



**DISCLAIMER:** This guide is intended solely as a technical overview of the extent to which local ground floor retail requirements may be eligible for concessions or waivers under State Density Bonus Law. It is not legal advice regarding any jurisdiction's specific policies or any proposed housing development project. Local staff should consult with their city attorney or county counsel before taking any actions suggested in this document.

## Ground Floor Retail Requirements: Waivers and Concessions

**Question Presented:** To what extent are local ground floor retail requirements subject to waivers and concessions under State Density Bonus Law (SDBL)?

**Short Answer:** A developer may request a waiver or concession from a local ground floor retail requirement under SDBL, but the available path depends on how the requirement is classified. The California Department of Housing and Community Development (HCD) has taken the position that ground floor retail requirements are not development standards, and therefore, developers may request a concession — but not a waiver — from local ground floor retail requirements. This distinction matters for two reasons: the justifications for concessions and waivers differ; and more significantly, concessions are limited in number, while waivers are unlimited. As this classification question is unsettled, jurisdictions should consult their attorneys. Jurisdictions have limited grounds to deny a concession and bear the burden of proving those grounds with substantial evidence. AB 2011 mixed-income projects are subject to additional rules discussed below.

### How State Density Bonus Law (SDBL) Applies to Ground Floor Retail

Under State Density Bonus Law (SDBL), a developer may request a waiver or a concession from **local** ground floor retail or commercial requirements.

As background, a housing development project that meets density bonus eligibility requirements are entitled to a finite number of incentives and concessions<sup>1</sup> based on the amount of affordable housing provided and other factors. A housing development project that meets density bonus eligibility requirements may also seek unlimited waivers of development standards as necessary to allow the project to be built at the density allowed by the bonus or with the approved incentives.

In technical assistance it has provided, HCD has taken the position that ground floor commercial requirements are not development standards, but rather zoning or use requirements. Therefore, it is HCD's position that developers cannot request a waiver from local ground floor commercial requirements — but may still request a concession.<sup>2</sup> As of the date of the publication of this memo, no court has considered or decided the question of whether ground floor commercial requirements are eligible for SDBL waivers.

The table below summarizes the difference between a waiver and a concession.

#### **SDBL Waivers vs. Concessions**

<b>Waiver</b> <b>Gov. Code Sec. 65915(e)</b>	<b>Concession</b> <b>Gov. Code Sec. 65915(d) &amp; (k)</b>
When complying with the development standard would have the effect of physically precluding the construction of a development at the densities or with the concessions or incentives permitted by SDBL.	Where a reduction or modification of the development standard or other regulatory requirement would result in identifiable and actual cost reductions, to provide for affordable housing costs or affordable rents.

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<sup>1</sup> Incentives and concessions are identical, and a reference to one includes the other.

<sup>2</sup> Cal. Dep't of Housing & Community Dev., Letter of Technical Assistance to City of San Jose re: State Density Bonus Law (Dec. 14, 2021), <https://www.hcd.ca.gov/community-development/housing-element/docs/sclsanjose-loi-ta-121421.pdf>.

## Jurisdictions Have Limited Grounds for Denying a Waiver or Concession

There are limited grounds upon which a local jurisdiction may deny a waiver or concession. The burden is on the jurisdiction to ensure that there is substantial evidence in the record to support its denial of a waiver or a concession.

### Grounds to deny a concession

A concession may be denied if the jurisdiction makes written findings that one or more of the following conditions exists:

1. The concession would not result in identifiable and actual cost reductions.
2. The concession would have a specific, adverse impact upon health or safety, or on any real property listed in the California Register of Historic Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.
3. The concession would be contrary to state or federal law.<sup>3</sup>

### Grounds to deny a waiver

A waiver may be denied if the jurisdiction makes written findings that one or more of the following conditions exists:

1. The waiver would have a specific, adverse impact upon health or safety, and for which there is no feasible method to satisfactorily mitigate or avoid the specific, adverse impact.
2. The waiver would have an adverse impact on a property in the California Register of Historical Resources.
3. The waiver would be contrary to state or federal law.<sup>4</sup>

Previously, jurisdictions could deny a waiver if compliance with the development standard would not physically preclude construction of the project at the permitted density and with the allowed concessions or incentives. However, this ground for denying a waiver has essentially

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<sup>3</sup> Gov. Code Sec. 65915(d)(1).

<sup>4</sup> Gov. Code Sec. 65915(e)(1).

been eliminated by a court decision and subsequent HCD guidance.<sup>5</sup> Once a project qualifies for a density bonus, waivers must be granted for the project as designed by the applicant. The jurisdiction cannot deny a waiver by proposing or demonstrating the existence of an alternative design that might avoid the need for the requested waiver. In practice, this means that jurisdictions have very little ability to deny a waiver on this basis.

**Note that HCD has taken the position that local ground floor retail requirements are not development standards and, as a result, are not eligible for a waiver. This means the denial grounds above are unlikely to be the primary issue in practice. The threshold question is whether a waiver is available at all.**

## **AB 2011 (2022) Mixed Income Projects: Concessions are Limited, Waivers Remain an Open Question**

AB 2011 (2022), known as the Affordable Housing and High Road Jobs Act of 2022, is intended to permit residential development on sites currently zoned and designated for parking, commercial, or retail uses.

AB 2011 mixed-income projects (but not AB 2011 affordable housing projects) are subject to their own rules regarding ground floor retail:

- AB 2011 allows jurisdictions to require up to one-half of the ground floor be dedicated to retail use.<sup>6</sup>
- AB 2011 projects are eligible for density bonuses, waivers, concessions, and parking reductions under SDBL.
- However, a developer of an AB 2011 mixed-income project cannot use a concession to eliminate a local ground floor retail requirement that is consistent with Gov. Code Sec. 65912.123(j)(4).<sup>7</sup>

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<sup>5</sup> *Bankers Hill 150 v. City of San Diego* (January 7, 2022, No. D077963) 2022 WL69108. Cal. Dep't of Housing & Community Dev., Notice of Violation to City of Encinitas re: State Density Bonus Law, the Housing Accountability Act, Housing Element Law, and Affirmatively Furthering Fair Housing (Jan. 20, 2022), <https://www.hcd.ca.gov/community-development/housing-element/docs/sdiencinitas-nov-012022.pdf>.

<sup>6</sup> Gov. Code Sec. 65912.123(j)(4).

<sup>7</sup> Gov. Code Sec. 65912.124(f)(1).

- A waiver may still be requested from the ground floor retail requirements that are consistent with Gov. Code Sec. 65912.123(j)(4). However, whether ground floor retail requirements that are consistent with Gov. Code Sec. 65912.123(j)(4) qualify as a *local* development standard eligible for a waiver remains an open question.