently identified as Section 36.45.75(g) in the EPC's action). This Section discusses the City's discretion to grant lower density bonuses for projects that do not meet the eligibility requirements of Density Bonus Law. The language was clarified to indicate that the provision applies to projects that do not provide enough affordable units to meet eligibility requirements of Density Bonus Law. The draft ordinance in Attachment 1 incorporates this clarification.

The EPC was supportive of the ordinance cleanup as presented by staff. The only identified concern from one Commissioner was that referencing State code may limit the EPC's direct interaction with density bonus and requested periodic updates about any subsequent changes to State law.

Three members from the public spoke at the hearing. Two speakers spoke in support of staff's recommendation and for a local ordinance that aligned with State standards to provide greater clarity and an increase in affordable housing. A representative from the Building Industry Association raised legal concerns with the option to choose either Bonus FAR and density bonus in some Precise Plan areas; the inclusion of the homeowners association (HOA) reserve fund for lower-income ownership housing; and the City's authority to request additional support of requested incentives/concessions in light of Permit Streamlining Act requirements.

In response to the issues raised, State law does not preclude the City from offering a local alternative that is consistent with State Density Bonus Law or from incorporating programmatic components, such as the HOA reserve fund, which align with the intent of density bonus to ensure the continuing affordability of lower-income units delivered through density bonus. In addition, the ordinance identifies the required information for an incentive/concession request, and this information will also be incorporated in the application checklist upon adoption of the ordinance.

Since taking the ordinance to EPC, staff has added language to clarify that floor area ratio (FAR) would also be used to calculate the maximum allowable density for residential uses that are not dwelling units as defined in the Zoning Code.

## **ANALYSIS**

The following is a summary of the components of the proposed ordinance to comply with State Density Bonus Law. Throughout the process, staff focused on changes that would streamline the ordinance, clarify program components for both applicants and City staff, and align density bonus with other City initiatives. The proposed ordinance can be found in its entirety in Attachment 1.

In addition to the ordinance, staff proposes to maintain a set of Administrative Guidelines (Attachment 3), which would serve several purposes:

1. Provide a single reference point for staff, stakeholders, and applicants to understand the provisions of State Density Bonus Law and local ordinance;

2. Provide a living document that can be updated as needed when new conditions or scenarios arise, State Law is amended, or Council direction is provided; and
3. Provide examples and other clarifications of State and local regulations, which may not be appropriate for incorporation into the ordinance itself.

The guidelines would be periodically amended by staff, consistent with State Density Bonus Law and the City's Density Bonus Ordinance. The attached draft is preliminary and provided only for informational purposes. Staff will finalize the guidelines after Council adoption of the ordinance.

### **Streamlining the Density Bonus Ordinance and Review Process**

#### *Referencing State Density Bonus Law*

State Density Bonus Law has been frequently amended in recent years due to various State legislative actions. The City's existing ordinance contains a large amount of language that was taken directly from State Density Bonus Law, which should be updated whenever State Density Bonus Law changes to ensure consistency. However, regardless of whether the City's ordinance is updated or not, the State Density Bonus Law would preempt any conflicting local ordinance provisions. In these situations, having standards codified in a local ordinance that conflict with the State's requirements is confusing for developers, the public, and staff. As a result, staff recommends that the relevant State Code sections be referenced by the ordinance, instead of incorporating language directly in State Density Bonus Law. This would allow the City's ordinance to remain consistent with the State, should additional changes occur in the future, without requiring frequent updates to the City's program.

#### *Density Increases Above the Maximum Required by State Law*

The current Density Bonus Ordinance includes language that allows the City to consider a density bonus greater than that allowed under State law. Staff recommends limiting this allowance to projects authorized through the affordable housing Notice of Funding Availability (NOFA) process. This supports the City's flexibility to provide streamlined approvals of affordable housing projects while ensuring that developers are not able to bypass the Gatekeeper process to submit applications with higher densities.

## **Clarify Program Components for Applicants and City Staff**

### *Adopting Procedures and Timelines for Processing a Density Bonus Application*

The City is required by State Density Bonus Law to adopt procedures and timelines for processing a density bonus application. The proposed ordinance includes a list of application requirements that must be submitted for a project requesting density bonus. Examples of application requirements will also be included in the administrative guidelines.

### *Determining Base Density*

To calculate the number of bonus units, incentives/concessions, waivers, and parking reductions that a project may receive as Density Bonus benefits as well as what affordability requirements apply, the City must first calculate the “base density,” which is the maximum allowable density that would be allowed without a density bonus. The City relies on either dwelling units per acre (du/acre) or FAR to define the base density, depending on the site. This variation is due to specific decisions made through the Precise Plan process to create flexibility in certain areas of the City. However, it also adds a layer of complexity when a project is under review for a density bonus because there is not a consistent density standard Citywide. In order to allow the various local density standards to work with the Density Bonus Ordinance, more direction is needed for both applicants and staff to determine when each standard is relevant. Staff is recommending clarifying language within the proposed ordinance that speaks to local nuances in density standards and where they are applicable.

### *Determining Reasonableness of Waiver Requests*

Waivers focus on development standards that physically preclude the proposed development with the bonus density or incentives/concessions permitted for density bonus projects. Under State Density Bonus Law, projects are eligible for an unlimited number of waivers if they can demonstrate with reasonable documentation that each waiver is needed to accommodate a project’s density and/or incentives/concessions. The City may only deny waivers if the City makes specific written findings that are listed in State Density Bonus Law. Because waiver requests are related to physical constraints on density, when reviewing waiver requests, both the City and an applicant must have a clear sense of what is permitted under the base density to assess whether or not waiver requests are needed to accommodate density increases. The proposed ordinance provides application requirements for waivers primarily through providing a written narrative of project or site-specific constraints. Incorporating this information up front as part of an application submittal allows staff to have a more complete picture of the

project in order to effectively determine project eligibility. Examples of waivers and the associated calculations are included in the administrative guidelines document in Attachment 3.

### *Reviewing Incentives/Concession Requests*

Incentives/concessions focus on modifications to regulatory or development standards that reduce a project's development cost. Depending on how much affordable housing is included in a project, a project may be eligible for up to four incentives/concessions. To qualify for an incentive/concession, applicants must demonstrate how the proposed incentive/concession results in actual cost reductions in order to provide affordable units on-site. Similar to waivers, the City must make specific findings to deny an incentive/concession request under State Law.

As incentives/concessions are directly tied to development costs, applicants will be required to provide documentation that demonstrates an actual cost reduction and how that reduction is used to provide for the project's affordability. While the City cannot require the developer to conduct a feasibility study, the City can request information in order to conduct its own feasibility study related to an incentive/concession request. Similar to waivers, examples of concessions/incentives and associated calculations are included in the administrative guidelines in Attachment 3.

### **Align Density Bonus with Other City Initiatives**

#### *Interaction Between Density Bonus, Below-Market-Rate Program, and Replacement Requirements*

State Density Bonus Law dictates minimum affordability terms for the affordable units but does not provide direction on administration of those affordability requirements, such as how the affordability will be guaranteed, tenant selection process, and recertification of incomes over time. The City's BMR program addresses these issues, and staff is proposing to use those BMR standards for the administration of the Density Bonus Program, which will streamline the administration of both programs.

Additionally, the affordable units produced as a result of Density Bonus Program requirements may count towards the project's BMR obligations as long as those affordable units are being used to meet the requirements of both programs. This is often referred to as double-counting, and this is permitted if the units meet the stricter of the two standards. However, in instances where a project is providing affordable units above what is required through the BMR program in order to qualify for density bonus benefits, certain components of the BMR program are not applicable to those additional affordable

units. This has the potential of creating an administrative burden as units in a single development could be subject to different affordability terms and restrictions. Staff is proposing the following additions to the City's Density Bonus Ordinance to enable consistent administration of affordable units, whether provided to satisfy Density Bonus Program or the BMR program. As these are local standards and not requirements under State Density Bonus Law, developers may request to waive these standards as an incentive or waiver request under Density Bonus:

- Require that affordable units be distributed throughout the project and be representative of the market-rate mix;
- Require that the affordable units be comparable in appearance and finishes to the market-rate units;
- For ownership projects, all affordable units will deed-restrict the affordability in perpetuity; and
- Require a HOA reserve for lower-income, for-sale units to support increases in a household's HOA fees above what the household can afford as part of 30 percent of their income.

In addition to consistency with the BMR program, projects that demolish existing rental units that meet specific characteristics are required to replace those units under both State Density Bonus Law and SB 330 (Housing Crisis Act of 2019). SB 330 is the more restrictive of the two requirements and gives the City the discretion to require that units previously rented to above-low-income households be replaced as either deed-restricted affordable units or as units covered under the Community Stabilization and Fair Rent Act (CSFRA). While the option provides flexibility for developers, staff recommends that replacement units be deed-restricted units. The decision to allow the units be replaced as covered CSFRA units can still be considered on a project-by-project basis, and such projects would be required to provide BMR units in addition to replacement requirements should they pursue this option.

#### *Bonus FAR*

In four Precise Plan areas, the City has implemented a Bonus FAR program, which is a local incentive program with its own requirements and project components. The proposed ordinance includes language clarifying how these Bonus FAR programs should be interpreted in conjunction with State Density Bonus Law. Specifically, two of the Precise Plans (El Camino Real and San Antonio) allow Bonus FAR to reach the maximum in the General Plan, so State Density Bonus Law can be applied in addition to the City's

Bonus FAR. Two other Precise Plans (North Bayshore and East Whisman) allow Bonus FAR on top of the maximum specified in the General Plan as an elective alternative to the State Density Bonus Law, so applicants for projects in these areas must choose between applying for increases that are allowed under either the Bonus FAR or the State Density Bonus Law.

### **Additional Code Amendments**

There are several other minor code amendments proposed in Attachment 1:

1. The location of the Density Bonus language is changing. The previous location was within the Residential Zones Article (Article IV). The new location will place it in the Administration Article (Article XVI). This is appropriate because it includes application materials and findings, which are generally located in Article XVI. It also reduces potential confusion because the density bonus would also apply to certain commercial and planned community zones where residential use is allowed. Some other parts of the Code need to update their section references to address this change in location.
2. The Density Bonus process identified in Table 36.44-1 may be confusing since a density bonus request does not change the application review process. Applications for a density bonus do not have a stand-alone process separate and apart from the underlying project application. The density bonus request would be processed with the underlying project and in accordance with the process required for the proposed project. The proposed amendment would delete the item from the Table.

### **ENVIRONMENTAL REVIEW**

The action to modify Chapter 36 for updates to the zoning text does not constitute a “project” within the meaning of the California Environmental Quality Act (CEQA) pursuant to CEQA Guidelines Section 15060(c)(2), Section 15378(a), and Section 15378(b)(5) because there is no potential the ordinance will result in either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. Even if the text amendments were a project within the meaning of CEQA, the ordinance is exempt from CEQA pursuant to Section 15061(b)(3) (the “common-sense” exemption) because it includes text amendments related to recent legislation enacted by the State and minor amendments to clarify an existing program.

**FISCAL IMPACT** – None.



## CONCLUSION

Staff recommends that Council introduce the proposed replacement Density Bonus Ordinance to conform with State law and clarify local implementation.

## ALTERNATIVES

1. Approve the proposed replacement Density Bonus Ordinance with modifications.
2. Refer the project back to the Environmental Planning Commission for further analysis and reconsideration.
3. Disapprove the replacement Density Bonus Ordinance.

## PUBLIC NOTICING

Agenda posting, newspaper publication, and a copy of the report on the City website.

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802-02-09-21CR  
200439

- Attachments:
1. Ordinance of Density Bonus Ordinance Replacement (Chapter 36)
  2. Existing Density Bonus Ordinance
  3. Draft Administrative Guidelines
  4. State Bills Summary Table
  5. Environmental Planning Commission Staff Report—January 20, 2021