Nina Chomsky
Pasadena, CA

Re: Council Meeting Monday, 12/5/2022; Agenda Item 21 – Applicable Density For Density Bonus Projects

Mayor Gordo and Councilmembers,

I am writing in my personal capacity with regard to the above-referenced Council Agenda item for Monday's meeting. This item, which probably will lead to enormous negative impacts on Pasadena, should be continued or pulled from this Agenda and sent to the Planning Commission for a full public discussion and review, particularly in response to the conclusory and minimal Staff Report "advocating" for a monumental change in public policy regarding certain Density Bonus projects.

Why was this major change to Density and the application of the State Density Bonus Law (SDBL) not brought first to the Planning Commission for review and analysis? Isn't such a procedure required by State law and also Pasadena's Charter? The Staff Report jumps to a number of interpretations and conclusions, including how to interpret provisions of the General Plan and how to apply these provisions in the context of the new Bill, that all need full and complete discussion and consideration in public at the Planning Commission. Also, the Planning Commission needs to review and consider the Staff "comments" on the impacts on the Specific Plan update process minimally discussed in the Staff Report. Yes, it probably is a good idea to consider enforceable Design Standards (as opposed to mere discretionary Design Guidelines) for the subject Projects, but the Staff Report provides only minimal comments on implementation including timing, and new funding that may be required to pay for this proposal.

Apparently the public and the Planning Commission all are supposed to know that the Council has discussed this matter and its impacts extensively in Closed Session, and Pasadena must respond immediately to current lawsuits claiming that the new law, which goes into effect on January 1st, is NOW the law. This idea is confusing -- maybe legal arguments are being made that the crux of the Bill is in fact the law now. But until this Bill goes into effect, the use of 87 units per acre as the Base Density is not obviously "the law", and, in any event, the new law is not retroactive, of course.

Further, I think that neither the Council nor the Staff realizes that both have been operating in a "Bubble" as to this matter, and this proposed Council action is a big surprise to many of us, including Planning Commissioners. This whole matter needs "sunlight" and public review and understanding.

What is the big rush or urgency to meet January 1st? Per usual, there will be an expected transition period for whatever changes are required. What are other cities, including other cities which have General Plan and Specific Plan provisions similar or exactly like Pasadena doing about all this and when? The Planning Commission has

not met recently, and several recent meetings were cancelled. There was plenty of time to take this matter to a regular Planning Commission meeting or hold a Special meeting.

Why isn't the full new Bill attached to the Staff Report? It is essential to understand the legal intent of the entire new law as well as the context of the specific, possibly applicable new "rules" to fully understand and conclude how they should apply to Pasadena.

Why isn't there a Legal Opinion from outside Counsel reviewing and analyzing the new law in the context of Pasadena Plans attached? At least a Legal Opinion from the City Attorney's office should be attached, although this matter is so earth-shaking in its possible impacts that I believe that very competent outside Counsel may be required to advise the City. AND this advice should include how to interpret and apply the new law in a manner that is as favorable as possible to Pasadena, and what strategies might be employed to resist or avoid potential terrible impacts on Pasadena from the new law. As to non-legal ideas on resisting or avoiding such impacts, the Planning Commission is a good place to start, followed by a full discussion at the Council with consideration given to the conclusions and advice of the Commission.

As to just how earth shaking this new public policy state mandate will be, my observation is that not all Council members may know how the State Density Bonus Laws work and what happens when applied now, let alone after this proposed change in Pasadena public policy. Where are examples from recent projects, maybe 5 of them located in the General Plan (up to) 87 units per acre area, comparing actual results with "projects" that will result from applying the new rules as proposed in the Staff Report and the proposed Resolution? Such examples should include not only "the numbers" and how they work, but also digital visual comparisons.

This Item should be continued or pulled from Monday's Agenda and sent to the Planning Commission for prompt review and discussion. The item is not ready for full and effective Council discussion and decision.

Thank you for considering my comments and concerns.

Sincerely,

Nina Chomsky

Nina Chomsky

CARLSON & NICHOLAS
Attorneys at Law

www.carlsonnicholas.com

Scott Carlson, Partner
Frank Nicholas, Retired
Richard McDonald, Of Counsel

301 E. Colorado Blvd
Suite No. 320
Pasadena, California 91101
(626) 356-4801

Scott@carlsonnicholas.com

RMcDonald@carlsonnicholas.com

December 5, 2022

Mayor Victor M. Gordo,
Vice-Mayor Andy Wilson,
Councilmembers T. Hampton, J. Jones, S. Madison, G. Masuda, J. Rivas, and F. Williams
City Council, City of Pasadena
100 North Garfield Avenue
Pasadena, California 91101

Re: Agenda Item 21 – Density Bonus Projects.

Dear Mayor Gordo, Vice-Mayor Wilson, and Honorable Councilmembers Hampton, Jones, Madison, Masuda, Rivas, and Williams:

This letter is filed on behalf of Stanford Pasadena, LLC, owner of 770 E. Green Street, in support of the staff's recommendation. In particular, although we disagree with the statement that AB2334 is a "substantial amendment of existing law", we nonetheless support staff's recommendation that the City of Pasadena change how it calculates the base density for density bonus projects because, for the reasons previously articulated to City staff, the Board of Zoning Appeals, and the City Council, the City's current interpretation of the phrase "maximum allowable residential density" under the State Density Bonus Law ("SDBL") is neither valid nor legal. As the courts have explained,

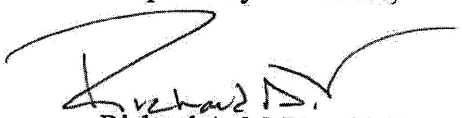
> [t]he density increase allowed under the density bonus law is an increase "over the otherwise maximum allowable residential density" (§ 65915, subd. (f).) "Maximum allowable residential density'" in turn means "the density allowed under the zoning ordinance and land use element of the general plan, 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. Where 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." (*Id.*, subd. (*o*)(2), italics added.) ***This statute recognizes that there may be inconsistencies between the density permitted***

> ***under a zoning ordinance as opposed to what is permitted under the land use element of a general plan, in which case the latter prevails.***

Wollmer v. City of Berkeley, 193 Cal. App. 4th 1329, 1344 (2011) (the project, and its density bonus, was in compliance with the general plan density standard and consistent with Section 65915) (emphasis added). *See also*, *Debottari v. City Council*, 171 Cal. App. 3d 1204 (1985) (California Supreme Court determined that a proposed referendum limiting zoning at two units per acre was inconsistent with the existing general plan that allowed 3-4 units per acre); Cal. Gov't Code § 65915(o)(2); Cal. Gov't Code § 65915(r) ("This chapter shall be interpreted liberally in favor of producing the maximum number of total housing units."); *Yes in My Backyard v City of Los Angeles*, Los Angeles County Superior Court Case No. 21STCP03883 (July 29, 2022 Decision on Petition for Writ of Mandate, at p. 41). As such, there is no legal authority for the proposition that the City may use more restrictive densities, and AB2334 simply codifies the law to that effect.

We, therefore, support staff's recommendation accordingly.

Respectfully Submitted,



Richard A. McDonald, Esq.
Law Office of Richard A. McDonald
Of Counsel, Carlson & Nicholas

YIMBY Law

57 Post St, Suite 908
San Francisco, CA 94104
hello@yimbylaw.org

YIMBY LAW

12/5/2022

Pasadena City Council
100 North Garfield Ave
Pasadena, CA 91101

correspondence@cityofpasadena.net
Via Email

Re: Agenda Item 21 – Density Bonus Projects

Dear Pasadena City Council,

YIMBY Law is a 501(c)3 non-profit corporation, whose mission is to increase the accessibility and affordability of housing in California. YIMBY Law sues municipalities when they fail to comply with state housing laws, including the Density Bonus Law and the Housing Accountability Act (HAA).

We understand that the City of Pasadena is considering changing how it has traditionally calculated the base density of state density bonus housing projects; we support staff's recommendation that the City make this change in calculation, because this change is necessary, and has been for years in order to comply with state density bonus law and the HAA.

Despite staff's contention that AB 2334, which goes into effect on January 1, 2023, necessitates action, the truth is that the city should have made this change years ago, as the law ALREADY requires general plan densities to be available to housing projects. State Density Bonus Law has required the maximum density of the general plan to be available as the base density of a density bonus project since 2008, and the HAA has made general plan densities available regardless of zoning since 2018.

The Density Bonus Law has a consistency provision: Under the current state density bonus law Government Code section 65915(o)(5),

"(5) "Maximum allowable residential density" means 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." (emphasis added)

On June 18, 2008, AB 2280's then-version of section 65915(o)(2) defined "maximum allowable residential density" as the density allowed under the zoning ordinance and land use element of the general plan, meaning the maximum if it was a range. The Senate Transportation and Housing Committee heard comments that the land use element of a general plan can and often will conflict with zoning ordinances, causing confusion as to the applicable maximum density: "Theoretically the land use element and zoning should always be consistent. In reality, they are often inconsistent. In such cases, this bill will create confusion and conflict." Section 65915(o)(5) therefore clarifies that if the general plan and zoning are inconsistent, the general plan prevails: "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."

It is already abundantly clear that the base density available to a state density bonus project is the maximum allowable density in the land use element of the general plan. This language doesn't contemplate Specific Plan densities, but Specific Plans must also be consistent with the Land Use element of the General Plan, and the existing statutory language allows the maximum density available under the Land Use element of the general plan. AB 2334 merely clarifies that, when considering the densities allowed in a Specific Plan, the maximum density allowed is the greater of the Zoning Ordinance, Specific Plan or General Plan. While it would be unusual for a Zoning Ordinance or a Specific Plan to allow greater density than the General Plan, with AB 2334, the legislature has contemplated this scenario for density bonus projects moving forward, and clarified that the density bonus calculations apply to the greatest density Plan or Ordinance.

As noted in AB 2334's Senate Governance and Finance Committee bill analysis report on May 2nd, 2022, "AB 2334 also includes clarifying and technical changes to density bonus law, including to...

- Update the definition of maximum allowable residential density;
- Revise the procedure for handling inconsistencies between allowable density between zoning ordinances and general plans to include specific plans and to allow the one with greater density to prevail rather than allowing general plans to prevail;"

YIMBY Law was recently involved in litigation with the City of Los Angeles over several matters, including their incorrect interpretation of state density bonus law. We were successful in convincing the court that our interpretation of the law, specifically both density bonus law and the Housing Accountability Act, is correct. *Yes in My Backyard v City of Los Angeles*, Los Angeles County Superior Court Case No. 21STCP03883. The following is a relevant excerpt from the ruling in our case:

> "The Density Bonus Law provides that a local government must apply "the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project" and, 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. 865915(o)(5).

> The City argues that the Density Bonus Law's definition of "maximum allowable residential density" has two directions. The second sentence regarding zoning consistency with the land use element of the general plan contrasts with the first sentence stating that the maximum allowable density is the density allowed under the "zoning ordinance and land use element of the general plan". §65915(o)(5). The plain language of the first sentence directs the City to harmonize the impact of both zoning and the plan when there is consistency so that zone and plan can have "concurrent operation." Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles, (2012) 55 Cal. 4th 783, 805. According to the City, Petitioners interpretation that the general plan's density must always be applied would render the first sentence meaningless or redundant. Opp. at 19.
>
> The first sentence exists for clarity and is not meaningless. As Petitioners argue (Reply at 9-10), section 65915(o)(5)'s language was intended to clear up any confusion that the maximum density allowed by the general plan applies when there is an inconsistency by laying out the alternatives. The first sentence of section 65915(o)(5) provides that the density bonus is the maximum density permitted by the general plan and zoning where they are consistent. The second sentence states that the density will be the general plan's density where the two are inconsistent. The Legislature added this inconsistency language after an analysis of the proposed amendment noted that **"Theoretically the land use element and zoning should always be consistent. In reality, they are often inconsistent.** In such cases, this bill will create confusion and conflict." Resp.RJN,Ex. 34, p. 706. The analysis suggested picking one standard, either the zoning or general plan. Id. Instead, the Legislature added language that "[i]f 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." " (**emphasis added**)

Additionally, the Housing Accountability Act, Government Code 65589.5(j)(4) also contemplates zoning and general plan inconsistencies, and it too generally requires projects which are consistent with general plan densities to be approved. In 2018, AB 3194 sought to close a loophole exploited by local governments to avoid compliance with the HAA by maintaining low zoning densities that force a project into a discretionary rezoning process. AB 3194 fixed this problem by (a) prohibiting local governments from requiring a project applicant to seek rezoning where the zoning is inconsistent with the general plan and (b) where zoning is consistent with the general plan, requiring the local government to facilitate the density allowed under the general plan rather than the zoning.

As the court noted in our lawsuit,

> "The consistency provisions of SB 35 and the Density Bonus Law are similar to the HAA. Petitioners are correct that section 65589.5(j)(4) must be interpreted to allow a project the maximum allowable density under a city's general plan in the same manner as those statutes. Otherwise, a local government would be required to grant a density bonus using its general plan density but would be free to deny the project under the HAA by relying on lower zoning densities. Pet. Op. Br. at 16 - Section 65589.5(j)(4) requires a city to defer to its general plan's density requirements whether a property's zoning is consistent or inconsistent with the general plan."

It is reasonable and appropriate for the city to change the way it calculates density bonus projects now, because it should already have been doing this for years. Density bonus projects have had access to full general plan densities since 2008, and the Housing Accountability Act has required these projects to be approved, regardless of the zoning, since 2018. The legislature has now gone even further, clarifying that the maximum base density allowed under state density bonus law is whatever is the greatest of the zoning, general plan, or specific plan. Since Pasadena has general plan land use elements that allow greater density than specific plans, Pasadena should already have been allowing projects which are consistent with the density noted in the Land Use element, and is already required under state law to approve projects which are consistent with general plan densities, regardless of the densities allowed in a zoning ordinance or specific plan.

I am signing this letter both in my capacity as the Executive Director of YIMBY Law, and as a resident of California who is affected by the shortage of housing in our state.

Sincerely,

Sonja Trauss

Sonja Trauss
Executive Director
YIMBY Law