

Senate Bill 35 Eligibility Checklist
(Includes updates to reflect amendments made by AB 1485
since adoption of City Council Resolution 19-113)

To be eligible for a streamlined review process under SB 35, an application must meet the objective planning standards required by SB 35, including all applicable City objective land use standards, in effect at the time the application is submitted, as described below.

1. **NUMBER AND DENSITY OF UNITS.** The project must comply with the minimum and maximum residential density range permitted for the site, plus any applicable density bonus. Guidelines § 300(c)(1). If the zoning code's density designation for the site conflicts with the density allowed in the general plan's land use designation, the density in the general plan's land use designation prevails. Gov. Code § 65913.4(a)(5). The project, if eligible, may request a density bonus and/or waivers and/or concessions under the Density Bonus Law (Gov. Code § 65915). Guidelines § 300(b)(3). Any increase in density granted under the Density Bonus Law is considered consistent with maximum allowable densities. Guidelines § 300(b)(3).

In addition:

- (a) The project must propose at least two multifamily residential units. Guidelines §§ 102(o), 400(a).
- (b) If the project is mixed-use, at least two-thirds of the proposed development's square footage must be designated for residential use. Guidelines § 400(b).
 - i. The two-thirds calculation is based upon the proportion of gross square footage of residential space and related facilities to gross development building square footage for an unrelated use, such as commercial or office uses. Structures utilized by both residential and non-residential uses shall be credited proportionally to intended use. Guidelines § 400(b).
 - ii. Related residential facilities are defined as any manager's units and any and all common area spaces that are included within the physical boundaries of the housing development, including, but not limited to, common area space, walkways, balconies, patios, clubhouse space, meeting rooms, laundry facilities, and parking areas that are exclusively available to residential users, except any portions of the overall development that are specifically commercial space. Guidelines § 102(u).
 - iii. Additional density, floor area, and units, and any other concession, incentive, or waiver of development standards granted pursuant to Density Bonus Law are included in the square footage calculation. Underground space, such as basements or underground parking garages, are not included in the calculation of the square footage of the development. Gov. Code § 65913.4(a)(2)(C).

(c) If the development project qualifies for a density bonus under Government Code section 65915, the applicant must submit detailed plans clearly showing location and the square footage of:

- i. Affordable units that qualify the project for a density bonus,
- ii. Additional density, floor area, or units granted pursuant to Density Bonus law

The plans must be of sufficient detail to verify the square footage of the residential units and additional bonus units, floor area, or density granted pursuant to Density Bonus Law. The applicant must comply with all objective standards relating to density bonus found in CMC Chapter 19.56. Guidelines § 300(b)(5).

(d) Both residential and non-residential components of a qualified mixed-use development are eligible for the streamlined approval process. Guidelines § 400(b)(2). Additional or subsequent permitting requirements pertaining to the individual businesses located in the commercial component (e.g. late night activity, live music or child care use permits) are subject to the City's General Plan and Development Code requirements. Guidelines § 400(b)(3).

2. AFFORDABILITY. The project must provide affordable housing as specified under Government Code section 65913.4(a)(3)(A) and (a)(4)(B) and under Cupertino's Below Market Rate Housing Program inclusionary zoning ordinance specifically:

(a) SB 35 projects must reserve at least 50% of their total units as affordable to households making below 80 percent of the area median income in Santa Clara County.¹ Guidelines § 402(a)(2); see § 402(e).

(b) Cupertino's inclusionary zoning ordinance provides objective affordability standards for its inclusionary BMR units in a project as follows:

- i. For developments that offer rental housing: very low-income and low-income households at a 60:40 ratio. Because SB 35 requires rental units be made available to households making below 80 percent of the area median income, if the project applicant wants to take credit for both SB 35 units and the City BMR Program, then the most restrictive requirement would apply and these rental units must be made available to households at the ratio required by the City's BMR Program.
- ii. For developments that offer ownership housing: median and moderate income households at a 50:50 ratio. Because SB 35 requires ownership units be made

¹ When jurisdictions have insufficient progress toward their Lower income RHNA (Very Low and Low income) but have had sufficient progress toward their Above Moderate income RHNA, they are subject to the streamlined ministerial approval process for proposed developments with at least 50 percent affordability. Gov. Code § 65913.4(a)(4)(B)(ii). Cupertino has had sufficient progress toward the Above Moderate income RHNA, but not toward the Lower income RHNA, and is therefore subject to streamlining of projects offering at least 50 percent affordability under SB 35 according to the most recent SB 35 Determination Summary, available at http://www.hcd.ca.gov/community-development/housing-element/docs/SB35_StatewideDeterminationSummary.pdf.

available to households making below 80 percent of the area median income, if the project applicant wants to take credit for both SB 35 units and the BMR Program, then the most restrictive requirement would apply and these ownership units must be made available to households making below 80 percent of the area median income rather than median and moderate income households.

- iii. The objective standards in Cupertino's inclusionary zoning ordinance shall apply to the project. Guidelines § 402(e).
- iv. As provided in the City's BMR Program, applicants for projects proposing up to six residential units may pay the Affordable Housing Mitigation Fee in-lieu of providing on-site affordable units subject to the City's BMR Ordinance. Payment of the fee does not change or override any of SB 35's affordability requirements.

(c) The applicant must record a land use restriction or covenant providing that the lower income housing units shall remain available at affordable housing costs or rent to persons and families of lower-income (or very low income, as applicable) for no less than the following periods of time, as applicable:

- i. For the units subject to Cupertino's inclusionary zoning ordinance:
 - 99 years or
 - 55 years (if a project financed with low-income housing tax credits (LIHTC))

(d) An affordable housing and/or regulatory agreement concerning all affordable units shall be recorded against the property prior to the issuance of the first building permit. The agreement(s) shall ensure compliance with all applicable laws and regulations and be consistent with the City's BMR Housing Mitigation Program Procedural Manual, except to the extent the Manual conflicts with SB 35's requirements.

3. URBAN INFILL. The project must be located on a legal parcel or parcels within the incorporated City limits. Guidelines § 401(a). At least 75 percent of the perimeter of the site must adjoin parcels that are developed with urban uses. Guidelines §§ 102(j), 400(a). For purposes of SB 35, "urban uses" means any current or former residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses. Guidelines § 102(z). Parcels that are only separated by a street or highway shall be considered adjoined. Guidelines § 102(j).

4. ZONED OR PLANNED RESIDENTIAL USES. The project must be located on a site that is either zoned or has a General Plan designation for residential or residential mixed-use development, including sites where residential uses are permitted as a conditional use. Guidelines § 401(a).

5. **CONSISTENT WITH OBJECTIVE STANDARDS.** The project must meet all objective general plan, zoning, design review, and other objective land use standards in effect at the time the application is submitted. Gov. Code § 65913.4(a)(5).

- (a) If the project is consistent with the minimum and maximum density range allowed within the General Plan land use designation, it is consistent with housing density standards. Guidelines § 300(c).
- (b) Modifications to otherwise-applicable standards under density bonus law do not affect a project's ability to qualify for SB 35. Guidelines § 300(c)(3).
- (c) Objective standards are those that require no personal or subjective judgment and must be verifiable by reference to an external and uniform source available prior to submittal. Guidelines § 102(p). Sources of objective standards include, without limitation:
 - i. General Plan.
 - ii. Municipal Code, including, without limitation, the Zoning, Subdivisions, and Building Codes
 - iii. Heart of the City Specific Plan
 - iv. Monta Vista Design Guidelines
 - v. North De Anza Conceptual Zoning Plan
 - vi. South De Anza Conceptual Plan
 - vii. Saratoga-Sunnyvale Conceptual Plan
 - viii. BMR Housing Mitigation Procedural Manual

6. **PARKING.** The project must provide at least one parking space per unit; however, no parking is required if the project meets any of the following criteria. Guidelines § 300(d):

- (a) The project is located within one-half mile of public transit.
- (b) The project is located within an architecturally and historically significant historic district.
- (c) On-street parking permits are required but not offered to the occupants of the project.
- (d) The project is located within one block of a car share vehicle station.

However, if any parking is provided, it must meet the City's objective standards from Chapter 19.124 of the Municipal Code and Public Works Standards. Guidelines § 300(d)(2).

7. **LOCATION.**

- (a) The project must **not** be located on a legal parcel(s) that is any of the following (*see* Guidelines § 401(b)):
 - i. Either prime farmland or farmland of statewide importance, as defined pursuant to United States Department of Agriculture land inventory and monitoring criteria, as modified for California, and designated on the maps prepared by the Farmland

Mapping and Monitoring Program of the Department of Conservation, or land zoned or designated for agricultural protection or preservation by a local ballot measure that was approved by Cupertino's voters.²

- ii. Wetlands, as defined in the United States Fish and Wildlife Service Manual, Part 660 FW 2 (June 21, 1993).
- iii. Within a very high fire hazard severity zone, as determined by the Department of Forestry and Fire Protection pursuant to Section 51178, or within a high or very high fire hazard severity zone as indicated on maps adopted by the Department of Forestry and Fire Protection pursuant to Section 4202 of the Public Resources Code. This does not apply to sites excluded from the specified hazard zones by the City, pursuant to subdivision (b) of Section 51179, or sites that have adopted fire hazard mitigation measures pursuant to existing building standards or state fire mitigation measures applicable to the development.
- iv. A hazardous waste site that is listed pursuant to Section 65962.5 or a hazardous waste site designated by the Department of Toxic Substances Control pursuant to Section 25356 of the Health and Safety Code, unless the State Department of Public Health, State Water Resources Control Board, or Department of Toxic Substances Control has cleared the site for residential use or residential mixed uses.
- v. Within a delineated earthquake fault zone as determined by the State Geologist in any official maps published by the State Geologist, unless the development complies with applicable seismic protection building code standards adopted by the California Building Standards Commission under the California Building Standards Law (Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code), and by any local building department under Chapter 12.2 (commencing with Section 8875) of Division 1 of Title 2.
- vi. Within a special flood hazard area subject to inundation by the 1 percent annual chance flood (100-year flood) as determined by the Federal Emergency Management Agency in any official maps published by the Federal Emergency Management Agency. This restriction does not apply if the site has been subject to a Letter of Map Revision prepared by the Federal Emergency Management Agency and issued to the City or if the applicant can demonstrate that the site will be able to meet the minimum flood plain management criteria of the National Flood Insurance Program.

² As of July 1, 2019, no properties in Cupertino fall within this category. Prior to submitting an application for streamlined review, applicants should confirm with the Planning Division if the listed exclusion is applicable.

- vii. Within a regulatory floodway as determined by the Federal Emergency Management Agency in any official maps published by the Federal Emergency Management Agency, unless the development has received a no-rise certification in accordance with Section 60.3(d)(3) of Title 44 of the Code of Federal Regulations.
 - viii. Lands identified for conservation in an adopted natural community conservation plan pursuant to the Natural Community Conservation Planning Act (Chapter 10 (commencing with Section 2800) of Division 3 of the Fish and Game Code), habitat conservation plan pursuant to the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), or other adopted natural resource protection plan.
 - ix. Habitat for protected species identified as candidate, sensitive, or species of special status by state or federal agencies, fully protected species, or species protected by the federal Endangered Species Act of 1973 (16 U.S.C. Sec. 1531 et seq.), the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3 of the Fish and Game Code), or the Native Plant Protection Act (Chapter 10 (commencing with Section 1900) of Division 2 of the Fish and Game Code).
 - x. Lands under conservation easement.
- (b) In addition, the project must not be located on a site where any of the following apply:
- i. A site that would require demolition of housing that is:
 - 1. Subject to recorded restrictions or law that limits rent to levels affordable to moderate, low, or very-low income households.
 - 2. Subject to rent control.
 - 3. Or has been occupied by tenants within the past 10 years.
 - ii. A site that previously contained housing occupied by tenants that was demolished within the past 10 years.
 - iii. A property that contains housing units that are occupied by tenants, and units at the property are, or were, subsequently offered for sale to the general public by the subdivider or subsequent owner of the property.
 - iv. A parcel of land or site governed by the Mobilehome Residency Law, the Recreational Vehicle Park Occupancy Law, the Mobilehome Parks Act, or the Special Occupancy Parks Act.³
 - v. A site that would require demolition of an historic structure that is on a local, state, or federal register.

³ As of June 2019, no properties in Cupertino fall within this category. Prior to submitting an application for streamlined review, applicants should confirm with the Planning Division if the listed exclusion is applicable.

8. **SUBDIVISIONS.** The project does not involve an application to create separately transferable parcels under the Subdivision Map Act. Guidelines § 401(d). However, a subdivision is permitted if the development is consistent with all objective subdivision standards in the subdivision ordinance, and either of the following apply (Guidelines § 401(d)):
 - (a) The project is financed with low-income housing tax credits (LIHTC) and satisfies the prevailing wage requirements identified in item 9 of this Eligibility Checklist.
 - (b) The project satisfies the prevailing wage and skilled and trained workforce requirements identified in items 9 and 10 of this Eligibility Checklist.

9. **PREVAILING WAGE.** The project proponent must certify that at least one of the following is true (Guidelines § 403):
 - (a) The entirety of the project is a public work as defined in Government Code section 65913.4(8)(A)(i).
 - (b) The project is not in its entirety a public work and all construction workers employed in the execution of the development will be paid at least the general prevailing rate of per diem wages for the type of work and geographic area.
 - (c) The project includes 10 or fewer units AND is not a public work AND does not require subdivision.

10. **SKILLED AND TRAINED WORKFORCE.** If the project consists of 75 or more units that are not 100 percent subsidized affordable housing, the project proponent must certify that it will use a skilled and trained workforce, as defined in Government Code section 65913.4(8)(B)(ii).⁴ Guidelines § 403.

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⁴ Beginning January 1, 2022, the skilled and trained workforce requirement is reduced to apply to projects of 50 units or more that are not 100 percent subsidized affordable housing.