



OFFICE OF THE CITY ATTORNEY

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July 16, 2021

**SENT VIA EMAIL & US MAIL**

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**RE: City of Mountain View Density Bonus Ordinance**

Dear Mr. Heaton:

On behalf of the City of Mountain View ("City"), thank you for providing the City with a copy of the June 21, 2021 letter from Matthew Francois to Megan Kirkeby alleging that the City's density bonus ordinance conflicts with state law and for providing us with the opportunity to respond. As explained in more detail below, the City's density bonus ordinance is consistent with the State Density Bonus Law (Government Code section 65915 *et seq.*), and the City consistently approves projects with bonus density, concessions, and waivers as set forth in state and local law.

In addition to your specific inquiry to Mountain View, we understand that HCD is generally analyzing how to apply the State Density Bonus Law in zoning districts that do not define density using dwelling units per acre ("DU/ac"). Over the past five years, Mountain View has received applications for – and approved – six projects seeking a density bonus in zones that regulate density using Floor Area Ratio ("FAR") only, resulting in 261 bonus units in addition to the maximum allowable residential density. Attachment A includes a table summarizing these approvals.

We would be happy to discuss Mountain View's experience approving projects in zones that regulate density using FAR with you in greater detail as you continue your analysis of this issue. In the meantime, specific responses to the claims raised in Mr. Francois's letter are provided below.

## **I. The City’s General Plan Defines Density Standards in the City.**

In his letter, Mr. Francois asserts that the City’s density bonus ordinance improperly limits base and bonus density in mixed-use planning areas. This is not correct. The City’s General Plan – not its density bonus ordinance – defines density in mixed use planning areas using FAR. Using FAR as base density, the City awards one density bonus to qualifying projects at or above the level that State Density Bonus Law requires:

“The amount of density increase above the otherwise maximum allowable residential density to which the applicant is entitled shall vary according to the amount by which the percentage of affordable housing units exceeds the percentage established in paragraph a., pursuant to formulas and tables in Section 65915(f) of the State Density Bonus Law.”<sup>1</sup>

As noted above, the City’s General Plan defines density using FAR in specified areas. Specifically, the General Plan says that, “FAR is also the development standard used to measure density and intensity in mixed-use areas,” although DU/ac is used to define density in residential-only neighborhoods.<sup>2</sup> The City implements the General Plan via its zoning code and Precise Plans, which likewise define density for residential uses using FAR in mixed-use zones. For example, the East Whisman Precise Plan defines a base FAR for residential mixed-use projects of 1.0.<sup>3</sup> Throughout the Precise Plan, the FAR limit is referred to as the density.<sup>4</sup>

## **II. The City Applies the State Density Bonus Law to Increase Densities Allowed Under the General Plan.**

Accordingly, when awarding a density bonus for a project in a mixed use zone, the City begins with the maximum allowable residential density applicable to the project, and then it applies the amount of density increase based on the formulas provided in the State Density Bonus Law.<sup>5</sup> The State Density Bonus Law broadly defines “maximum allowable residential density” as “the density allowed under the zoning ordinance and land use element of the general plan, or, if a range of density is permitted . . . the

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<sup>1</sup> Mountain View Municipal Code (“MVMC”) § 36.48.80.b. The City also has a number of local bonus programs that award bonuses in excess of those in the State Density Bonus Law for projects that provide requisite levels of affordable housing and additional public benefits.

<sup>2</sup> Mountain View 2030 General Plan (adopted July 10, 2012; most recently amended June 30, 2020) page 80.

<sup>3</sup> Mountain View East Whisman Precise Plan (adopted November 5, 2019; most recently amended October 13, 2020) Table 6: Mixed-Use Character Area Height, FAR, and Open Area Standards, page 68.

<sup>4</sup> East Whisman Precise Plan pages 73, 174, 178, Appendix 1 page 2.

<sup>5</sup> MVMC §§ 36.48.70.g, 36.48.80.b.

maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project.”<sup>6</sup>

This definition permits the City to use the density metric allowed under the zoning ordinance and General Plan to define the maximum allowable residential density. In mixed-use areas, when the General Plan and applicable zoning or Precise Plan define density using FAR, the FAR applies as the maximum allowable residential density, and the City increases the allowable development by five to fifty percent for mixed income projects.<sup>7</sup> To reflect the fact that the State Density Bonus Law awards bonuses in terms of units, the City converts FAR to units to calculate the percentage of units that the applicant is entitled to develop, and then increases the FAR accordingly.<sup>8</sup> An excerpt from the City’s Density Bonus Program Guidelines illustrating how the City calculates the base density in zones that rely on FAR is included as Attachment B.<sup>9</sup>

The City acknowledges that density is commonly defined by DU/ac, but contrary to Mr. Francois’s claims, density need not categorically be expressed only by DU/ac. In fact, California courts have upheld cities’ authority to define density using other metrics, such as FAR.<sup>10</sup> For example, Mr. Francois cites Government Code section 65302(a), which requires the land use elements of General Plans to include both population density and building density, as evidence that the City may only use DU/ac to define density. However, in *Twain Harte Associates*, the Court of Appeal concluded that “[g]iven the variety of legitimate ways of interpreting the term ‘population density,’ it appears sensible to allow local governments to determine” the appropriate method for measuring population standards.<sup>11</sup> Contrary to Mr. Francois’s assertion that the Government Code requires DU/ac to be the sole metric for measuring density, the *Twain Harte Associates* Court concluded that population density can be measured by standards other than just dwelling units per acre.<sup>12</sup> Likewise, the *San Francisco Tomorrow* Court held that San Francisco’s General Plan appropriately regulates density, despite a challenge that claimed the General Plan was inadequate because it only expressed density through FAR.<sup>13</sup>

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<sup>6</sup> Gov. Code § 65915(o)(2)

<sup>7</sup> Gov. Code § 65915(f). In addition, the City increases FAR by eighty percent for 100 percent affordable projects, and such projects that are also within one-half mile of a major transit stop are exempt from any maximum controls on density.

<sup>8</sup> MVMC §§ 36.48.75.j, 36.48.80.

<sup>9</sup> To assist applicants understand how density bonus requirements are applied, the City maintains Guidelines on its website: <https://www.mountainview.gov/civicax/filebank/blobdload.aspx?BlobID=35564>.

<sup>10</sup> See, e.g., *Twain Harte Associates, Ltd. v. County of Tuolumne* (1982) 138 Cal.App.3d 664; *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498.

<sup>11</sup> *Twain Harte Associates, Ltd.*, 138 Cal. App. 3d at 698.

<sup>12</sup> *Id.*

<sup>13</sup> *San Francisco Tomorrow*, 229 Cal.App.4th at 509-511.

Here, the City has appropriately used its legislative authority to create density standards for mixed-use zones that are limited not by DU/ac, but by FAR.<sup>14</sup> When a project provides the requisite amount of affordable housing to qualify for a density bonus, the City increases the density as the State Density Bonus Law requires. Therefore, the City's density bonus ordinance is consistent with law.

### **III. State Density Bonus Law Does Not Require the City to Approve Multiple Density Bonuses.**

Under the State Density Bonus Law's plain language, an applicant is not permitted to receive multiple density bonuses; rather, the State Density Bonus Law requires that the City shall grant *one* density bonus and may grant multiple concessions/incentives and unlimited waivers.<sup>15</sup> As explained above, a project's bonus density may be an increase over FAR when FAR is used in the General Plan to define the maximum allowable residential density. By definition, awarding a density bonus based on FAR would mean that an applicant could not receive a second increase in FAR by applying for a concession or a waiver, because this would result in more than one density bonus, contrary to the State Density Bonus Law's requirements.

The State Density Bonus Law was not meant to entitle applicants to increased density from *both* bonus density *and* concessions/incentives and waivers. Certainly, the City agrees that FAR must be considered a development standard in districts where density is defined based on DU/ac, and in such cases, those FAR limits may be properly subject to waivers and/or concessions.<sup>16</sup> By contrast, where FAR establishes a project's density, such as in the City's mixed-use zones, FAR cannot also be considered a development standard that is subject to additional waivers and increases pursuant to the State Density Bonus Law.

### **IV. Eliminating the City's Density Metrics Would Lead to Absurd Results.**

In his letter, Mr. Francois argues that the City must categorically approve FAR waiver requests, even when FAR regulates density. Paradoxically, this would have the effect of either (1) rendering projects in the mixed use districts ineligible for waivers; or (2) nullifying the City's General Plan density standards in mixed use zones. Neither result would be consistent with the State Density Bonus Law.

As an initial matter, the State Density Bonus Law requires the City to waive development standards that would physically preclude the construction of a project

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<sup>14</sup> Mountain View is not the only City to regulate density using FAR. For example, San Francisco, Berkeley and Santa Rosa all have at least one zone or plan area where residential density is regulated via FAR.

<sup>15</sup> Gov. Code § 65915(b)(1)

<sup>16</sup> See e.g. MVMC Div. V of Art. IV of Ch. 36 (Multiple-Family (R3) Zone); MVMC § 36.48.70.d.

*with the bonus density and incentives* that are permitted, unless the City makes specific findings for denial.<sup>17</sup> If Mr. Francois were correct, and FAR could not be used to regulate density in mixed use zones, then all properties in the mixed-use zone would be completely free of density limitations. Because an applicant is already allowed to develop as many units as they want within the permitted building envelope established by the FAR under the City's General Plan, it would be impossible for an applicant to demonstrate that a development standard "physically precluded" developing at the density to which they are entitled if density were required to be defined in terms of DU/ac. Therefore, no waivers would be approved. Accordingly, the City's interpretation is more consistent with the State Density Bonus Law's mandate to be liberally applied to facilitate housing production, because the City approves a density bonus that increases FAR along with any waivers that are necessary to accommodate the increased density.

The alternative application of Mr. Francois's theory would require the City to waive all development standards in mixed use zones, because an applicant could propose any number of dwelling units at any size or configuration, and then request unlimited waivers of any applicable development standard. The Legislature recognized – and avoided – this potential absurdity when it adopted AB 1763 (2019). Under AB 1763, 100 percent affordable housing projects within one-half mile of a major transit stop are not subject to any controls on maximum density. However, when combined with the State Density Bonus Law's provisions regarding waivers of development standards, this would have the effect of allowing a 100 percent affordable project to propose any size development and request unlimited waivers to accommodate the project. Accordingly, the Legislature *prohibits* these density de-controlled 100 percent affordable projects from receiving waivers, apart from specified height increases.<sup>18</sup> However if Mr. Francois's interpretation were accepted, this would be the exact result for projects in mixed use zones in Mountain View. If the Legislature did not allow such an extreme result for 100 percent affordable projects, it certainly cannot be correct that the State Density Bonus Law requires the City to award predominantly market rate projects unlimited development potential and waivers from all development standards.

We note that the circumstances described above are not simply idle speculation. Although Mr. Francois does not disclose this fact in his letter, he is currently representing a client that is proposing a project with a 2.44 FAR in a zone where the maximum allowable residential density is 1.0 FAR. The project is a mixed-income development, so assuming the largest density bonus available under state law, the project would be permitted to develop at a density of approximately 1.5 FAR. This fact illustrates the flaw in Mr. Francois's position. If his interpretation of State Density

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<sup>17</sup> Gov. Code § 65915(e)

<sup>18</sup> Gov. Code § 65915(e)(3).

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Bonus Law were correct, the City would effectively have no density regulations in its mixed use zones. Not only could developers such as Mr. Francois's client be free to propose projects that enjoy two and half times the maximum allowable residential density, they could propose projects at any density they chose. This would not only contravene the City's General Plan, but it would go far beyond the limits contemplated by the State Density Bonus Law.

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The City appreciates this opportunity to share its explanation of why its density bonus ordinance is consistent with the State Density Bonus Law. As a next step, we propose to schedule a meeting with City staff, you, HCD Housing Policy Manager Paul McDougall, and other HCD staff as may be appropriate to review the City's approach to awarding density bonuses to projects. To the extent you have questions or would like any additional information in the meantime, please do not hesitate to contact me at [Sandra.Lee@mountainview.gov](mailto:Sandra.Lee@mountainview.gov).

Sincerely,

*Sandra Lee*

Sandra Lee  
Senior Assistant City Attorney

#### Attachments

- A. Recently Approved Density Bonus Projects
- B. Example Density Bonus Calculations

cc: **VIA EMAIL ONLY**

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**ATTACHMENT A**  
**Recently Approved Density Bonus Projects**

The table below summarizes the six applications for projects in zones defining density by FAR that the City has received in the past five years. Each of the projects was approved.

<b>Density Bonus Projects Relying on FAR Approved 2016 - 2021</b>				
<b>Project Address</b>	<b>Approval Date</b>	<b>Number of Units Proposed under Base Density</b>	<b>Number of Density Bonus Units Proposed</b>	<b>Number of Total Project Units</b>
1701 W El Camino Real	6/21/2016	54	13	67
400 San Antonio Road	9/27/2016	432	151	583
2700 El Camino Real	6/27/2017	172	39	211
1313 El Camino Real	12/12/2018	18	6	24
950 W El Camino Real	4/30/2019	68	3	71
1100 La Avenida	7/2/2021	51	49**	100
<b>Total</b>		<b>795</b>	<b>261</b>	<b>1,056</b>

*Note: The 1100 La Avenida project is a 100 percent affordable project, to which the City awarded a density bonus beyond the minimum required by State Density Bonus Law.*

## ATTACHMENT B Example Density Bonus Calculations

The text below provides examples of how the City calculates base density and awards density bonuses in zones where FAR regulates the density. Further discussion is provided in the City's Density Bonus Program Guidelines, from which these examples are drawn.

### Example 1

An applicant proposes a 64-unit project in a 105,000 square foot building on a 45,000 square foot lot (2.33 FAR). The maximum FAR is 1.85, allowing 83,250 square feet.

$$\text{Base Units} = 64 * (83,250/105,000) = 50.74, \text{ which is rounded up to } 51$$

If the applicant proposes four very low-income units, the applicant would qualify for the bonus.

- Four very low-income units is greater than 7% but less than 8% of 51 base units, so a 25% bonus is allowed.
- A 25% bonus over 51 base units equals  $63.75 = > 64$ , which is greater than or equal to the project units.
- NOTE: The project floor area is more than 25% over the maximum allowed gross floor area, but only to the extent that the base and allowed units were rounded up. This is consistent with the State Density Bonus Law, which requires each step in the calculation to be rounded up in order to provide the most housing development potential.

If the applicant only proposes three very low-income units, the applicant would not qualify for the requested bonus.

- Three very low-income units is greater than 5% but less than 6% of 51 base units, so only a 20% bonus would be allowed.
- A 20% bonus over 51 base units equals  $61.2 \Rightarrow$  a maximum of 62, which is less than the project units.

### Example 2

An applicant proposes a 100-unit project in a 125,000 square foot building on a 50,000 square foot lot (2.5 FAR). The project includes 5,000 square feet of retail. The maximum FAR is 1.0, allowing 50,000 square feet.

$$\text{Base Units} = 100 * (50,000-5,000)/(125,000-5,000) = 37.5 \Rightarrow 38$$



The applicant's requested bonus is calculated as follows:

$$\text{Requested Bonus} = (99.001 - 38) / 38 = 1.6053 = 160.53\%$$

Since the project needs a minimum 160.53% bonus, there is no density bonus available through the State Density Bonus Law for this project, and it cannot be approved.