



## STAFF REPORT TO THE ANTIOCH PLANNING COMMISSION

**DATE:** Regular Meeting of December 4, 2024

**SUBMITTED BY:** Zoe Merideth, Planning Manager

**APPROVED BY:** Kevin Scudero, Acting Community Development Director

**SUBJECT:** State Density Bonus Law Ordinance Update (LA2024-0005)

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### **RECOMMENDED ACTION**

It is recommended that the Planning Commission table the item.

### **DISCUSSION**

Staff prepared an ordinance repealing and replacing Title 9, Chapter 5, Article 35 of the Antioch Municipal Code (AMC), Density Bonus Program to present at the November 20, 2024 Planning Commission meeting. The Density Bonus Program of the AMC regulates and implements the State Density Bonus Law (SDBL). SDBL allows for a sliding scale of density bonuses and the granting of one or more concessions based on the amount and type of affordable housing that is provided, an unlimited number of waivers or reductions of local regulations, and parking reductions based on unit size. Staff had prepared the ordinance to ensure compliance with State law, outline application and approval procedures, and include development standards for affordable units constructed under the ordinance.

The afternoon of the Planning Commission November 20, 2024 meeting, after the public comment period for written correspondence had closed, staff received three letters challenging the City's ability to include certain provisions into the proposed ordinance, namely requiring the affordable units built under the ordinance to be the same size and appearance as the market rate units in a housing development. An organization that wrote one of the three original letters re-sent a letter to be included as public comment at the December 4, 2024 meeting. This letter is included as Attachment A.

Based on the correspondence received, staff is requesting that the item be tabled. Any future public hearings for the item would be re-noticed.

### **ATTACHMENTS**

A. Public Comment Letter Received

# ATTACHMENT "A"



Nov 21, 2024

City of Antioch  
200 H Street  
Antioch, CA 94509-1285

Re: Proposed Density Bonus Ordinance

By email: [planning@antiochca.gov](mailto:planning@antiochca.gov)

Cc: [tsmith@ci.antioch.ca.us](mailto:tsmith@ci.antioch.ca.us); [cgarcia@ci.antioch.ca.us](mailto:cgarcia@ci.antioch.ca.us); [cityclerk@antiochca.gov](mailto:cityclerk@antiochca.gov);  
[citymanager@ci.antioch.ca.us](mailto:citymanager@ci.antioch.ca.us); [zmerideth@antiochca.gov](mailto:zmerideth@antiochca.gov)

Dear Antioch Planning Commission,

The California Housing Defense Fund ("CalHDF") writes to inform the Planning Commission as to the meaning and operation of the state Density Bonus Law ("DBL"; Gov. Code, § 65915). Specifically, CalHDF writes to point out certain problems with the proposed State Density Bonus Law Ordinance Update, which will be heard on December 4, 2024. We urge the Planning Commission to address these problems before passing the ordinance.

## The Density Bonus Law Preempts the City's Proposed Amendments to Its Ordinance

As background, the DBL preempts provisions in local ordinances that clash with the DBL. This is unambiguous. (See, e.g., *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 771 ["The Density Bonus Law ... preempts any inconsistent local provisions."].) Furthermore, compliance with the DBL is mandatory: if a proposed project satisfies the terms of the DBL, then it is entitled to take advantage of the DBL, whatever the local government might think. (Gov. Code, § 65915, subd. (a)(1) ["local government shall comply with this section"].) There is no room for cities to add their own gloss on the DBL, and attempts to do so have no effect.

The bottom line is this: if a proposed development project complies with the terms of the DBL, it may use the DBL. It does not matter whether the local government has nominally created additional hurdles that must be cleared before a project may use the DBL. As far as the DBL is concerned, those nominal hurdles do not exist.

The proposed amendments to the City's DBL implementation ordinance on tonight's agenda would create such nominal hurdles. These amendments seek to require that affordable units

in a given development resemble the market rate units in that development, and that they be distributed evenly throughout the development, before the DBL can be invoked. Such amendments find no support in the text of the DBL and, in fact, clash with the text of the DBL, which makes no mention of the size or physical characteristics of the affordable units that can be used to claim a density bonus. (See generally Gov. Code, § 65915.) The DBL also – contradicting the purpose and effect of the City’s proposed amendments – states that it is to be interpreted “liberally in favor of producing the maximum number of total housing units.” (*Id.* at subd. (r); see also *id.* at subd. (u)(1) [“the intent behind the Density Bonus Law is to allow ... a developer to include more total units in a project than would otherwise be allowed”].) The DBL, then, is intended to produce more housing units and more affordable housing units – note the emphasis on “total units” – and it is not intended to restrict the size or physical characteristics of those units.

Of note, the California Department of Housing and Community Development has issued technical guidance to the City that, while not directly on point, clearly demonstrates that any type of housing unit can count towards the DBL’s requirements. On November 15, 2024, HCD sent the City a letter explaining that accessory dwelling units attached to larger primary dwelling units counted towards the DBL’s “total unit” calculation. (See attached letter from HCD.) HCD’s interpretation of state housing laws merits deference from the courts. (*Hoffmaster v. City of San Diego* (1997) 55 Cal.App.4th 1098, 1113, fn. 13 [“We substantially rely on the Department of Housing and Community Development’s interpretation [...] regarding compliance with the housing element law”]; see also *Boling v. Public Employment Relations Bd.* (2018) 5 Cal.5th 898, 911, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.)

### **Density Bonus Applicants Would Be Able to Waive the City’s Proposed Requirements**

Furthermore, even assuming the City’s proposed amendments have an effect, the DBL allows a project proponent to waive those rules. (See Gov. Code, § 65915, subds. (d) [outlining concessions and incentives to which DBL projects are entitled], (e) [outlining waivers of local standards to which DBL projects are entitled], and (k) [defining concessions and incentives].) If the City refuses to allow such a waiver, the proponent may sue and collect attorney’s fees and costs of suit. (*Id.* at subds. (d)(3) and (e)(1).)

### **The City Should Affirmatively Further Fair Housing by Facilitating More Multi-family and Affordable Development, Not by Restricting It**

CalHDF notes that staff cites the City’s duty to affirmatively further fair housing as a motivation for the proposed changes to the City’s DBL implementation ordinance. (Staff Report, p. 4.) CalHDF applauds the City for acknowledging its legal duty here and suggests that instead of attempting to impede the operation of the DBL – a law that produces thousands of affordable units across our state each year – the City instead focus on reducing regulatory and financial barriers to the construction of multifamily housing, which is

cheaper than the single-family homes that dominate the City's housing stock, and which correspondingly houses less wealthy households. To affirmatively further fair housing as state law requires (Gov. Code, § 8899.50), the City should act to ease barriers to multifamily housing, rather than make it more costly to construct.

CalHDF understands the frustration that motivates the City to attempt the proposed amendments. It is a bad look (to put it colloquially) when affordable units in a development are smaller than or otherwise distinguishable from the market rate units. But the problem here is the cost of building affordable units given the lower rents they will command. (See Gov. Code, § 65915, subd. (u) [noting that the DBL is meant to address financing difficulties for affordable units].) If the City wants to produce larger and more expensive affordable units, it needs to address this problem: the City needs to find money to build such units or pay developers to build such units. The City could also, of its own accord, offer greater density bonuses for developers who build their affordable units to the standards the City desires: the DBL allows for that. (Gov. Code, § 65915, subd. (n).) Without addressing the cost issue, a mandate that affordable units be more expensive (like the proposed changes to the City's ordinance) will simply reduce the number of affordable units that get built – a bad outcome for a city that already produces little new housing, and most of whose housing stock is expensive single-family homes.



CalHDF is a 501(c)3 non-profit corporation whose mission includes advocating for increased access to housing for Californians at all income levels, including low-income households. You may learn more about CalHDF at [www.calhdf.org](http://www.calhdf.org).

Sincerely,

A handwritten signature in blue ink, appearing to read "Dylan Casey".

Dylan Casey  
CalHDF Executive Director

A handwritten signature in black ink, appearing to read "James M. Lloyd".

James M. Lloyd  
CalHDF Director of Planning and Investigations

**DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT  
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November 15, 2024

Kevin Scudero, Community Development Director  
City of Antioch  
200 H Street  
Antioch, CA 94531

Dear Kevin Scudero:

**RE: City of Antioch State Density Bonus Law Implementation – Letter of Technical Assistance**

The California Department of Housing and Community Development (HCD) received a request for technical assistance regarding the application of the State Density Bonus Law (SDBL)<sup>1</sup> to the housing development project proposed at 3001 Oakley Road (Project). The SDBL allows housing developments with at least five residential units to obtain increases in allowable density, incentives/concessions, development standard waivers, and, for qualifying projects, reductions in parking requirements, by providing affordable housing. The purpose of this letter is to provide technical assistance to the City of Antioch (City) regarding the ability of the project to use accessory dwelling units (ADUs) to qualify for the benefits of the SDBL.

**Background**

HCD understands the Project proposes the construction of 150 units (consisting of 52 duplex units, 51 single-family houses, and 47 ADUs) on two contiguous lots with a combined area of approximately 14.58 acres. All units in the project would be offered for rent and managed together as a single community. The Project seeks to deed restrict 11 of the ADUs as low-income units to obtain a 22 percent density bonus under the SDBL. This density bonus will enable the construction of eight of the 52 duplex units.

The City initially held the position that under State ADU Law,<sup>2</sup> the City was permitted to stagger the review of the primary units and ADU components of the project, such that the Project would be unable to use the ADUs to obtain a density bonus for the primary units. Following a meeting on September 3, 2024, where HCD provided verbal technical assistance that State ADU Law was meant to allow for simultaneous discretionary primary unit review and ministerial ADU review, the City concluded the Project would

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<sup>1</sup> Gov. Code, § 65915.

<sup>2</sup> Gov. Code, § 66317, subd. (a).

have to deed restrict primary units as affordable in order to obtain a density bonus for the primary units.

## Analysis

The SDBL requires that local governments grant certain housing developments density bonuses if the developments provide specified percentages of their pre-density bonus “total units” as deed restricted affordable housing. Therefore, the relevant question is:

### **Can deed restricted ADUs serve to qualify a project for a density bonus pursuant to the SDBL, even if the bonus sought is for primary units?**

The answer is “yes,” if all the ADUs in the project are counted towards the “total units” in the project. Although the SDBL makes no mention of ADUs in its text, it likewise does not expressly narrow the definition of unit to exclude ADUs. A project initially qualifies under the SDBL when the project’s deed restricted affordable units meet or exceed the percentages specified in the SDBL, not when the project’s deed restricted affordable *primary* units meet or exceed the specified percentages. ADUs are a type of housing unit that can be used to establish eligibility “*provided they are counted within the total units of the project.*”<sup>3</sup>

However, a project may not deed restrict units to qualify under SDBL if the units are not counted toward the total unit count for the purposes of SDBL. Furthermore, deed restricting ADUs to achieve SDBL eligibility, where they only exist in relation to primary units, makes them a “dependent project” that renders all ADUs in the project, deed restricted or not, part of the total unit count.<sup>4</sup>

Applied to the Project, the development has 142 “total units,”<sup>5</sup> including 95 primary units and 47 ADUs. This means that to use ADUs as deed restricted units, at least 15 units (including ADUs only, if desired) would need to be deed restricted for low-income households to meet the 10-percent SDBL minimum. Alternatively, the Project could deed restrict only 10 *primary* units so that the 47 ADUs would not be counted toward the Project’s “total units.”

Qualifying for the SDBL with deed restricted ADUs would grant the project up to 29 bonus units, while qualifying with primary units would grant up to 19 bonus units; in

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<sup>3</sup> See HCD Letter of Technical Assistance to the City of Carlsbad, February 16, 2024, available at <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/carlsbad-hau565-ta-02162024.pdf>, page 2. (Emphasis added.)

<sup>4</sup> See HCD Letter of Technical Assistance to the City of El Cajon, February 16, 2023, available at <https://www.hcd.ca.gov/sites/default/files/docs/planning-and-community/HAU/el-cajon-hau484-ta-02162024.pdf>.

<sup>5</sup> “Total units” means the number of units in the project excluding bonus units. See Gov. Code, § 65915, subd. (o)(8)(A).

either case, this is beyond the eight bonus units the Project seeks to obtain. What is not permitted, however, is for an applicant to include only a portion of the ADUs in the “total units” count – as proposed in the subject Project.

Note that using deed restricted ADUs to qualify for the SDBL is a choice for applicants that comes with responsibilities. In addition to considering whether the applicant should increase its number of total units by using deed restricted ADUs for eligibility, applicants must ensure the continued affordability of the ADUs for the duration of their deed restriction. The purpose of the SDBL is to ensure that deed restricted affordable units are built and continuously occupied by households at qualifying income levels. Enforcing this in ADUs can be challenging, especially if the development includes for-sale primary units or will be parceled off in the future. In the context of the Project, this is not an immediate issue because the applicant intends to own the Project as a single community and manage it collectively, but it may pose challenges in the future should that ownership and management structure change. In future projects where an applicant may be inclined to qualify under the SDBL by deed restricting ADUs, the City might consider imposing a recurring affordable unit monitoring fee as provided for in the SDBL.<sup>6</sup> This would help to ensure that the affordable ADUs are occupied by households at qualifying income levels.

## Conclusion

Deed restricted affordable ADUs can be used to meet the requirements of the SDBL, provided that the developer can ensure the affordability of the ADUs and that all ADUs are counted as “total units” for the purposes of calculating the number of deed restricted units required for SDBL eligibility.

HCD remains committed to supporting the City of Antioch in facilitating housing at all income levels and hopes the City finds this clarification helpful. If you have questions or need additional information, please contact David Ying at [david.ying@hcd.ca.gov](mailto:david.ying@hcd.ca.gov).

Sincerely,



David Zisser  
Assistant Deputy Director  
Local Government Relations and Accountability

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<sup>6</sup> Gov. Code, § 65915.3 as created by AB 2430 (Chapter 273, Statutes of 2024), effective January 1, 2025.