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CITY COUNCIL INFORMATIONAL MEMORANDUM

June 26, 2026

To: Cupertino City Council

From: Floy Andrews, Interim City Attorney and John Cardenas, Special Counsel

Re: State Density Bonus Law

Summary
California's State Density Bonus Law (SDBL), codified under California Government Code Sections 65915 - 65918, is a statutory mandate requiring local governments to grant specific development incentives to builders who include deed-restricted affordable housing in their projects. The law requires cities like Cupertino to adjust baseline zoning limits in exchange for affordable housing units. Over more than four decades, it has evolved from a simple incentive program into a mandatory streamlining mechanism that reshapes municipal land-use authority.

Background

When the State Density Bonus Law was enacted in 1979, the Legislature sought to create a voluntary mechanism through which market-rate homebuilders would provide lower-income units in exchange for a modest increases in allowable project density. Initially, the law offered a maximum 25% density increase for projects that set aside a portion of their units for low- or moderate-income residents. The law had limited impact because cities retained discretion to reject projects or impose cost-prohibitive design standards.

In 2004 with Senate Bill 1818, the maximum density bonus was raised to 35% and expanded the types of incentives and concessions developers could request, such as reduced setbacks and increased building heights. SB 1818 also codified the concept of "waivers," preventing local jurisdictions from enforcing any development standard that would physically preclude a project from achieving its authorized density.

Assembly Bill 2345, enacted in 2020, further increased the standard maximum density bonus to 50% and reduced the affordable unit thresholds required to qualify for local concessions (e.g., the threshold for obtaining two concessions was reduced from 20% to 17% low-income units, and for three concessions from 30% to 24%). The bill expanded multifamily housing production across California by indexing developers' financial returns directly to specific tiers of income-restricted housing.

Assembly Bill 1287, which took effect on January 1, 2024, represents the greatest expansion of the law, allowing developers to double their density to a 100% total increase. To qualify, a project must maximize its standard 50% base bonus and then commit to a second tier of affordable housing. This structure provides up to a 100% density increase if a project provides 15% very-low-income units alongside 15% moderate-income units, targeted at middle-class or "missing middle" households.

Most recently, in response to concerns regarding commercial real estate, the Legislature enacted Senate Bill 92 to regulate mixed-use developments using SDBL benefits. SB 92 clarifies that local governments are not required to grant incentives, concessions, or waivers for transient lodging portions of a project, such as hotels or motels. Furthermore, for applications submitted after January 1, 2026, the bill caps the commercial floor area ratio (FAR) allowed via SDBL concessions at 2.5 times the property's underlying base zone commercial FAR. This protects local commercial zoning while preserving residential density incentives.

Current Requirements in Practice

The State Density Bonus Law applies universally to any housing development project consisting of five or more residential units. It covers rental and for-sale housing, as well as specialized configurations like senior housing, student housing, and residential care facilities. While local jurisdictions are required to maintain a local density bonus ordinance, a developer is legally entitled to all state benefits even if the city's local ordinance is outdated or non-compliant.

The baseline density calculations originate from a city's General Plan or specific plan zoning designations. If a site allows 20 units under Cupertino's local code, a developer qualifying for a 50% bonus can build 30 units. If they leverage the AB 1287 stacked bonus to reach a 100% increase, they can build 40 units on that same parcel. The affordable units must remain deed-restricted at below-market rates for a minimum of 55 years for rental housing.

Beyond extra units, qualifying projects receive "incentives and concessions" designed to make affordable housing financially feasible by lowering actual construction costs. Developers are entitled to between one and five concessions depending on the percentage and depth of the project's affordability. Common concessions include modifications to zoning requirements, such as adding stories to building heights, reducing minimum unit square footage, or adjusting architectural design elements.

The law also provides developers with "waivers of development standards." Unlike concessions, which are capped in number, developers can request unlimited waivers if they can prove that a local rule physically prevents them from building the project at its legally permitted density. For example, if Cupertino's standard setback or lot-coverage rules prevent a

developer from physically fitting the authorized 50% or 100% density units onto the site, the city must waive those specific standards.
A separate provision of the SDBL limits a city's power to mandate vehicular parking spaces. Under the state's default parking ratios, a city cannot demand more than one space for studio to one-bedroom units, or more than 1.5 spaces for two-to-three-bedroom units. Most notably, if a project features at least 11% very-low-income units and sits within one-half mile of a major transit stop with unobstructed access, the city is prohibited from imposing any minimum parking requirements whatsoever.

<u>Fast Tracking and the SDBL</u>
The integration of Senate Bill 35 and its successor, Senate Bill 423, with the State Density Bonus Law (SDBL) represents a frequently used combination of housing laws available to developers in California.

While the SDBL forces cities to increase a project's size and waive restrictive physical rules, SB 35/SB 423 fast-tracks the approval timeline. When applied to Cupertino, this integration effectively strips the City Council of its traditional land-use authority, creating a mandatory, accelerated, and "by-right" pathway for multifamily developments.

<u>Recent Case Law</u>
Three recent decisions have resulted in further limiting a city's discretion to restrict projects under density bonus provisions. In *Bankers Hill 150 v. City of San Diego (2022),* the Court of Appeal stopped allowing cities like Cupertino that historically could successfully argue that a developer did not "need" a waiver or concession because they could simply redesign the building—such as making the units smaller or rearranging the layout—to fit within local zoning requirements. The court ruled that a density bonus project is legally entitled to waive development standards that would physically preclude the project as proposed and designed by the developer. As a result, cities can no longer require that a builder eliminate amenities (such as courtyards or balconies) or redesign a building to force compliance with local setback or height rules.

In *Schreiber v. City of Los Angeles (2021),* the court addressed SDBL "concessions" and the historical requirement that a "concession" must result in identifiable, actual cost reductions to help make affordable housing financially feasible. Many cities previously required developers to submit proprietary, expensive, and exhaustive financial pro formas to "prove" the exact cost savings. In *Schreiber v. City of Los Angeles*, the court ruled that local municipal codes demanding such proof are preempted by state law. The court established a strong legal presumption that a developer's requested incentives will result in cost reductions. The burden of proof now rests entirely on the city. So, for example, if Cupertino wishes to deny a concession, city staff must produce "substantial evidence" proving that the concession will *not* result in a cost reduction (a high legal threshold for a city to clear).

Finally, in *Rodriguez v. City of Los Angeles (2025)*, a significant appellate ruling addressed what happens to density bonus affordability covenants if a project goes bankrupt or faces foreclosure. Financial institutions argued that a foreclosing lender's deed of trust could wipe out the BMR restrictions if the lender's lien was recorded first. The Court of Appeal rejected this, ruling that a recorded density bonus agreement is the legal equivalent of a land-use permit condition. Because it is a permit condition, the 55-year BMR covenant survives foreclosure and runs with the land permanently, binding any future bank or buyer. This protects municipal housing inventories from losing affordable units during economic downturns.

Prepared by: John Cardenas, Special Counsel
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