

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

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October 8, 2021

Mathew D. Francois  
Rutan & Tucker, LLP  
455 Market Street, Suite 1870  
San Francisco, CA 94105

Dear Mathew D. Francois:

**RE: Mountain View State Density Bonus Law Ordinance – Letter of Technical Assistance**

The purpose of this letter is to provide technical assistance on the application of State Density Bonus Law (SDBL). (Gov. Code, § 65915.) The California Department of Housing and Community Development (HCD) has reviewed the recently updated density bonus ordinance adopted by the City of Mountain View (City) to evaluate the request for technical assistance set out in your letter dated June 21, 2021. HCD did not attempt a comprehensive review of the City's ordinance, including its compliance with recent changes to SDBL made in AB 2345 (Chapter 197, Statutes of 2021, § 2, eff. Jan. 1, 2021), and thus this letter ought not be interpreted as an endorsement of the ordinance in its entirety.

Your letter raises concerns about two specific provisions in the ordinance that you believe to be inconsistent with SDBL. You have requested that HCD review the ordinance and provide technical assistance. After reviewing your letter and the City's ordinance, HCD finds that the two provisions in the City's ordinance identified in your letter are not inconsistent with the SDBL. HCD's rationale and conclusions are described below.

**Issue 1: Density Expressed Only in Floor Area Ratio (FAR)**

In your letter, you assert that state law prohibits a local agency from regulating density purely via FAR. Rather, you state that local agencies must express density only in terms of dwelling units per acre. HCD disagrees with this interpretation for the following reasons.

First, this interpretation would unduly hamstring planning efforts by local agencies. FAR is a tool used by planning agencies to increase flexibility for applicants. HCD cannot

state categorically that FAR is not permitted as a measurement of density as well as intensity, so long as a city's regulatory scheme makes adequate explanation for each. Used appropriately, FAR offers flexibility in some cases, and actually fosters the development of certain kinds of housing, such as more, smaller units on a property, as opposed to a standard of dwelling units per acre.

Second, SDBL nowhere uses the phrase dwelling units per acre. It does speak of allowing a density bonus over the maximum allowable gross residential density. (Gov. Code, § 65915, subd. (f).) As you know, "Maximum allowable residential density" means:

the density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted, means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project. If the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density shall prevail.

(Gov. Code, § 65915, subd. (o)(4).) Often residential density is expressed in dwelling units per acre, and in other areas, such as commercial areas, FAR is utilized. There is nothing in law that mandates that a city adopt one or the other. In fact, 2019 legislation encourages use of a density bonus in the context of a FAR density for certain affordable projects associated with commercial development near transit. (See Gov. Code, § 65915.7; see also Gov. Code, § 65917.2.)

*Twain Harte Associates, Ltd. v. County of Tuolumne* (1982) 138 Cal.App.3d 664 does not appear to be contrary or even relevant. The court there did note that Government Code section 65302 requires that a general plan's land use element "shall include a statement of the standards of population density and building intensity recommended for the various districts and other territory covered by the plan." Notably; however, these terms are not contained in density bonus law. Further, there is nothing that precludes a city from adopting either dwelling units per acre or FAR-based zoning and complying with section 65302.<sup>1</sup>

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<sup>1</sup> The general plan at issue there was so very sparse that it provided no statement of population density for most of the areas, rendering it impossible for the county to properly plan for services. In some areas dwelling units per acre were provided, in other areas merely categories of land use provided. The court found this to be inadequate. The court concluded that the term population density and building density were not synonymous, but the court also held that the terms population density and dwelling units per acre were also not synonymous. The point of "population density" in this context was not so much a measure of land use control as a measure of people who might utilize an area of the city to allow appropriate planning. Dwelling units per acre might suffice if a "basis for correlation between the measure of dwelling units per acre and numbers of people is set forth explicitly in the plan" (*Twain Harte Associates, supra*, at pp. 698–699), but then FAR might suffice in the same circumstances. (See also *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 511 (same, clarifying that the population density requirement in section 65302 is descriptive, not prescriptive or regulatory as might be utilized to control land use).

HCD considers that a local agency can utilize FAR or dwelling units per acre as a base measurement for setting out the maximum allowable gross residential density. Neither measure; however, can be utilized to avoid compliance with SDBL.

**Issue 2: Floor Area Ratio (FAR) Waiver in the Context of the City's Floor Area Ratio (FAR) Bonus**

In your letter you assert that—because SDBL explicitly includes FAR within the definition of the term “development standard” (Gov. Code, § 65915, subd. (o)(1))—a project must remain eligible for a FAR waiver even when an applicant is pursuing a FAR density bonus. HCD disagrees with this interpretation for the following reasons.

First, Mountain View's Density Bonus Law ordinance provides procedures for applying the SDBL in zones in which density is expressed in dwelling units per acre and in zones in which density is expressed only in FAR. The processes are nearly identical in each, except regarding the calculation of base density (Mount. View Mun. Code, § 36.48.75.j) and the consideration of FAR as a development standard. Per the local definition of development standard, FAR is considered a development standard “except in zones where floor area ratio defines the maximum allowable residential density....” (*Id.*, § 36.48.70.d.) By defining the development standard in this way, the City is eliminating the potential for an applicant to obtain a development standard waiver for FAR in a zone where density is expressed only in terms of FAR. Were the City to allow FAR waivers in these zones (i.e., within the San Antonio, El Camino Real, North Bayshore, or East Whisman Precise Plan Areas), the City would in effect be allowing unlimited FAR. Additionally, interpreting the law as you propose would result in FAR being both used as the measure of underlying density, a yardstick for determining how many affordable units and bonus units would be required, and a standard that is waived, resulting in confusion and absurdity. (Gov. Code, §§ 65915, 65917.) The City's approach is not inconsistent with SDBL in defining development standards this way for the purpose of a FAR bonus.

Second, while the SDLB does not address this potential scenario directly, the legislative intent of the original law and subsequent amendments do not express an intent to permit unlimited FARs in all zones in which density is expressed solely in terms of FAR. Development standard waivers (Gov. Code, § 65915, subd. (e)) are intended to facilitate the development of housing by waiving development standards that would preclude the construction of the development. They are intended to allow just enough relief from development standards to facilitate a development inclusive of the bonus units (regardless of the underlying expression of density in du/ac or FAR) but no more. Where the density of a site, as well as bonuses, are expressed in FAR, there is no need to waive FAR to get to the permitted density. In other words, even if FAR were a development standard in such as case, FAR by definition in such a case could not impede a development with bonus.

Finally, the base density formula described in Mountain View's Municipal Code provides a formula for calculating a density bonus in zones in which density is expressed in FAR. To perform the calculation, your client would need to submit a desired project floor area and desired number of residential units. From this, a base density can be established, and eligibility determined for up to a 50% density bonus pursuant to Government Code section 65915 subdivision (f). Alternatively, and pursuant to the same subdivision, your client may choose not to pursue a density bonus and instead request incentives/concessions and development standard waivers (excluding an FAR waiver) based on the percentage of affordable units to be included in the development.

If you have questions or need additional information, please contact Brian Heaton at [Brian.Heaton@hcd.ca.gov](mailto:Brian.Heaton@hcd.ca.gov).

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Heaton". The signature is written in a cursive, flowing style.

Land Use & Planning Unit Chief

cc: Sandra Lee, City of Mountain View  
Aarti Shrivastara, City of Mountain View