

**SENATE JUDICIARY COMMITTEE**  
**Senator Thomas Umberg, Chair**  
**2023-2024 Regular Session**

AB 323 (Holden)  
Version: May 18, 2023  
Hearing Date: July 6, 2023  
Fiscal: Yes  
Urgency: No  
ID

**SUBJECT**

Density Bonus Law: purchase of density bonus units by nonprofit housing organizations: civil actions

**DIGEST**

This bill prohibits developers from offering affordable housing units built in accordance with a density bonus project or under an inclusionary zoning ordinance for sale to a non-income eligible buyer or to a non-owner-occupant, unless the developer can demonstrate no such qualified buyer exists.

**EXECUTIVE SUMMARY**

California is in a housing crisis. Affordable housing and homeownership are becoming increasingly rare. To combat this trend, California and localities in the state have enacted a number of laws for developers of housing projects meant to increase the availability of affordable housing for low income Californians. However, there are gaps in the laws that may allow investors and non-owner-occupants to purchase houses otherwise designated as low-income units for low-income families. These gaps could result in units meant to be owned by low-income families being owned by investors or corporations that then rent out the units, even when there are low-income families qualified to have bought the units themselves. To address this issue, AB 323 clarifies provisions relating to the Density Bonus Law (DBL) and adds provisions to the civil code relating to local “inclusionary zoning” ordinances that specify that for-sale affordable units must be initially sold to and occupied by low-income families. It creates a process and timeline for a local agency to inform a developer about potential low-income buyers of affordable housing units, and mandates that a developer cannot sell such units to a nonprofit housing corporation unless it proves that no eligible buyers qualify to buy the units. AB 323 also would strengthen the accreditation requirements imposed on non-profits purchasing units awarded a density bonus. To enforce its provisions relating to inclusionary zoning ordinances, AB 323 would authorize a local

public prosecutor to seek civil penalties from developers who sell units subject to inclusionary zoning laws in a manner not permitted by law.

AB 323 is sponsored by the California Association of Realtors and supported by numerous real estate organizations. It has no known opposition in its current form. The bill passed out of the Senate Housing Committee on a vote of 11 to 0.

### **PROPOSED CHANGES TO THE LAW**

Existing law:

- 1) Establishes the density bonus law (DBL), which enables housing development projects to receive a specified increase in allowable density, and receive a specified number of incentives or concessions from local governments, in return for providing a specified amount of affordable housing. (Gov. Code § 65915.)
- 2) Requires that, for a for-sale project that received a density bonus, an applicant must agree to ensure, and the local government must ensure, that the for-sale unit meets either of the following conditions:
  - a) the unit is initially occupied by a person or family of very low, low, or moderate income, it is offered at an affordable housing cost, and is subject to an equity sharing agreement; or
  - b) the unit is purchased by a qualified non-profit housing corporation pursuant to a recorded contract that includes specified repurchase provisions, an equity sharing agreement, and affordability restrictions on the sale and conveyance of the property to ensure the property will be used for low income housing for at least 45 years for owner-occupied housing units. (Gov. Code § 65915 (c)(2).)
- 3) Allows the legislative body of any county or city to adopt ordinances that require, as a condition of the development of residential rental units, that the development include a certain percentage of residential rental units affordable to, and occupied by, households with incomes that do not exceed the limits for moderate-income, lower income, very low income, or extremely low income households, as specified. (Gov. Code § 65850 (g).)
- 4) Authorizes a county counsel to be appointed by a county Board of Supervisors, and grants the county counsel the powers of a public prosecutor similar to those of a city attorney. (Gov. Code § 27640.)
- 5) Authorizes a city to create the position of city attorney and vests the city attorney with the powers of a public prosecutor, including the prosecuting of civil legal matters as required by the Legislature. (Gov. Code § 41803.)

This bill:

- 1) Prohibits a developer from offering a unit that is intended for owner-occupancy pursuant to a local inclusionary zoning ordinance to a purchaser that intends to rent the unit to families of extremely low, very low, low, and moderate-income families, unless the developer can prove that no eligible buyers for owner-occupancy can qualify for the unit.
- 2) Provides that a developer who violates this prohibition is subject to a civil penalty of not more than fifteen thousand dollars (\$15,000) for each violation, which is to be assessed and recovered in a civil action brought by the county counsel or city attorney for the jurisdiction in which the violation occurred.
- 3) Requires any local government that administers a local inclusionary zoning ordinance to send a list of buyers who are eligible to purchase an affordable housing owner-occupant unit to the developer starting at the time the building permit is issued until 90 days after the certificate of occupancy or final inspection is issued or completed for that unit.
- 4) Provides that if there are no qualified buyers from the pool of those sent to the developer, the developer may sell the unit to a purchaser that intends to rent the unit to families of extremely low, very low, low- and moderate income families.
- 5) Provides that if an affordable housing unit is constructed pursuant to the state density bonus law and is a for-sale unit to be occupied by a household of very low, low, or moderate income, that it must also originally be sold to such a household.
- 6) Provides that, if an affordable housing unit is constructed pursuant to the state density bonus law as a for-sale unit, and it is purchased by a qualifying non-profit, for rent as a very-low, low, or moderate-income unit, the non-profit must comply with all of the following:
  - a) have a determination letter from the Internal Revenue Service affirming its tax-exempt status and is not a private foundation;
  - b) be based in California;
  - c) have all board members claim primary residence in California; and
  - d) have as its primary activity, the development and preservation of affordable home ownership housing in California.
- 7) Requires any local government to send a list of buyers who are eligible to purchase a unit built pursuant to a density bonus to the developer, starting at the time the building permit is issued until 90 days after the certificate of occupancy or final inspection is issued or completed for that unit.

- 8) Makes the various findings and declarations necessary for the bill to apply to all cities, including charter cities.

## COMMENTS

### 1. California's Affordable Housing Crisis

Homeownership has long been considered an essential part of the creation and generation of wealth for Californian families. It provides greater stability and lower housing costs over time, and allows families to accrue wealth through the relatively reliable increase in value that homes usually experience. Scholarship also typically has identified racial gaps in homeownership as a major factor in the racial disparity in generational wealth.

Yet, in recent years, housing in California has become so expensive that homeownership is now out of reach for the vast majority of Californians. The price of homes has increased so significantly that only the wealthiest of prospective buyers can afford to purchase. In mid-2022, the median price of a single-family home in California set an astounding record high of \$898,980.<sup>1</sup> This represented a ten percent increase in the price of homes over the previous year, and the priciest housing market in the nation. Such a median price would require an annual income of more than double the state's median household income. Accordingly, it should be no surprise that homeownership rates in California are the second lowest in the country, at 56 percent from 2016 to 2020.<sup>2</sup> Within that low overall rate of homeownership are significant disparities based on race: Caucasian Californians are almost twice as likely to own their home as African American Californians.<sup>3</sup> At the same time, rent in California has also experienced significant increases, in part due to how unobtainable homeownership is becoming for most Californians. The largest cities in California are among the most expensive cities for renters in the United States.

### 2. The Density Bonus Law (DBL)

Considering these facts, California has enacted a variety of laws over the years to make homeownership more accessible and affordable to more Californians. One of these laws is the Density Bonus Law (Cal. Gov. Code § 65915), which was created to boost the development of affordable housing. The DBL authorizes developers to build more units in a development than would otherwise be allowed under the zoning ordinance for the

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<sup>1</sup> Ryan Lillis, "Unaffordable: California home prices break yet another record. How do we compare to US?" The Sacramento Bee (Jun. 29, 2022), available at

<https://www.sacbee.com/news/california/article262865873.html>.

<sup>2</sup> Marisol Cuellar Mejia et al, "Homeownership Trends in California," Public Policy Institute of California (Jun. 14, 2022), available at <https://www.pplic.org/blog/homeownership-trends-in-california/>.

<sup>3</sup> Ben Christopher et al, "Californians: Here's why your housing costs are so high," Cal Matters (Mar. 3, 2022), available at <https://calmatters.org/explainers/housing-costs-high-california/>.

property, if the developer includes a specified minimum number of affordable units in the development. Allowing more total units allows a developer to make additional profit than would otherwise be permitted and spread the cost of affordable units over more market-rate units. In addition to the density bonus, the DBL also requires localities to provide concessions or incentives, waiver of any development standards that would prevent the developer from utilizing the density bonus or incentives, and reduced parking standards.

To qualify for DBL benefits, the proposed development must contain certain percentages of affordable housing. The developer will receive density increases depending on the percentage of affordable housing included in the development. Thus, these density increases operate on a sliding scale; if the development provides a greater percentage of the housing for low, very low, or moderate-income units, it will receive a larger density increase. If a developer provides five percent of the units for very low-income units for sale or rent, as defined in the health and safety code, the developer will be allowed a 20 percent increase in the total allowable number of units. If it provides seven percent of the units for very low-income units, it will receive a 25 percent density bonus. If the development provides ten percent of units for low-income units for sale or rent, it will receive a 20 percent density increase. If the percentage of low-income units is 20 percent, the development will receive a 35 percent density increase. If the development provides ten percent of the development for sale to moderate-income persons or families, the developer will receive a five percent density increase. There are also provisions of the DBL providing for density bonuses for providing units for lower-income full-time undergraduate, graduate, or professional students, a senior citizen housing development, transitional foster youth, disabled veterans, or for homeless individuals. The maximum density increase under the DBL is 50 percent, such as when a development provides 15 percent for very low-income units, 24 percent for low-income units, or 44 percent for moderate-income units.

To ensure that the affordable units developed under DBL projects reach low to moderate-income households as intended, the law includes a number of provisions regulating the units' sale or rental. Units for very low-income or low-income occupants can be either sold or rented, while units for moderate-income occupants are designated for sale. For very low and low-income units for rent, the developer is required to ensure that the units continue to be offered at affordable rental rates for at least 55 years. For affordable units that are to be sold, the developer must ensure that each affordable unit is either occupied by a person or family of very low, low, or moderate income at an affordable cost, or be sold to a qualified nonprofit housing corporation. If a unit is sold to a qualified nonprofit, the contract must include a repurchase option for the nonprofit to have a right to repurchase if the subsequent buyer decides to sell, an equity sharing agreement, and include affordability restrictions on the sale for at least 45 years.

### 3. Inclusionary Zoning

Many cities and counties in California also have adopted their own zoning ordinances meant to promote affordable housing. These ordinances are commonly called “inclusionary zoning,” and they generally require developers to include a certain minimum percentage of housing units in a development for lower-income households. Inclusionary zoning ordinances vary widely by jurisdiction. Sometimes these ordinances require that a developer either provide affordable housing on-site, pay a fee to fund affordable housing elsewhere in the community in lieu of on-site affordable housing, or dedicate land for affordable housing construction. Inclusionary zoning ordinances, like DBL projects, may also include requirements covenants that the units be used for affordable housing for a specified amount of time.

### 4. Some developers are thwarting the rules meant to create affordable housing

According to the sponsors of AB 323, the rules for inclusionary zoning and DBL projects are being circumvented by developers to the detriment of affordable housing and homeownership. They cite to two density bonus projects in Encinitas, California that in 2021 were originally designated for sale to very-low-income families, but instead of selling the homes to families qualified to purchase them, the city decided to sell the units to a for-profit investor, who then turned the properties into rental units.

### 5. AB 323 seeks to increase homeownership and promote affordable housing

To ensure that the purpose of the DBL are achieved and developments under the program actually result in affordable housing for California families, AB 323 makes a number of changes to the DBL. First, it clarifies that, if a developer sells a low, very low, or moderate-income unit, the unit must initially be sold to and occupied by a person or family of low, very low, or moderate income. Currently, the law is ambiguous to this point, allowing that a developer sell the unit to a corporation or other person, and only be occupied by a low, very low, or moderate income family or individual. Thus, this change is being made to ensure that such units are actually sold to very low-to-moderate income families or individuals, therefore increasing homeownership among very low-to-moderate income individuals in California. If the developer does elect to sell the unit to a nonprofit corporation, as allowed under the DBA for for-sale very low-to-moderate income units, AB 323 would set additional requirements for the nonprofit housing corporation. These include that the nonprofit has a determination letter from the IRS affirming its tax-exempt status, that the nonprofit be based in California, that all its board members have their primary residence in California, and that the primary activity of the nonprofit be the development and preservation of affordable home ownership. AB 323 also adds a section allowing that for-sale units, if not sold to and occupied by a person or family of very low-to-moderate income or sold to a qualifying nonprofit housing corporation, can be sold to a purchaser that intends to rent the unit to extremely low, very low, or moderate-income families.

AB 323 also makes changes to the Civil Code meant to target the worst abuses of inclusionary zoning ordinances. It specifically adds a provision to the code mandating that a developer cannot offer a unit to a purchaser who intends to rent the unit if the unit was constructed under an inclusionary zoning ordinance that intended for the unit to be owner occupied, unless the developer can prove that no owner-occupant applicants can qualify. To effectuate the exception, AB 323 requires that a city, county, or local public housing authority send a list of eligible buyers to the developer throughout the building process. If there are no qualified buyers from the pool sent to the developer, the developer may then sell the unit to a purchaser that intends to rent the unit to extremely low, very low, low, and moderate-income families.

AB 323 states that a developer that violates this provision is subject to a civil penalty of not more than \$15,000 for each violation, and that this penalty must be assessed and recovered in a civil action brought by the county counsel or city attorney for the jurisdiction where the violation took place.

Through these changes, AB 323 aims to ensure that affordable housing units developed under inclusionary zoning ordinances or the DBL actually end up being owned by very low-to-moderate-income Californians, and that the aims of increasing homeownership among California's low and moderate income families are achieved by these laws.

#### 6. Arguments in support of AB 323

According to the sponsor of AB 323, the California Association of Realtors:

It has long been assumed that units offered for sale as the result of local inclusionary zoning policies would go to owner occupants. However, it was discovered through recent fair housing litigation that developers can petition local government to change the occupancy designation after construction from owner occupied to rental ownership, which reduces opportunities for owner occupancy and increases investor holdings.

In 2021, two density bonus projects located in Encinitas, California contained single family detached homes designated for sale to very-low-income families, making less than 60% of the area median income. Instead of selling the homes to families qualified to purchase the homes, which were initially designated in the development for owner occupancy, the city elected to sell the units to non-owner occupant investors, upon request by the developer of the project. According to the developer, there were eighty-one qualified families and two investors interested in purchasing the "affordable" units in their newly constructed community. The for-profit investor purchaser, which was discovered to be a subsidiary of large-scale real estate investment trust, requested that the developer petition the city to convert the "affordable" owner occupied units to rental housing. The city approved the developer's request, and the investor purchased the parcels for \$138,000 and

\$112,000, respectively, depriving low income, underserved, and single moms from realizing their dream of homeownership.

While socioeconomic status is not a protected category under federal fair housing laws, the plaintiffs in a lawsuit against the Encinitas investors (discussed above) were low-income single women with children and families of color, groups that federal and state housing laws protect from discrimination. Additionally, the Biden administration recently warned that corporate investor purchases of single-family homes which result in the parcels conversion to rental investments has increased costs and competition for lower priced homes. This has resulted in pricing out many first time and first-generation home buyers and is creating a disparate negative impact on underserved groups.

Homeownership makes a difference in wealth accumulation opportunities. According to the Federal Reserve's 2019 Survey of Consumer Finances, wealth accumulation remains driven, almost entirely, by homeownership status. In fact, the ability to accumulate equity on the full value of an investment while only investing a fraction of the money up front provides the only significant opportunity for wealth accumulation in California. As a result, while the median family in the U.S. had \$121,700 in real wealth in 2019, renter families had roughly \$6,300 in net worth that they have had for the past 4 decades, while the median homeowner has acquired at least \$255,000 in wealth.

It is vitally important that we ensure that the discriminatory fair housing violation that took place in Encinitas in 2021 is not repeated.

### SUPPORT

California Association of Realtors (sponsor)  
Asian Real Estate Association of American  
National Hispanic Organization of Real Estate Associates  
LGBTQ+ Real Estate Alliance  
Habitat for Humanity California

### OPPOSITION

None known



## RELATED LEGISLATION

### Pending Legislation:

AB 440 (Wicks, 2023) defines “maximum allowable residential density” under the DBL to mean the greatest number of units allowed under the zoning ordinance, specific plan, or land use element of the general plan, or, if a range of density is permitted, the greatest number of units allowed by the specific zoning range, specific plan, or land use element of the general plan applicable to the project. The bill also removes from that definition the provision stating that the greater density prevails if the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan or specific plan.

AB 637 (Low, 2023) excepts from the requirements of DBL that a city grant a concession of development standards that would alter the requirements of a local program, policy, or ordinance that requires, as a condition of the development of residential units, that the development include a certain percentage of residential units that meet specified affordability requirements.

AB 713 (Padilla, 2023) specifies that “development standard” for the purposes of required concessions under the Density Bonus Law include those 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.

AB 1287 (Alvarez, 2023) requires a city, county, or city and county to grant an additional density bonus, calculated as specified, when (1) an applicant proposes to construct a housing development that conforms to specified requirements, (2) the applicant agrees to include additional units affordable to very low income households or moderate income households, as specified, and (3) the housing development provides 24% of the base density units to lower income households, conforms to specified requirements and provides 15% of the base density units to very low income households, or conforms to specified requirements and provides 44% of the total units to moderate-income units.

AB 1485 (Haney, 2023) permits both the department of Housing and Community Development and the office of the Attorney General to intervene as a matter of unconditional right in any legal action addressing a violation of the specified housing laws described above, including, among others, the Housing Accountability Act, the Density Bonus Law, and the Housing Crisis Act of 2019.

Prior Legislation:

SB 728 (Hertzberg, Ch. 365, Stats. 2021) authorized a qualified nonprofit housing organization to purchase as a rental a unit designated a for-sale affordable housing unit under density bonus law (DBL).

SB 290 (Skinner, Ch. 340, Stats. 2021) made various changes to DBL, including providing additional benefits to housing developments that include low-income rental and for-sale housing units, and moderate-income for-sale housing units.

AB 1505 (Bloom, Ch. 376, Stats. 2017) authorized the legislative body of a city or county to establish inclusionary housing requirements as a condition of development of residential units.

**PRIOR VOTES:**

Senate Housing Committee (Ayes 11, Noes 0)

Assembly Floor (Ayes 78, Noes 0)

Assembly Appropriations Committee (Ayes 11, Noes 1)

Assembly Judiciary Committee (Ayes 9, Noes 1)

Assembly Housing and Community Development Committee (Ayes 8, Noes 0)

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