

Date of Hearing: April 11, 2018

ASSEMBLY COMMITTEE ON HOUSING AND COMMUNITY DEVELOPMENT

David Chiu, Chair

AB 2797 (Bloom) – As Introduced February 16, 2018

SUBJECT: Planning and zoning: density bonuses

SUMMARY: Provides that, while state density bonus law does not supercede or in any way alter or lessen the effect or application of the California Coastal Act of 1976 (Act), any density bonus, incentives or concessions, waivers or reductions of development standards, and parking ratios granted pursuant to state density bonus law shall not be a basis for finding a project inconsistent with Section 30251 of the Public Resources Code, which relates to the scenic and visual qualities of coastal areas.

EXISTING LAW:

- 1) Defines “density bonus” as a density increase over the otherwise maximum allowable residential density as of the date of application by the applicant to the local government.
- 2) Requires all cities and counties to adopt an ordinance that specifies how they will implement state density bonus law.
- 3) Provides that when an applicant seeks a density bonus for a housing development within, or for the donation of land for housing within, the jurisdiction of a city, county, or city and county, that local government shall comply with state density bonus law.
- 4) Provides that the density bonus for low-, very low-, and moderate-income units increase incrementally according to a set formula.
- 5) Requires cities and counties to provide an applicant for a density bonus concessions and incentives based on the number of below market-rate units included in the project.
- 6) Prohibits a city or county from applying any development standard that will have the effect of precluding the construction of housing that qualifies for a density bonus at the densities or with the concessions or incentives required by density bonus law.
- 7) Provides that the granting of a concession or incentive shall not require or be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, study, or other discretionary approval.
- 8) Provides that density bonus law does not supercede or in any way alter or lessen the effect or application of the Act (Government Code Section 65915).
- 9) Establishes the Coastal Commission (Commission) in the Natural Resources Agency and requires the Commission to consist of 15 members (3 non-voting and 12 voting).
- 10) Requires a person planning to perform or undertake any development in the coastal zone to obtain a coastal development permit (CDP) from the Commission or local government

enforcing a local coastal program (LCP) (Public Resources Code Section 30600).

- 11) Defines "development" to mean, among other things, the placement or erection of any solid material or structure on land or in water. "Structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line (Public Resources Code Section 30106).
- 12) Defines the "coastal zone" as the land and water area of the State of California from the Oregon border to the border of the Republic of Mexico, extending seaward to the state's outer limit of jurisdiction, including all offshore islands, and extending inland generally 1,000 yards from the mean high tide line of the sea. In significant coastal estuarine, habitat, and recreational areas, the coastal zone extends inland to the first major ridgeline paralleling the sea or five miles from the mean high tide line of the sea, whichever is less. In developed urban areas, the zone generally extends inland less than 1,000 yards. The coastal zone does not include the area of jurisdiction of the San Francisco Bay Conservation and Development Commission, nor any area contiguous thereto, including any river, stream, tributary, creek, or flood control or drainage channel flowing into such area (Public Resources Code Section 30103).
- 13) Prohibits LCPs from being required to include housing policies and programs (Public Resources Code Section 30500.1).
- 14) Authorizes the Commission to consider environmental justice, or the equitable distribution of environmental benefits throughout the state when acting on a CDP, the issuing agency, or the Commission on appeal (Public Resources Code Section 30013).
- 15) Provides that nothing in the Act shall exempt local governments from meeting the requirements of state and federal law with respect to providing low- and moderate-income housing, replacement housing, relocation benefits, or any other obligation related to housing imposed by existing law or any law hereafter enacted (Public Resources Code Section 30007).
- 16) Provides that the Legislature finds and declares that it is important for the Commission to encourage the protection of existing and the provision of new affordable housing opportunities for persons of low- and moderate-income in the coastal zone. (Public Resources Code Section 30604).
- 17) Requires the Commission to encourage housing opportunities for low- and moderate-income households. Provides that the Commission may not take measures that reduce the density of a housing project below the level allowed by local zoning ordinances and state density bonus law unless the Commission makes a finding that there is no feasible method to accommodate the density without creating a significant adverse impact on coastal resources (Public Resources Code Section 30604).
- 18) Provides, pursuant to the Mello Act, requirements for preserving housing for persons and families with low- and moderate-incomes in the coastal zone (Govt. Code Section 65590).
- 19) Provides that the scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to

protect views to and along the ocean and scenic coastal areas, to minimize the alteration of natural land forms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreation Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting (Public Resources Code Section 30251).

FISCAL EFFECT: None.

COMMENTS:

Need for this bill: According to the author, this bill seeks to correct a recent court case, *Kalnel Gardens, LLC v. City of Los Angeles*, which "undermined the application of Mello and Density Bonus Law in the coastal zone." If not corrected, the author contends that this decision will likely prevent density bonus law from being used in the coastal zone, resulting in fewer affordable housing units. The author seeks to clarify a provision in density bonus law to ensure that a project cannot be found inconsistent with the Act merely because it is entitled to a density increase under state law, while also ensuring that coastal resources are protected as the Act requires.

Development in the coastal zone: In 1976, the California Legislature enacted the Coastal Act, mandating that coastal counties manage the conservation and development of coastal resources through a comprehensive planning and regulatory program. In partnership with coastal cities and counties, the Commission plans and regulates the use of land and water in the coastal zone. Development activities, which are broadly defined by the Coastal Act to include construction of buildings, divisions of land, and activities that change the intensity of use of land or public access to coastal waters, generally require a CDP from either the Commission or the local government with a certified LCP.

A person planning to undertake any development in the coastal zone is required to obtain a CDP from the Commission or local government enforcing a LCP. 85% of the coastal zone is currently governed by LCPs drafted by cities and counties, and certified by the Commission. In these certified jurisdictions, local governments issue CDPs pursuant to detailed planning and design standards. There are 14 jurisdictions without LCPs- also known as "uncertified" jurisdictions- where the Commission is still the permitting authority for CDPs. One exception to this is the City of Los Angeles, which implements the Act directly by issuing CDPs, despite not having a certified LCP. However, every city-issued CDP can be appealed to the Commission.

Density bonus law: Density bonus law was originally enacted in 1979, but has been changed numerous times since. The Legislature enacted the density bonus law to help address the affordable housing shortage and to encourage development of more low- and moderate income housing units. Nearly forty years later, the Legislature faces the same challenges. Density bonus is a tool to encourage the production of affordable housing by market rate developers, although it is used by developers building 100% affordable developments as well. In return for inclusion of affordable units in a development, developers are given an increase in density over a city's zoned density and concessions and incentives. The increase in density and concessions and incentives are intended to financially support the inclusion of the affordable units.

All local governments are required to adopt an ordinance that provides concessions and incentives to developers that seek a density bonus on top of the cities' zoned density in exchange for including extremely low, very low, low, and moderate income housing. Failure to adopt an ordinance does not relieve a local government from complying with state density bonus law. Local governments must grant a density bonus when an applicant for a housing development of five or more units seeks and agrees to construct a project that will contain at least any one of the following:

- Ten percent of the total units for lower income households;
- Five percent of the total units of a housing for very low income households;
- A senior citizen housing development or mobilehome park;
- Ten percent of the units in a common-interest development for moderate-income households; or
- Ten percent of the total units of a housing development for transitional foster youth, disabled veterans, or homeless persons.

As part of the density bonus application, a developer may also request incentives, concessions and parking ratio reductions. The number of incentives and concessions, and the parking ratio reduction, vary depending on the percentage and type of affordable housing included in a project.

Density bonus law provides that the granting of a concession or incentive shall not require or be interpreted, in and of itself, to require an LCP amendment. It also clarifies that density bonus law does not supercede or in any way alter or lessen the effect or application of the Act. Multiple local governments in the coastal zone have adopted LCPs that incorporate density bonus policies.

Kalnel Gardens, LLC v. City of Los Angeles (3 Cal.App.5th 927 (2016)): In 2013, City of Los Angeles planning officials approved a proposed residential development in the Venice area. The project would have involved tearing down a two-story, three-unit apartment building and replacing it with a 15 unit housing development including five duplexes and five single family homes. Pursuant to density bonus law, the developer was allowed to exceed the normal density restrictions for that location because two of the units would be designated for very low income households. Density bonus law also entitled the developer to other zoning concessions, including a height variance. The City approved the project's vesting tentative tract map, including findings that the project complied with the City's General Plan as well as the Venice Specific Plan, and also approved a CDP under the Act.

In September 2013, a neighborhood group appealed the planning department's development approvals, including the CDP. The residents argued the project violated the Act because its height, density, setbacks, and other visual and physical characteristics were inconsistent with the existing neighborhood. The Planning Commission found that the development did not conform to the Act because its size, height, bulk, mass, and scale were incompatible with and harmful to the surrounding neighborhood and because the setbacks were too small. The developer appealed the Planning Commission's decision to the City Council, which denied the appeal.

The developer then brought an administrative mandate action against the City, alleging that it had violated the Housing Accountability Act, the Density Bonus Act, and the Mello Act. For the purpose of this analysis, the focus will be on the court's decision as it relates to state density bonus law and the Act. The trial court found that the density bonus, height and setback variations initially approved for the project were proper under the housing density statutes and other City zoning plans and regulations, including the Commission-approved Venice Land Use Plan. However, the trial court found that the housing density statutes were subordinate to the Act and that substantial evidence supported the City's findings that the project violated the Act because it was visually out of step with the surrounding coastal community.

The developer appealed, and the appellate court affirmed the trial court's decision, holding that that state density bonus law is subordinate to the Act and that a project that violates the Act as the result of a density bonus may be denied on that basis. The court noted that "the Legislature appears to have struck a balance" between the Act and density bonus law "by requiring local agencies to grant density bonuses unless doing so would violate the [Act]."

Staff comment: It is worthwhile to examine the legislative history behind two bills relating to state density bonus law and the Act, both of which enacted laws referenced in the *Kalnel Gardens, LLC* case. AB 1866 (Wright), Chapter 1062, Statutes of 2002, made numerous changes to state density bonus law and state law relating to second units. According to this Committee's analysis of that bill, the sponsors contended that "there are many reasons for California's housing crisis, but one very important reason are the many constraints and obstacles imposed on housing by local governments." One of the provisions of density bonus law added by AB 1866 is that the granting of a concession or incentive shall not require or be interpreted, in and of itself, to require an LCP amendment. It also added the section of law this bill seeks to amend- Government Code Section 65915(m), providing that density bonus law does not supercede or in any way alter or lessen the effect or application of the Act.

AB 1866 was opposed by the Commission until August 6, 2002, shortly after amendments taken in the Senate added, among other provisions, what is now Government Code Section 65915(m). Prior to that amendment, in the Commission's opposition letter to the Senate Housing Committee, it stated "...[t]he Commission has historically taken the position that housing density bonus ordinances need to be consistent with other LCP and Coastal Act policies, and therefore should be formally amended into any applicable LCP." In the Commission's August 7, 2002 letter to the author of AB 1866, it states that the Commission voted to remove its opposition and take a neutral position on the bill because "the most recent amendments clarify that nothing in the bill is meant to supercede or lessen the application of the Coastal Act policies..." The Assembly Concurrence in Senate Amendments analysis, which appears to be the only legislative analysis of AB 1866 that directly addresses this amendment, describes the amendment as "[p]rovid[ing] that the requirements of the California Coastal Act shall not be superceded by any of the provisions in this measure."

One year later, SB 619 (Ducheny) Chapter 793, Statutes of 2003, made several changes to laws relating to the development of affordable housing, including requiring the Commission to encourage housing opportunities for low-and moderate-income households. It also provided that the Commission may not take measures that reduce the density of a housing project below the level allowed by local zoning ordinances and state density bonus law unless the Commission makes a finding that there is no feasible method to accommodate the density without creating a significant adverse impact on coastal resources. This Committee's analysis noted that the "author

asserts that in spite of overwhelming need, many communities continue to resist new housing development, especially multifamily housing and higher density housing." According to the Senate Natural Resources Committee analysis, "California coast cities, with the current rate of growth, will have to support more housing. From an environmental perspective, coastal areas should consider increasing housing density and affordability.... Affordable housing projects developed in coastal areas, as long as they are consistent with LCPs, are an environmental bonus, not a detriment."

In short, the relevant provisions of existing law were not intended to make state density bonus law wholly subordinate to the Act. Rather, they clarify that density bonus law should be accommodated in a manner that is consistent with the Act. The author is concerned that the *Kalnel Gardens, LLC* case could be interpreted to allow a permitting authority, whether it is a local government or the Commission, to deny a project simply because the developer is entitled to a density bonus, rather than working with the developer to accommodate the density bonus consistent with the Act.

To better reflect the author's intent, the Committee may wish to consider amending the bill to provide that any density bonus, concessions, incentives, waivers or reductions of development standards and parking ratios to which the applicant is entitled under density bonus law shall be accommodated, but in a manner that harmonizes density bonus law and the portions of the Act relating to Coastal Resources Planning and Management Policies.

Arguments in support: Supporters contend that if the law is not clarified post-*Kalnel Gardens, LLC* this court decision will likely prevent density bonus law from being used in the coastal zone and will undermine the production of housing. Supporters also point to density bonus law's interaction with the Mello Act. Density bonus law incentivizes the creation of affordable housing without direct subsidy. The Mello Act, meanwhile, requires the preservation and production of affordable housing within the coastal zone. Under the Mello Act, developers building within the coastal zone typically must replace affordable housing units when they are demolished and must include affordable units in new housing developments if feasible. One tool to ensure that the units feasibly can be built is density bonus law, which could be at risk in the coastal zone post-*Kalnel Gardens, LLC*.

Arguments in opposition: Opponent California Coastal Protection Network, writing in opposition to the current version of the bill, views it as an exemption from PRC Section 30251, which protects scenic and visual qualities of coastal areas. They request that the bill be amended to add clear enforceable policies and accountability measures that will more reliably advance affordable housing in the coastal zone, such as (1) support for local governments that lack LCPs with affordable housing provisions to complete them in a timely fashion; (2) requirements for local governments to include density bonus and other affordable housing policies in LCPs beyond a date certain; (3) clear and enforceable policies in the Act that require local governments and the Commission to protect, encourage, and where feasible, provide for affordable housing in the coastal zone; and (4) amendments to the Mello Act to make it more difficult for developers and local governments to shift affordable housing up to three miles outside of the Coastal zone, as they are currently allowed to do, and to require local jurisdictions to adopt ordinances that proactively advance affordable housing in the coastal zone.

Committee amendments:

To better reflect the author's intent of harmonizing density bonus law and the Act, the below amendments are proposed:

1. On page 2, in line 1, add the following uncodified intent language:

It is the intent of the Legislature in amending subdivision (m) of Section 65915 of the Government Code to supersede the holding and dicta in *Kalnel Gardens, LLC v. City of Los Angeles* that Section 65915 is subordinate to the California Coastal Act of 1976 (Division 20 (commencing with Section 30000) of the Public Resources Code). The Legislature's intent is that the two statutes be harmonized.

2. On page 16, delete lines 14 through 18 and insert the following language:

Resources Code). Any density bonus, concessions, incentives, waivers or reductions of development standards and parking ratios to which the applicant is entitled under this section shall be accommodated, but in a manner that harmonizes this section and Chapter 3 of the Coastal Act.

Related legislation:

AB 663 (Bloom, 2017): Would have required, until January 1, 2023, housing opportunities for persons of low and moderate income to be protected, encouraged, and, where feasible, provided by the Act. *This bill died on the Assembly Floor inactive file.*

SB 619 (Ducheny) Chapter 793, Statutes of 2003: Made several changes to laws relating to the development of affordable housing, including requiring the Commission to encourage housing opportunities for low-and moderate-income households. Provides that the Commission may not take measures that reduce the density of a housing project below the level allowed by local zoning ordinances and state density bonus law unless the Commission makes a finding that there is no feasible method to accommodate the density without creating a significant adverse impact on coastal resources.

AB 1866 (Wright), Chapter 1062, Statutes of 2002: Made numerous changes to state density bonus law and state law relating to second units, including providing that that the requirements of the Act shall not be superseded by any of the provisions in density bonus law.

Double-Referred: If AB 2797 passes out of this committee, the bill will be referred to the Committee on Natural Resources.

REGISTERED SUPPORT / OPPOSITION:**Support**

California Rural Legal Assistance Foundation (co-sponsor)

Western Center on Law and Poverty (co-sponsor)

California Apartment Association

California Association of Realtors

California Building Industry Association

California Housing Consortium
Disability Rights California

Opposition

California Coastal Protection Network

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