This is the second in two blog posts about state density bonus law and its potentially unintended consequences. The first post is here.

As I noted in my prior post, the basic concept of state density bonus law is that if a project proponent includes a certain amount of affordable housing in their project, they get an increase in how big their project can be. If the project proponent includes a minimum percentage of units to serve a variety of possible housing consumers – very low income, low income, moderate income, students, farmworkers, emergency shelter, or senior citizens – then the local government "shall grant one density bonus, the amount of which shall be as specified in subdivision (f)." (In addition, the applicant will get a specific number of concessions to preempt local regulations that increase project costs, subdivision (d), unlimited waivers to preempt local regulations that prevent the project as propose from being built, subdivision (e), and lowered or no parking requirements, subdivision (p).) The minimum percentage of units the proponent must provide ranges from five percent and up, depending on the category of housing consumers the units will serve.

The size of the density bonus in subdivision (f) in turn depends on how large a percentage of affordable units the project provides. A higher proportion of affordable units, the bigger the density bonus – subdivision (f) has a series of tables showing the relationship. Importantly, the percentage of affordable housing needed to qualify for the density bonus under subdivision (b) is the percent of the "total units" of the project. "Total units" in turn is defined to "exclude[] a unit added by a density bonus awarded pursuant to this section." Total units are the total number of units in the project as originally proposed. The tables in subdivision (f) do not refer to "total units" but just to the "percentage" of units proposed – but this presumably also is the percentage of total units, excluding the density bonus – indeed, the beginning of subdivision (f) cross-references the percentages in subdivision (b). So it seems that, under the statute, it is the proportion of "total units" that determines whether you get a density bonus and how big a bonus you get.

The density bonus in (f) is defined as a percentage increase in units. But an increase from what baseline? Subdivision (f) defines the density bonus as "a density increase over the otherwise maximum allowable gross residential density," though the applicant can choose a lower increase, or no increase, if they wish. The statute then defines in (o)(6) "maximum allowable residential density" as "the greatest number of units allowed under the zoning ordinance, specific plan, or land use element of the general plan." (Note that this is a slightly different phrase, but

“maximum allowable gross residential density” is not defined in the statute, so this presumably is what the legislature intended. For a court taking that approach, see West Adams Heritage Ass’n v. City of Los Angeles, 326 Cal.Rptr.3d 844, 874 n.18 (Cal. Ct. Appl. 2nd Dist. 2024)). In other words, if you meet a specified percentage of “total units” as affordable, then the density bonus increases the maximum zoning density by a set percentage. As an example, a project with 5 percent of its total units set aside for very low income residents would get a density bonus percentage of 20.

But there is a gap here. The percentage of affordable units that gets you a density bonus is the percentage of units of the project, as proposed. But in return, you get an increase “over the otherwise maximum allowable gross residential density”, which is set by the zoning code or the general plan, whichever is higher.

So, take this hypothetical. A developer has a one acre site. The general plan allows for a maximum density of 40 units/acre for the site, so a maximum of 40 units (this is not a high threshold, some cities have much higher ones). The developer proposes to build a five unit project (the minimum number of units that can qualify for the density bonus law, see subdivision (i)), with one unit set aside for very low income tenants. That 20 percent set-aside gets the developer a density bonus that is a 25 percent increase on the maximum zoning. So now we have 50 units/acre for the site, or a maximum of 50 units under the general plan. But the density bonus is an increase in the maximum zoning potential for the project – it appears to set a new ceiling for the project at a much higher level, and the proponent can take any or all of that new ceiling as their density bonus. So the project now becomes 50 units, with one affordable unit. The result is a much larger project, with an affordable percentage of only 2% — but remember, the qualifying percentage for the law is “total units” which here is only 5 units. We have a ten-fold increase in the size of the project, without any increase in the affordability. The proponent gets a much larger project, with a minimal expense for affordable housing. (And note that because of the waiver provisions, the larger project would override local zoning rules that would make the project infeasible.)

As far as I can tell, this is not how the state law has been interpreted or applied so far. In practice, it seems that proponents either are proposing base projects close to the maximum density (in which case the proportion that is affordable remains quite high, even after the density bonus) or are taking smaller increases under the density bonus. So it is entirely possible I am missing something in how the statute “should” be interpreted. (None of the caselaw on state density bonus law

addresses this issue.)

My guess is that in practice, everyone assumes the density bonus that the proponent receives should bear some proportion to the project as proposed – in my hypothetical above, the proponent only should get 2 units in the density bonus (25% of 5, or 1.25, which rounds up to 2 units under the law), or maybe the 10 unit increase over the maximum density (but not the increase from 5 units up to the original maximum density of 40 units). (For an example of the former approach under an earlier version of the statute, where the court applied the density bonus to a proportion of the original project as proposed, see Wollmer v. City of Berkeley, 102 Cal.Rptr.3d 19, 27 (Cal. Ct. App. 1st Dist. 2009)). My guess is also that is how the legislature envisions the law as working. But as far as I can tell, the statute as written does not work that way – perhaps because of the accretion of amendments over the years. (Again, this is only a guess on my part – it is hard to find any information about this particular issue in local government guidance on state density bonus law implementation)

If you've read this far, I have a few take aways. Whatever the ultimate answer to my question about how the law actually works here, this is an example of how the complexity of California's housing laws might produce rather extreme results that are not probably what the legislature intended originally. I doubt the legislature would want to allow large increases in zoning capacity for a project that ultimately provides only 2% of affordable housing. But that may well be what the law allows (and note, with higher maximum densities, the results get even more extreme).

More generally, I think this supports two important points for the future of California's ongoing efforts to develop more housing in a sustainable way. First, it highlights the uncertainty about how California's housing reforms work in practice – an uncertainty that may be contributing to some of the difficult politics around reforms. Second, it also highlights the potential benefits of more fundamental reform of the state's land-use regulatory system. Rather than adding ever more intricate additions and alterations to a complicated state land-use superstructure that sits on top of an even more complicated local land-use regulatory system, we may be better off just blowing up the system and implementing a simpler, clearer one that advances the goals the legislature has consistently produced: more housing, but in an environmentally sustainable way that allows for a local say in how more housing is produced. A state-wide map that identifies urban areas that should be subject to CEQA streamlining/exemption is one example of that type of a fundamental reform of state housing law.