Bill No:	SB 713	**Hearing Date:**	4/24/2023
Author:	Padilla		
Version:	4/17/2023 Amended		
Urgency:	No	**Fiscal:**	No
Consultant:	Alison Hughes		

SUBJECT: Planning and zoning: density bonuses: preemption

DIGEST: This bill clarifies that for purposes of state density bonus law (DBL) "development standards" means those adopted by the local government or enacted by the local government's electorate exercising its local initiative or referendum power, whether that power is derived from the California Constitution, statute, or the charter or ordinances of the local government.

ANALYSIS:

Existing law:

1) Pursuant to the California Constitution, confers on local governments the power to make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.

2) Requires, pursuant to state DBL, cities and counties to grant a density bonus, based on a specified formula, 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:

   a) Include at least 5% of the units affordable to very low-income households;
   b) Include at least 10% of the units affordable to low-income households;
   c) Include at least 10% of the units in a for-sale CID affordable to moderate-income households;
   d) Be a senior housing development;
   e) Include 10% of the total units for foster youth transitioning out of foster care, veterans with disabilites, or persons experiencing homelessness.
   f) Include 20% of the total units for lower-income students in a student housing development.
   g) 100% of the units of a housing development for lower-income households, except that 20% of units may be for moderate-income households.

3) Provides that, in no case may a local government apply any development standard that will have the effect of physically precluding the construction of a development at the densities or with the concessions or incentives permitted by state DBL. A "development standard" includes a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, a minimum lot area per unit requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation.

4) Provides that, upon the developer's request, the local government may not require parking standards greater than specified parking ratios.

5) Requires applicants to receive concessions and incentives depending on the percentage of affordable housing included in the project.

6) Permits an applicant to submit to a local government a proposal for the specific incentives or concessions that the applicant requests, as specified, and allows the applicant to request a meeting with the local government.

This bill:

1) Clarifies that "development standard" for purposes of state DBL includes standards adopted by the local government or enacted by the local government's electorate exercising its local initiative or referendum power, whether that power is derived from the California Constitution, statute, or the charter or ordinances of the local government.

COMMENTS:

1) *Author's statement.* "California is in the midst of a housing crisis. Every step is vital as we work to bridge the gap between housing supply and demand. This measure would clearly articulate state law as developers and cities collaborate and seek to build new units of housing that are compliant with state law. SB 713 codifies a recent technical assistance memorandum from the Department of Housing and Community Development that explicitly re-states existing law, that local governments cannot impose standards that stop state density bonus projects from moving forward. This greater certainty allows developers to proceed with confidence to develop more housing, faster."

2) *Local police power generally and state preemption*. Local police power, even though recognized by common law, is set forth in the California Constitution, which confers on cities the power to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." To that end, the California Supreme Court has held: "Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to limitation that they exercise this power with their territorial limits and *subordinate to state law*." (Emphasis added). Under California's Constitution, a city's ordinance cannot conflict with the state's general laws that preempt the subject matter. (Cal. Const. art. XI §7). Conversely, a city may not make or enforce a regulation that conflicts with state law. A conflict exists if the ordinance "duplicates, contradicts or enters an area fully occupied by general law, either expressly or by legislative implication."[1] For example, the Housing Accountability Act preempts a city's discretion to deny certain types of affordable housing projects. The scope of the preemption can be broad. For example, the Legislature has adopted health and safety policies and criteria for the establishment of certain residential uses that preempt local zoning. Courts have consistently held that the Legislature can preempt local initiatives that conflict with state law, which also applies to local voter initiatives.

3) *San Diego Coastal Height Limit Overlay Zone and state DBL.* A developer sought to build a 100% affordable project (60 units) in San Diego (the city) in a zone that, by a local voter initiative (San Diego Coastal Height Limit Overlay Zone), imposed a 30 foot height limit. The developer sought to utilize state DBL and receive a height increase of up to an additional three stories, or 33 feet. The city and the developer asked HCD to provide technical assistance and answer whether state DBL preempts local voter initiatives, in this case the local height limit imposed. HCD responded in the affirmative – that state law preempts a local voter initiative – following a similar analysis as provided in Comment 2.

4) *State DBL.* Given California's high land and construction costs for housing, it is extremely difficult for the private market to provide housing units that are affordable to low- and even moderate-income households. Public subsidy is often required to fill the financial gap on affordable units. DBL allows public entities to reduce or even eliminate subsidies for a particular project by allowing a developer to include more total units in a project than would otherwise be allowed by the local zoning in exchange for affordable units. Allowing more total units permits the developer to spread the cost of the affordable units more broadly over the market-rate units. The idea of DBL is to

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[1] *Viacom Outdoor, Inc. v. City of Arcata, 140 Cal.App 4th 230, 236 (2006).*

cover at least some of the financing gap of affordable housing with regulatory incentives, rather than additional subsidy.

Under existing law, if a developer proposes to construct a housing development with a specified percentage of affordable units, the city or county must provide all of the following benefits: a density bonus; incentives or concessions; waiver of any development standards that prevent the developer from utilizing the density bonus or incentives; and reduced parking standards.

5) *Clarifying the impact of local development standards.* Under state DBL, in no case may a local government apply any development standard (*e.g.* height restriction, floor area ratio, setback, or similar standard) that will have the effect of physically precluding the construction of a development permitted by state DBL. The author and sponsors point to several local voter initiatives across the state that impose height limits, in addition to the one in effect in San Diego, predominantly in wealthier, exclusionary coastal communities. While it is quite clear that state law preempts these local voter initiatives due to the inherent conflict with state law, these initiatives have had the impact of slowing down both affordable and mixed income housing developments from moving forward.

Greater certainty in housing development is especially critical to affordable housing developers seeking funding from multiple federal, state, and local public funding sources. Additionally, this certainty provides more opportunities for multifamily developers to build in jurisdictions that are not housing friendly. Some local governments have intentionally made development processes onerous to such a degree developers – particularly affordable housing developers – have avoided working in those jurisdictions altogether. Longer, uncertain permitting situations are risky for developers, and could kill projects all together. More clarity in the law unlocks more land opportunities, particularly in higher-resource, unfriendly housing cities.

This bill would clarify in state DBL that regardless of how it was adopted – including if the standard was adopted by the electorate through local initiative or referendum power – a local government cannot apply any development standard that precludes the development seeking a density bonus. This clarification is consistent with settled law governing state preemption. This clarification will provide greater clarity for local governments approving density bonus projects and greater certainty for the housing developers state DBL.

6) *Double-referral.* This bill was also referred to the Senate Governance and Finance Committee.

FISCAL EFFECT: Appropriation: No   Fiscal Com.: No   Local: No

POSITIONS: **(Communicated to the committee before noon on Wednesday, April 19, 2023.)**

SUPPORT:

San Diego Housing Federation (Sponsor)
California Life Sciences
LVDSDCA, LLC
YIMBY Action
YIMBY Law

OPPOSITION:

None received.

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