



Planning and Development Department
Land Use Planning Division

MEMORANDUM

DATE: August 2, 2021

TO: Land Use Planning Staff

FROM: Steven Buckley, Land Use Planning Manager

SUBJECT: Housing Accountability Act & Density Bonus – Objective Standards

QUESTION / ISSUE

State law requires the City to identify objective zoning standards for the purpose of defining housing development projects that qualify for protections under the Housing Accountability Act (HAA) and to define a base project for the purposes of calculating density bonuses. An issue arises in defining those projects when the City's Zoning Ordinance provides development standards that can be modified with a use permit or administrative use permit, i.e. should all modifications be assumed to be granted when defining the qualifying or base project for these purposes?

DETERMINATION

The protections afforded by the HAA and the definition of a base project for density bonus calculations apply to a housing development project up to and including the maximum development allowed with use permits and/or administrative use permits.

BACKGROUND

The City's zoning code distinguishes between use permits required for any construction to take place (e.g., BMC sections 23B.32.040 and 23C.08.010) and additional use permits required to modify the "base" development standards, e.g. reduced setbacks, increased height, location of parking, etc. The decision-maker responsible for determining whether to grant such modifications usually has no objective basis for adjudicating whether to approve these modifications, i.e. the zoning ordinance uniformly relies on a traditional land use permit finding of non-detriment and consistency with the General Plan and zoning district purposes. As such, adjudicative decisions are made based on qualitative aspects such as shadow impacts, view obstruction, privacy, air circulation and other "compatibility" factors.

For example, BMC section 23D.32.070 allows the Zoning Officer to issue an administrative use permit to construct a building up to 35 feet in average height, which exceeds the nominal height limit of 28 feet in the R-2A district. Despite the fact that a discretionary permit is required, the 35-foot height limit is the applicable objective standard, and a project that complies with that standard cannot be denied or reduced in density unless it fails to comply

with another objective development standard (or if the findings in Government Code section 65589.5(j)(1) can be made).

ANALYSIS

Effect of the HAA on Discretionary Permits

Government Code section 65589.5(j) (the most broadly applicable provisions of the HAA) states:

When a proposed *housing development project* complies with applicable, objective general plan, zoning, and subdivision standards and criteria, including design review standards, in effect at the time that the application was deemed complete, but the local agency proposes to *disapprove the project* or to impose a condition that the project be developed at a *lower density*, the local agency shall base its decision regarding the proposed *housing development project* upon written findings supported by a preponderance of the evidence on the record that both of the following conditions exist

The written findings must establish that “the housing development project would have a *specific, adverse impact upon the public health or safety* unless the project is *disapproved* or approved upon the condition that the project be developed at a *lower density*” and that there is no other *feasible method to mitigate* that adverse impact. In the absence of such findings, the City must approve any housing development project that complies with applicable objective standards.¹

Government Code section 65589.5(h)(2) defines “housing development project” as “a use consisting of any of the following”:

- (A) Residential units only.
- (B) Mixed-use developments consisting of residential and nonresidential uses with at least two-thirds of the square footage designated for residential use.
- (C) Transitional housing or supportive housing.

Any project comprised of two or more residential units or mixed-use developments with at least two-thirds of the square footage designated for residential use may be subject to the Housing Accountability Act, including modifications to an existing property that qualifies as a residential development project (e.g. multi-family residential additions).

¹ Italicized terms are defined in the Government Code; interpretation of their meaning is also provided in the HAA. Technical Assistance Advisory published by the State Department and Housing and Community Development. <https://www.hcd.ca.gov/community-development/housing-element/housing-element-memos/docs/hcd-memo-on-haa-final-sept2020.pdf>

For purposes of the HAA, “lower density” includes any conditions that have the same effect or impact on the ability of the project to provide housing, generally understood to mean the total number of dwelling units, but also related to overall square footage, number of bedrooms, etc. This could include a condition that directly lowers the overall number of units proposed (e.g., the development proposes 50 units, but the local government approves only 45 units). Another example would be a reduction in proposed building height that would result in the project being able to provide fewer units than originally proposed.

Therefore, the Zoning Officer, ZAB, DRC and LPC should refrain from applying subjective findings (e.g., non-detriment) to any application to construct a qualifying housing development project (including remodeling or reconfiguration of housing) if that project satisfies objective standards for permit issuance, unless specific findings for denial under the Housing Accountability Act can be made. While decision-makers retain discretion in the overall land use and design review process, i.e., whether the use is properly located or the building and site improvements are compatibly designed, the ultimate decision on density and development intensity is protected by the HAA.

Obviously, those standards that are objective or that are not subject to modification with a use permit remain in effect, e.g. maximum floor-area-ratios are generally not subject to modification, and certain design standards for commercial storefronts are numeric and enforceable as written.

Staff reports and findings for these development projects should still address the requirements of the zoning code for granting the requested permits, while also acknowledging the protections afforded by the HAA.

Effect on Density Bonus Projects

State Density Bonus Law requires local agencies to grant a density increase over “the otherwise maximum allowable gross residential density” for the zoning district and the General Plan Land Use Element for qualifying housing development projects. Density bonus can include a bonus in number of units, as well as additional incentives, concessions, and/or waivers to development standards.

To implement the State Density Bonus Law, the City has developed the administrative concept of a “base project” that excludes the modified development standards available with use permits. In addition, current density bonus procedures do not account for residential density standards in the General Plan Land Use Element. This approach must be modified.

State Density Bonus Law 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, 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.

This definition of maximum allowable residential density requires the City to consider the base density to be the higher densities allowed pursuant to the modified standards available with discretionary permits, i.e. all “density allowed under the zoning ordinance” must be considered in establishing the maximum allowable base residential density.²

Furthermore, Density Bonus Law (Government Code section 65915) requires that a request for a density bonus does not constitute a valid basis on which to find a proposed housing development project is not compliant with the HAA.

Next Steps

In order to address the need for additional objective standards, the City is undertaking studies of objective standards for a variety of development impact issues, as well as overhauling the organization and clarity of the existing zoning ordinance. The next step in the process will be studying and recommending zoning ordinance revisions, including objective design review criteria, to address the necessity of more predictable outcomes.

² In addition, State Density Bonus Law explicitly requires the City to consider “the density allowed under the land use element of the general plan” in determining maximum allowable residential density. If the General Plan conflicts with the Zoning Ordinance, the density allowed under the General Plan must be used to calculate allowed density under State Density Bonus Law. Where the General Plan specifies a range of densities for a land use classification (as is the case in the City of Berkeley), state law requires the City to apply the maximum density in that range to determine maximum allowable residential density. However, the Berkeley General Plan does not apply the stated densities on a parcel-specific basis, so this provision is inapplicable.

Housing Accountability Act Decision Matrix

Housing Accountability Act Decision Matrix

This decision tree generally describes the components of the HAA. Both affordable and market-rate developments are protected by components of the HAA. The statute contains detailed requirements that affect the applicability of the HAA to a specific housing project based on its characteristics.

