A PUBLIC AGENCY GUIDE TO CALIFORNIA DENSITY BONUS LAW

Barbara E. Kautz

GOLDFARB & LIPMAN LLP

Adapted from Presentation for
County Counsels' Association of California

Land Use Fall 2005
Study Section Conference

1300 Clay Street, Ninth Floor
Oakland, CA 94612
510 836-6336
bkautz@goldfarblipman.com

The State's density bonus law (Government Code section 65915 – 65918) was significantly modified in 2004 by SB1818 (effective January 1, 2005). It can be considered a voluntary inclusionary housing ordinance, providing large incentives to developers who include small amounts of affordable housing in their projects. The bill requires cities and counties to grant developers both density bonuses of 20 to 35 percent, depending on the amount and type of affordable housing provided, and "concessions"—exceptions from normally applicable zoning and other development standards. Section 65915 was amended again in 2005 (SB 435, Chapter 496). While SB 435 clarified some issues, what has resulted is poorly drafted and confusing legislation that has raised substantial public concerns while resulting in little additional affordable housing to date, although the jury is still out on the ultimate impact of the bill.

A. Background of the Legislation

The State's density bonus law formerly provided a 25 percent increase in density in exchange for 10 to 20 percent affordable housing. Anecdotal reports indicated that few developers took advantage of the legislation because of the relatively high percentage of affordable housing required to receive a bonus.

In 2004, a coalition of housing advocates and the California Association of Realtors (CAR) achieved the passage of SB1818, which made significant changes in the law. The changes reduced the proportion of affordable units needed to obtain a density bonus, increased the maximum bonus from 25 to 35 percent, required local governments to grant additional concessions, and added a bonus for land donation. Of interest is that the Building Industry Association (BIA), whose membership includes the major developers in the state, did not play a major role in drafting the legislation.

Although the stated purpose of the changes was to increase the amount of affordable housing in the state, the two advocacy groups had additional interests. The issue of greatest concern to nonprofit housing developers was local parking standards, which they considered excessive for affordable housing and which have a significant effect on the economics of an affordable project. CAR's interest may have derived in part from a desire to force local governments to give more incentives when they imposed local inclusionary housing requirements. The December 27, 2004, edition of the California Real Estate Journal stated that:

> "In effect, Section 65915 grafts the density bonus and additional incentives onto the local inclusionary zoning requirement. Accordingly, developers that want to build in jurisdictions with local inclusionary zoning should consider taking advantage of the benefits of Section 65915 as a means to mitigate the economic burden imposed by inclusionary zoning."

However, ambiguous language in the bill and competing Assembly and Senate floor analyses for SB 435 make it unclear whether developers of inclusionary housing are in fact entitled to a density bonus!

Regardless of the statute's ambiguity and complexity, all cities and counties must adopt an ordinance specifying how they will comply with the legislation.[1] The law is applicable to charter cities.[2]

B. Basic Provisions

Density bonuses may be given for affordable housing, senior housing (whether or not affordable), donations of land for affordable housing, condominium conversions that include affordable housing, and child care facilities. In addition to density bonuses, applicants who provide affordable housing qualify for various zoning concessions and for reduced parking standards.

1. Projects Eligible for Density Bonuses

Density bonuses are available to five categories of residential projects:

a. **Affordable Housing.** Housing developments that create at least five dwelling units or unimproved lots[3] are eligible for density bonuses if *either:*

- **Five percent** of the units are affordable to *very low income* households earning **50 percent of median** or less;[4] *or*
- **Ten percent** are affordable to *lower income* households earning **80 percent of median** or less;[5] *or*
- **Ten percent** are affordable to *moderate income* households earning **120 percent of median** or less, but only if the project is a common interest development[6] where *all* of the units, including the moderate-income units, are available for sale to the public.[7]

These required percentages of affordable housing apply only to the project *without* any density bonus, not the entire project. For instance, assume that a 100-unit project is entitled to a 20 percent density bonus, giving a total of 120 units. To qualify for the 20 percent bonus, the project need only provide:

---

[1] Government Code section 65915(a). All further references are to the Government Code unless otherwise indicated. In addition, all references are to the statute as amended by SB435, Chapter 496, Statutes of 2005 (effective January 1, 2006.)

[2] Section 65918.

[3] Section 65915(g)(5) (which states that the bonuses apply to housing developments consisting of five or more dwelling units); Section 65915(j) (defining "housing development" as including residential units, subdivisions, conversion of commercial buildings to residences, and rehabilitation of apartments that creates additional dwelling units). The definitions are poorly written and could be interpreted to allow a density bonus for an existing affordable development. However, Section 65915(b)(1) states that a bonus is available when an applicable "agrees to *construct*" a housing development, implying that the bill does not apply to existing developments.

[4] Section 65915(b)(1)(B) (referring to Health & Safety Code § 50105 for definition of very low income households; see also 25 CCR § 6926). Income levels for all categories are adjusted by household size and published annually for each county by the California Department of Housing and Community Development. See 25 CCR § 6932..

[5] Section 65915(b)(1)(A) (referring to Health & Safety Code § 50079.5 for definition of lower income households; see also 25 CCR § 6928).

[6] As defined by Civil Code § 1351.

[7] Section 65915(b)(1)(D) (referring to Health & Safety Code § 50093 for definition of moderate income households; see also 25 CCR § 6930).

- 5 very low income units (5% of 100); *or*
- 10 lower income units (10% of 100).

Continued Affordability. To be eligible for a density bonus, the affordable units must be sold or rented at affordable prices or rents and must remain affordable for a specified period.

All **very low income and lower income units** must remain affordable for **30 years** (unless a subsidy program requires a longer period of affordability).[8] Housing costs for very low income units cannot exceed 30 percent of 50 percent of median income. In other words, if median income equals $80,000 per year, the household's housing expenses theoretically cannot exceed $12,000 per year (30% x (50% of $80,000) = 30% x $40,000 = $12,000). (Note, however, that the California Housing and Community Development Department (HCD) publishes income limits by household size that may vary significantly from actual calculations of median income.) For lower income units, rents cannot exceed 30 percent of 60 percent of median income, while housing costs in owner-occupied lower income units cannot exceed 30 percent of 70 percent of median income.[9]

Moderate income ownership units must initially be sold to moderate income buyers at an affordable price (generally based on housing costs equal to 35 percent of 110 percent of median income).[10] At resale, the local government can either enforce an equity-sharing agreement (involving sale of the home at fair market value and sharing of the profits with the city) or enforce another law regarding affordability.[11] This latter provision probably allows counties and cities to adopt their own laws imposing stricter resale controls on these moderate income units, if desired.

Affordable rents and sales prices for the affordable units must be determined by using the methodology included in the California Code of Regulations.[12] Total housing costs for rentals include rent, utilities, and any fees and service charges levied by the landlord. Total housing costs for ownership units must include principal, interest, property taxes, insurance, private mortgage insurance (if any), utilities, homeowners' association fees, and an allowance for maintenance costs. These formulas tend to result in lower sales prices than would be typical in the private market. In other words, banks would generally be willing to loan more money to these buyers than is the case when the statutory formulas are used.

b. Senior Housing. A senior citizen housing development as defined by Civil Code sections 51.3 and 51.12[13] is eligible for a density bonus even if none of the units are affordable. Senior housing projects eligible under Civil Code section 51.3 must contain at least 35 units.[14]

---

[8] Section 65915(c)(1).
[9] Section 65915(c)(1) (referring to Health & Safety Code sections 50053 & 50052.5). Agencies should use HCD's published income charts for each County to determine applicable very low, low, and moderate-income limits. These are available on HCD's web site.
[10] Section 65915(c)(2) (referring to Health & Safety Code sections 50093 & 50052.5).
[11] Section 65915(c)(2).
[12] 25 CCR §§ 6910, 6918 & 6920.
[13] This code section is applicable only to Riverside County.
[14] Civil Code § 51.3(b)(4).

c. Donations of Land. A land donation can qualify a project for a density bonus if the parcel donated is large enough to accommodate at least 10 percent of the market-rate units at densities suitable for very low income housing.[15] In other words, a 500-unit market-rate project can receive a density bonus by donating land zoned at densities that can accommodate, and are suitable for, a 50-unit very low income project.

Land donations must meet strict criteria. In particular, the donated land must satisfy all of the following requirements:[16]

- Have the appropriate general plan designation, zoning, and development standards to permit the feasible development of units affordable to very low income households in an amount equal to at least 10 percent of the units in the residential development;
- At least one acre in size or large enough to permit development of at least 40 units;
- Served by adequate public facilities and infrastructure;
- Located within the boundary of the residential development or within one-fourth mile of it (if approved by the local agency);
- Have all necessary approvals except building permits needed to develop the very low income housing, unless the local government chooses to permit design review approval at a later date;
- Subject to a deed restriction to ensure continued affordability;
- Transferred to either a local agency or housing developer identified by the local agency, or by the developer.

These criteria in effect make land donation an option only for larger projects which can donate sites of at least one acre. This option can be quite favorable for large developers, however, because a site large enough to accommodate 10 percent very low income units will normally include much less than 10 percent of the project's land area. That is because very low income projects are usually built at densities of at least 20 units/acre, greater than the density of most market-rate projects in "greenfield" areas. If a county or city is willing to allow higher densities, this can be an effective way to create significant affordable housing.

d. Condominium Conversions. A condominium conversion is eligible for a density bonus if either 33 percent of units are affordable to *moderate-income* households or 15 percent are affordable to *lower income* households.[17] Since condominium conversions by definition apply to existing structures, presumably this would apply only in the rare instances when additional units may be added on the site either by subdividing existing units or by adding units on site. This code section was not changed by the 2004 or 2005 legislation.

---

[15] Section 65915(h).
[16] Section 65915(g)(2)(A – F).
[17] Section 65915.5(a) (referring to Health & Safety Code section 50093 for definition of moderate income households and to Health & Safety Code section 50079.5 for definition of lower income households).

e. **Child Care Facilities.** A housing development is eligible for an *additional* bonus if it includes a child care facility *and* either qualifies as a senior citizens housing development or includes enough affordable housing to be eligible for a density bonus.[18] The statute requires counties and cities to place strict operating requirements on the child care facilities. The child care centers must:

- Remain in operation for the period of time that affordable units must remain affordable (30 years in the case of very low income and lower income households); and
- Ensure that the children attending the facility come from households with the same proportion of very low, lower, or moderate incomes as qualified the project for the density bonus.[19] In other words, if the housing development qualified for a density bonus because 10 percent of the units were affordable to moderate-income households, then 10 percent of the children at the child care center must come from moderate-income households.

These conditions are in a practical sense virtually impossible to enforce over time, although they must be imposed as conditions of approval.

Like the section on condominium conversions, this code section was not amended by the 2004 or 2005 legislation.

2. Density Bonuses Available

a. **Affordable Housing.** The 2004 statute modified density bonus law to give higher bonuses for lower income housing and lower bonuses for moderate-income housing. Housing developments are eligible for a **20 percent density bonus** if they contain:

- **Five percent** of units affordable to **very low income households**;[20] or
- **Ten percent** of units affordable to **lower income households**.[21]

Housing developments qualify for only a **5 percent density bonus** if **ten percent** of the units are affordable to **moderate-income families**.[22]

In addition, there is a sliding scale that requires:

- An additional **2.5% density bonus** for each additional increase of 1% very low income units;[23]
- An additional **1.5% density bonus** for each additional 1% increase in lower income units;[24] and

[18] Section 65915(i). Section 65917.5 also allows a city or county to provide a density bonus for a commercial or industrial project that includes a child care facility.
[19] Section 65915(i)(2).
[20] Section 65915(g)(1).
[21] Section 65915(g)(2).
[22] Section 65915(g)(4).
[23] Section 65915(g)(1).
[24] Section 65915(g)(2).

- An additional **1% density bonus** for each 1% increase in moderate income units.[25]

No total density bonus can be greater than **35 percent.** The maximum density bonus is reached when a project provides *either* 11 percent very low income units, 20 percent lower income units, or 40 percent moderate income units. The table on page 10 shows these calculations.[26]

A change made by SB435 (effective January 1, 2006) clarified that a developer must choose a density bonus from ***only one affordability*** **category** and cannot combine categories.[27] Thus a project that includes, say, 10 percent moderate-income units and 10 percent lower income units must choose the bonus from *either* the moderate-income category or the lower income category. Since the project would be entitled to a 20 percent bonus based on the lower income units, but only a 5 percent bonus based on the moderate-income units, the developer would presumably select the density bonus based on the lower income category and would get no additional bonus for the moderate-income units provided. The effect is to encourage developers to concentrate units in either the lower or very low income categories.

b. Senior Housing. A project qualifying as a **senior citizen housing development** is entitled to a **20 percent density bonus**.[28] The bonus *cannot* be combined with the bonuses granted for affordable housing.[29]

c. Donations of Land. *Additional* density, which may be combined with the density bonuses given for affordable and senior housing, is available for projects that donate land for very low income housing. However, in no case can the total bonus granted exceed 35 percent.[30]

A **density bonus of 15 percent** is available for a land donation that can accommodate **10 percent of the market-rate units** in the development. An additional **1% density bonus** is available for each **1% increase** in the number of units that can be accommodated on the donated land, up to a maximum of 35 percent.[31]

d. Condominium Conversions. A condominium conversion is entitled to a flat density bonus of 25 percent when it includes either 33 percent moderate-income units or 15 percent lower income units.[32] Here, however, the local agency can instead choose to provide an alternative incentive of "equivalent financial value" if it does not choose to grant the density bonus.[33] Note that a conversion is ineligible for a bonus if the apartments to be converted received a density bonus when they were originally built.[34]

---

[25] Section 65915(g)(4).
[26] SB 435 amended the bill to include tables for each category showing the specific bonus granted for varying percentages of affordability.
[27] Section 65915(b)(2).
[28] Section 65915(g)(3).
[29] Section 65915(b)(2).
[30] Section 65915(h)(2).
[31] Section 65915(h)(1).
[32] Section 65915.5(a) & (b).
[33] Section 65915.5(a).
[34] Section 65915.5(f).

e. Child Care Facilities. A child care facility meeting the operational requirements of the statute and constructed in association with an affordable or senior project is entitled to either an *additional* density bonus equal to the amount of square footage in the child care center; or an alternative incentive that "contributes significantly to the economic feasibility" of the center.[35] Since a "density bonus" is usually interpreted to refer to the number of dwelling units permitted on a site, it is unclear how this requirement for additional *square feet* relates to the otherwise permissible residential density.

The table on the next page summarizes the available density bonuses.

f. Calculating the Density Bonus.

- **Bonus Over Zoning Maximum or General Plan Maximum?**

The authors of SB 1818 appear to have intended to clarify that any bonus is to be calculated over the maximum density otherwise allowable by the *zoning ordinance.* Section 65915(o)(2) defines "maximum allowable residential density" as that allowed under the *zoning ordinance*, or the maximum allowable under the *zoning* when a range of density is specified.

However, section 65915(g) states that a density bonus is an increase over the "maximum allowable residential density" under the zoning ordinance *and* the land use element of the general plan, and section 65915(h)(1) relating to land donations repeats this language.

Local agencies can attempt to clarify this by stating in their local ordinances that the density bonus is to be calculated over the zoning maximum. This becomes an issue only where the zoning ordinance permits a lower maximum density than permitted by the community's land use element. Since this situation by itself could raise issues of consistency between the general plan and zoning ordinance,[36] especially if the community utilized the maximum densities in the land use element to obtain approval of its housing element,[37] it is probably better practice in any case to have the same maximum densities in the zoning ordinance and in the land use element.

- **What If There's NO Maximum Density?**

A few communities do not place *any* limit on the number of dwelling units that can be constructed on a site, but instead allow as many units as can be constructed given limitations on height, setbacks, floor area, and other zoning regulations. Do these communities also need to grant density bonuses?

Since density bonuses allow developers additional *units*, it appears that an agency would not need to grant density bonuses if there is no limit on the number of units to begin with. However, at least one city attorney believes that the agency must calculate the reasonable maximum density otherwise allowable under the city's regulations and then allow additional units over that density. This calculation, however, involves numerous assumptions regarding the size and type of the units to be built.

[35] Section 65915(i)(1).
[36] Section 65860(a).
[37] Section 65863(b).

The child care provision defines additional square footage as a *density* bonus.[38] Consequently, another interpretation might be that the agency is required to allow a percentage increase in square footage.

Our own view is that no density bonuses need be given where there are no limits on density.

Affordable Units or Category	Minimum % Units in Category	Bonus Granted	Additional Bonus for Each 1% Increase in Units in Category	% Units in Category Required for Maximum 35% Bonus
Note: A density bonus may be selected from only one category, except that bonuses for land donation may be combined with others, up to a maximum of 35%, and an additional sq. ft. bonus may be granted for a day care center.				
Very-low income	5%	20%	2.5%	11%
Lower-income	10%	20%	1.5%	20%
Moderate-income (ownership units only)	10%	5%	1%	40%
Senior housing type 1 (35 units or more; no affordable units required)	100% senior	20%	--	--
Land donation for very-low income housing	10% of market-rate units	15%	1%	30%
Condominium conversion –moderate-income	33%	25%(a)	--	--
Condominium conversion – lower-income	15%	25%(a)	--	--
Day care center	--	Sq. ft. in day care center (a)	--	--
Notes: (a) Or an incentive of equal value, at the City's option.				

- **Rounding Up**

Any density bonus calculation resulting in a fraction entitles the developer to another bonus unit.[39] For instance, a project with 102 units, 10 percent of which are affordable to

[38] Section 65915(i)(1)(A).
[39] Section 65915(g)(5).

lower income households, is entitled to 21 bonus units (20% x 102 = 20.4, or 21 bonus units). Of course, local agencies can play this game as well by requiring in their local ordinances that the number of affordable units to be provided must also be rounded up. Thus, in a 102-unit project, a developer would need to provide 11 units to meet the 10 percent requirement (10% x 102 = 10.2, or 11 affordable units if all percentages are to be rounded up).

3. Concessions, Incentives, Waivers, Reductions, and Reduced Parking Requirements

Of greatest concern to local planners are the requirements in the statute that give applicants the right to modifications in local development standards: zoning, subdivision controls, and design review requirements. The planners' parade of horribles includes poorly designed multifamily housing with inadequate parking forced upon counties and cities by developers who take full advantage of the statute, defeating years of effort by housing advocates and local governments to overcome opposition to multifamily and affordable housing by ensuring that it is well designed. Unfortunately, if faced with a poorly designed project proposed under density bonus law, agencies are forced to take various procedural maneuvers to ensure that projects are of high quality.

To date few developers have applied for a density bonus or any significant concessions. The bill's proponents argue that most applicants do not want to have protracted disagreements with cities and counties, and their requests will be reasonable.

Applicants can have standards relaxed in three ways: by requesting "concessions and incentives;" by asking for "waivers and reductions;" and by using reduced parking standards contained in the statute.

a. Concessions and Incentives. An applicant who 1) applies for a density bonus[40] and 2) bases the request on the provision of affordable housing may also apply for one to three "concessions or incentives." "Concessions and incentives" are defined as:

- **Reductions in site development standards and modifications of zoning and architectural design requirements**, including reduced setbacks and parking standards,that result in "identifiable, financially sufficient, and actual cost reductions."[41]
- **Mixed used zoning** that will reduce the cost of the housing, if the non-residential uses are compatible with the housing development and other development in the area.[42]

[40] Some applicants have argued that they may apply for an incentive or concession without first applying for a density bonus. However, Section 65915(a) states that, "*When an applicant seeks a density bonus*…[the relevant] local government shall provide the applicant incentives or concessions …;" and Section 65915(d)(1) similarly states, "*An applicant for a density bonus*…may submit to a city, county or city and county a request for the specific incentives or concessions…" (emphasis added). On the other hand, the statute allows the applicant to propose a lesser density bonus than the maximum permitted by the statute (Section 65915(g)), so an application for just one bonus unit would entitle the applicant to the incentives and concessions.

[41] Section 65915(*l*)(1).

[42] Section 65915(*l*)(2).

- **Other regulatory incentives or concessions** that result in "identifiable, financially sufficient, and actual cost reductions."[43]

One to three incentives or concessions may be requested on a sliding scale, depending on the amount of affordable housing provided, as shown in the table below.[44]

The developer has the right to select the incentives, although a city or county may of course encourage the developer to select other incentives on a voluntary basis. However, to deny the specific incentives proposed, the agency must either find that they do not meet the threshold requirements set in the statute—in particular, that they do not result in "identifiable, financially sufficient, and actual cost reductions"—or make the findings required to deny a request for an incentive, discussed below.

Target Units or Category	**% of Target Units**		
Pursuant to State Density Bonus			
Very-low income	5%	10%	15%
Lower-income	10%	20%	30%
Moderate-income (ownership units only)	10%	20%	30%
Condominium conversion – 33% moderate-income	(d)		
Condominium conversion – 25% lower-income	(d)		
Day care center	(d)		
Maximum Incentive(s)/Concession(s) [(a)(b)(c)]	**1**	**2**	**3**
Notes: (a) A concession or incentive may be requested only if an application is also made for a density bonus. (b) Concessions or incentives may be selected from only one category (very-low, lower, or moderate). (c) No concessions or incentives are available for land donation or market-rate senior housing. (d) Condominium conversions and day care centers may have one concession or a density bonus at the City's option, but not both.			

b. "**Waivers and Modifications" of "Development Standards."** Localities may not enforce any "development standard" that would preclude the construction of a project with the density bonus and the incentives or concessions the developer is entitled to.[45] In addition to requesting "incentives and concessions," applicants may request the waiver of an unlimited number of "development standards" by showing that waiver is needed to make the project economically feasible.[46] Waivers and modifications are not limited to

[43] Section 65915(*l*)(3).
[44] Based on Section 659159d)(2).
[45] Section 65915(e).
[46] Section 65915(f).

projects containing affordable housing and may be requested by any applicant requesting a density bonus, including bonuses for senior housing, condominium conversions, and child care centers.

In yet another example of inartful drafting, the statute defines "development standards" as "site or construction conditions that apply to a residential development pursuant to any ordinance, general plan element, specific plan, charter amendment, or other local condition, law, policy, resolution, or regulation."[47] Since this is different from the definition of "incentive or concession," and does not specifically include zoning or architectural design, some attorneys have argued that it has a more limited meaning related to "construction," such as drainage, grading, soils engineering, and utilities, but not including zoning regulations regarding height, setbacks, etc. However, this view is not supported by the statute's requirement that cities and counties establish procedures for waivers and reductions which "*shall* include . . .such items as *minimum lot size, side yard setbacks*, and placement of public works improvements."[48] "Site and construction conditions" *do* seem to be confined to conditions affecting the *physical* location or type of construction and do not include use restrictions, procedural requirements, affordable housing requirements, and impact fees.

This is an area where local agencies may wish to resolve the ambiguity by providing a better definition of "development standards" in their local ordinances.

c. Parking Standards. If a project qualifies for a density bonus because it is a senior project or provides affordable housing, a city or county, at the request of the developer, must reduce the required parking for the entire project—*including the market-rate units*—to the following:

- zero to one bedroom – one on-site parking space
- two to three bedrooms – two on-site parking spaces
- four or more bedrooms – two and one-half on-site parking spaces.[49]

These numbers include guest parking and handicapped parking. The spaces may in tandem or uncovered, but cannot be on-street. The standards are uniform throughout the state, with no ability to vary them for local conditions. Unlike incentives or concession, *the parking standards may be requested even if no density bonus is requested.*

Some communities have defined a request for reduced parking (assuming that these standards are lower than those normally required) as a concession.

4. Local Agency Discretion

Can counties and cities deny requests for density bonuses, incentives, concessions, waivers, reductions, and reduced parking? Only with difficulty: either by making specified findings, supported by substantial evidence; or, by finding that the request does not meet the threshold requirements laid out in the statute.

[47] Section 65915(o)(1).
[48] Section 65915(d)(3) (emphasis added)
[49] Section 65915(p).

a. **Threshold Requirements.** Projects do not qualify for a density bonus—and hence the local agency may disapprove a request—if they do not meet the standards set in the statute. Local agencies can require that applicants show that they have met these threshold requirements. Some of the most important are these:

- **For affordable housing:** Initial sales prices and rents must meet the requirements of the California Code of Regulations. The applicant may be asked to provide (or reimburse the local agency's costs to provide) appropriate deed restrictions to ensure affordability.
- **For land donations:** The project must comply with the long list of conditions included in Section 65915(h)(2).
- **For incentives and concessions:** The regulatory concessions requested must result in "identifiable, financially sufficient, and actual cost reductions."[50] Local agencies can encourage applicants to apply for certain concessions and incentives by making a finding in their ordinances that certain concessions do result in actual cost reductions, and the homebuilder need not provide his or her own economic analysis.
- **For waivers and reductions:** The applicant must show that the development standard being waived will preclude the construction of the project with the density bonus, incentives and concessions requested;[51] and that the waiver is needed to make the housing units economically feasible.[52]

Because projects are eligible for a density bonus, incentives, and waivers only if they meet the threshold requirements contained in the statute, local agencies should be able to deny these requests if the application fails to meet these requirements.

b. **Findings for Disapproval**. In three places the statute lists findings required to deny incentives, concessions, waivers, and reductions. The findings are similar in all three cases but have slight variations. However, *no findings* are listed that may be used to deny a density bonus or a requested reduction in parking requirements; the language in the statute appears to preempt local authority to deny these requests.[53]

The findings are included in the table on the following page.

c. **Attorneys Fees.** An applicant is entitled to attorneys' fees and costs if a city or county denies a request for a density bonus, incentive, concession, waiver, or reduction in violation of either Section 65915(d)(3) or 65915(e).

[50] Sections 65915(*l*)(1) & (3).
[51] Section 65915(e).
[52] Section 65915(f).
[53] "Upon the request of the developer, no city, county, or city and county shall require a vehicular parking ratio . . .that exceeds the following ratios . . ." Section 65915(p)(1).

Code Section	Applicable To:	Procedural Requirements	Finding
65915(d)(1)	Incentives & concessions	In writing, based on substantial evidence	(A) The concession or incentive is not required in order to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c); or (B) The concession or incentive would have a specific adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5,* upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households.
65915 (d)(3)	Incentives and concessions	Agency must adopt procedures for complying with section	1. Nothing in this subdivision shall be interpreted to require a local government to grant an incentive or concession that has a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5,* upon health, safety, or the physical environment, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact. 2. Nothing in this subdivision shall be interpreted to require a local government to grant an incentive or concession that would have an adverse impact on any real property that is listed in the California Register of Historical Resources.
65915(e)	Waivers and modifications	Agency must adopt procedures for granting waivers**	1. Nothing in this subdivision shall be interpreted to require a local government to waive or reduce development standards if the waiver or reduction would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5,* upon health, safety, or the physical environment, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact. 2. Nothing in this subdivision shall be interpreted to require a local government to waive or reduce development standards that would have an adverse impact on any real property that is listed in the California Register of Historical Resources.
*Paragraph (2) of subdivision (d) of Section 65589.5 states: "[A] 'specific, adverse impact' means a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." **This requirement is in section 65915(d)(3).			

C. Issues

1. Relationship to Local General and Specific Plans

The density bonus law is, at its heart, profoundly anti-planning. It assumes that every parcel in the state can accommodate a density 35 percent higher than its existing zoning—no matter how high the permitted density or the capacity of the local infrastructure. By allowing unlimited waivers to accommodate density bonuses, the law assumes that achieving maximum density is more important than any other local planning requirement. But the state Department of Housing and Community Development (HCD) gives no credit to communities that encourage density bonuses. In calculating zoning capacity (the number of dwellings that can be built given present zoning), HCD does not allow communities to increase their capacity based on developers' ability to obtain a density bonus.

The statute provides specifically that the granting of a density bonus, concession, or incentive by itself shall not require a general plan amendment, zoning change, local coastal plan amendment, *or any other discretionary approval*.[54] Consequently, counties cannot establish a "density bonus permit" or other special permit for projects that request density bonuses, even when they violate the general plan and zoning. Rather, the density bonus and any request for concessions should be heard as part of any other discretionary approval needed.

There is no similar statutory language prohibiting discretionary approvals when applicants request waivers, reductions, and reduced parking. In fact, section 65915(d)(3) mandates that communities establish procedures for dealing with waiver requests. While most communities treat these like other density bonus requests, it may be possible to set up a separate discretionary process for these particular requests.[55]

2. Relationship to Local Inclusionary Requirements

The density bonus law applies when an applicant “seeks a density bonus” and "seeks and agrees to construct” the required percentages of affordable units. Does this mean that bonuses are available only when the developer *voluntarily* agrees to construct affordable units, or are they available whenever the developer builds affordable units, even if those affordable units were built because a local inclusionary housing ordinance *requires* their construction?

The legislative history for the recently adopted SB 435 provides diametrically opposed interpretations of this issue. Earlier versions of the bill amended Section 65915 to clarify that density bonuses would be available whenever projects included affordable housing meeting the thresholds in the bill. This language was removed by the Assembly Housing and Community Development Committee, and the original language was restored. The final floor analysis in the Assembly read as follows:

> [T]he language added on June 21, 2005, which states that a local government must provide a density bonus only when an applicant "seeks and agrees to construct" was

[54] Sections 65915(g)(5) & 65915(k).

[55] But if reduced parking is defined as an incentive or concession in the local ordinance, then the community should treat it like any other incentive or concession and not require a separate discretionary approval.

> intended to clarify that these density bonus provisions only apply when either: 1) a local government does not have an inclusionary housing ordinance or 2) an applicant proposes to include affordable units over and above those required by a locally adopted inclusionary ordinance. That amendment was adopted by the Assembly Housing Committee to clarify that issue.

However, when the identical bill was returned to the Senate, the Senate Floor analysis read as follows:

> This language means that any affordable units in a development count toward meeting density bonus requirements, regardless of whether or not the affordable units are required to be constructed by the local government pursuant to an ordinance.

What does this mean for localities? There is a basis for both interpretations. We have not yet found a case interpreting a statute where the two houses of the Legislature completely differed on its meaning.

a. Applying Inclusionary Requirements to Bonus Units. It is also not clear whether local inclusionary requirements can be imposed on bonus units themselves. Clearly the Legislature intended to give developers market-rate units in exchange for affordable units; the number of affordable units required is based on the project size *without* the bonus units.[56] For instance, assume that a 100-unit project becomes a 120-unit project after receiving a 20% density bonus because it includes 10% lower income units. Only 10 units (10% of 100) need to be affordable to lower income households, not 12 units (10% of 120).

If a county or city chooses to allow a density bonus for inclusionary units, then the overall percentage of affordable units will decline. For instance, with a 10% inclusionary requirement, normally the local agency would require 12 inclusionary units in a 120-unit project (10% of 120 units). However, if 20 units are density bonus units, none of which are affordable, then only 8.4% (10/120) of the total units will be affordable inclusionary units, rather than 10% (12/120) as intended by the inclusionary ordinance.

b. Avoiding the Application of the Costa-Hawkins Act by Granting Density Bonuses. The Costa-Hawkins Act (Civil Code §1954.51 *et seq*.) regulates local rent control. It gives the owner of any rental unit the right to set both the initial rent and the rent when a tenant vacates the unit ("vacancy decontrol"). At least two Southern California cities (Santa Monica and the City of Los Angeles) have been sued on the basis that their inclusionary ordinances, when applied to rental housing, violated the Costa-Hawkins Act.[57]

However, language in Costa-Hawkins states that its provisions do not apply when the owner of rental apartments has agreed by contract with a public agency to control rents in consideration for "a direct financial contribution or any other form of assistance specified in [Section 65915]."[58] Inclusionary rental units should be exempt from Costa-Hawkins when the project

---

[56] Section 65915(g)(5).

[57] Both cases were settled, resulting in no published decision. While the Costa-Hawkins statute was clearly intended to preempt local rent control laws, there is little evidence that it was intended to put an end to inclusionary programs for rental housing, which were common when the Costa-Hawkins act was adopted in 1995. Unfortunately, efforts to amend the law to clearly exempt inclusionary programs have been unsuccessful. See detailed discussion in Nadia I. El Mallakh, Comment, *Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?* 89 Cal. L.Rev. 1847 (2001).

[58] *See* Civil Code section 1954.52(b).

includes: (1) a contract with the local agency; and (2) any of the incentives listed in the density bonus law.

Consequently, giving density bonuses and the other development concessions for rental inclusionary units can avoid this problem. In addition, since the forms of assistance specified by Section 65915 are very broad, it is likely that most projects that include rental inclusionary units have received one of these incentives. Most inclusionary ordinances require developers to enter into a recorded agreement. To avoid the application of Costa-Hawkins, the agreement should recite that the developer has agreed to control rents in exchange for the incentives granted by the locality.

c. Relationship to Redevelopment Inclusionary Requirements. Redevelopment law requires that every ten years, 15 percent of *all* newly built and substantially rehabilitated units in a redevelopment project area must be affordable to low and moderate income households.[59] Of the 15 percent, 6 percent must be affordable to very low income households, and 9 percent to moderate-income households. Some communities meet these production requirements by ensuring that every residential project in the redevelopment area contains the required 15 percent affordable housing.

However, a difficulty can arise if the community grants a density bonus in exchange for these redevelopment inclusionary units. A project with 6 percent very low income units qualifies for a 22.5% density bonus. A 100-unit project with 15 affordable units, for example, would receive an additional 23 market-rate units. However, if the inclusionary requirements were not applied to the 23 bonus units, only 12.2% (15/123) of the now 123-unit project would be affordable, leaving the project area 4 units short in meeting its production requirements.

What to do? Besides deciding to live with the shortfall, agencies could adopt several strategies:

- Require that all projects in the redevelopment area meet the redevelopment affordable housing production requirements (15% total; 6% very low, 9% moderate), regardless of whether a density bonus is granted, on the theory that this is the best means to reconcile conflicting state goals. (One weakness of this theory is that redevelopment law does not require *each* development to meet the affordability requirements, only the project area as a whole.)
- Do not allow inclusionary units provided to comply with redevelopment law to qualify a project for a density bonus (relying on the Assembly's interpretation of the bill).
- Require a higher percentage of inclusionary units when density bonuses are requested in redevelopment areas. For instance, a project with 7.5% very low income units and 11.25% moderate income units would qualify for a 25 percent bonus but overall would meet the 6% low and 9% moderate requirement.

3. Relationship to Local Coastal Plans

The statute provides that it shall not be construed to supersede or in any way alter the effect of the California Coastal Act.[60] However, it also provides that density bonuses, incentives, and concessions do not, in and of themselves, require an amendment to a local coastal plan.[61]

[59] Health & Safety Code section 33413(b)(2).
[60] Section 65915(m).

Coastal communities have reported, with some puzzlement, that the Coastal Commission staff has refused to approve local density bonus ordinances applicable within the coastal zone. We're not yet aware of the rationale, although it may relate to the reduction of the overall percentage of affordable housing in the coastal zone if bonus units do not need to be affordable.

4. Application of CEQA to Density Bonus Projects

Section 65915 does not establish an exemption from CEQA requirements. The regulatory concessions that must be offered to a qualifying project cannot include non-compliance with CEQA. CEQA is not limited by the statute.

Because density bonus projects will exceed general plan and zoning densities and may include reduced development standards, they may not be within the scope of program EIRs and similar EIRs prepared for general plans, specific plans, and zoning ordinances. Hence citizens may be able to make a "fair argument" either that the project itself was not adequately covered by the earlier EIR; or that the cumulative impacts of projects with densities higher than those reviewed in the general plan have not been adequately addressed. Similarly, an argument may be made that reduced parking may have significant effects because residents will park on-street. In general, because they are more likely to be inconsistent with general plans, an argument may be made more easily that density bonus projects need an EIR.

A local agency may deny a proposed incentive, concession, or waiver when there is substantial evidence that it would have a "specific adverse impact" on "public health and safety" or the physical environment, as defined in Section 65589.5(d)(2), or on a property listed on the California Register of Historical Resources, and there is "no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households." An EIR would likely provide the basis for such findings. The agency could deny a proposed incentive, concession, or waiver if an EIR identified: 1) significant project impacts 2) based on objective written standards 3) that either cannot be avoided or 4) that could be mitigated, but the mitigation would make the project unaffordable.

D. Density Bonus Requirements in the Context of a Land Use Regulatory Scheme

Density bonus law is not part of a city or county's normal land use regulatory scheme. It is based on the assumption that the density and development standards of every community are too strict and should be modified when a small amount of affordable housing is created. The law is profoundly opposed to local planning. In an example of unintended consequences, some communities have already found that the law has resulted in:

- **Increased resistance to upzonings and high densities**, since residents fear that a 35 percent density bonus will be added to the approved high densities.

---

[61] Sections 65915(g)(5) & 65915(k).

- **Increased resistance to inclusionary zoning**, since a density bonus may need to be granted when affordable housing is built. Some communities have set their inclusionary requirements to avoid the need for a density bonus (e.g., 3% very low income and 9% moderate-income).
- Concern that affordable projects will be built with **insufficient parking and poor design**, marking a return to the bad old days when poorly designed affordable housing created massive public resistance to new affordable developments.

There are some strategies that localities can use in drafting their own density bonus ordinances to enable local plans to be implemented to the extent possible. To date, the majority of communities appear to have chosen to do nothing because of the complexity of the law and the time-consuming drafting process. A local ordinance, however, can avoid staff panic when faced with the first application, can better protect the agency from legal challenge, and can better support local plans and zoning. Some provisions to include are these:

- **Application requirements.** Require detailed information to ensure that the project complies with the threshold requirements discussed earlier. These may include, for instance, calculations of affordability, evidence that incentives and concessions provide "identifiable, financially sufficient, and actual cost reductions," and economic analyses to show that any waivers are required to make the project economically feasible.
- **Enforceable written agreements.** Require that the affordability requirements be enforced through a recorded written agreement. Some communities also require the developer to provide the documents to be recorded that will enforce the obligation, or to pay for ongoing public agency monitoring of affordability or public agency preparation of the documents. Some agencies also will not subordinate these agreements to a first mortgage; there is no requirement that the agency do so, although this will make financing more expensive and more difficult to obtain (Fannie Mae and FHA will not purchase loans subject to an affordability restriction).
- **Findings required for approval and denial.** Include as findings in the ordinance the threshold criteria needed for project approval (such as the need for incentives to result in "identifiable, financially sufficient, and actual cost reductions") and, for those projects that meet the threshold criteria, the statutory findings that could justify denial. This will help guide decision-makers' deliberations to those aspects of the project that justify approval or denial of the bonus, incentives, or waivers.

  Note that the city or county retains full discretion to approve or deny the project for reasons unrelated to the density bonuses, incentives, or concessions.
- **Encouraging certain incentives and concessions.** Although the developer, rather than the public agency, has the right to choose the incentive or concession, some ordinances attempt to encourage certain favored incentives by requiring less information from the developer when the favored incentives are proposed.
- **Limitations on certain incentives.** If the local zoning ordinance already grants incentives for affordable projects, ensure that these incentives do not automatically apply to a density bonus project. This will prevent the project from requesting incentives *in addition to* those that the project is already entitled to, but will allow the public agency to grant the normal incentives pursuant to density bonus law.

- **Counting the reduced parking standards as an incentive or concession.** List a request for reduced parking standards conforming to Section 65915(p) as a concession if these parking standards are lower than normally required by the zoning ordinance. The statute is silent and somewhat unclear on this issue.[62]
- **Clarifying the relationship to local inclusionary ordinances.** For cities and counties with an inclusionary ordinance, adopting a density bonus ordinance allows the community to decide whether inclusionary units can be used to qualify a project for a density bonus; to ensure that common definitions are consistent (such as those for affordable housing cost, moderate-income, etc.), and to clarify the minimum affordable housing requirements that apply to every residential development.

Conclusion

California's density bonus law is a confusing and ambiguous statute that relates poorly to, and undermines, planning and zoning law. Although density bonus projects are not common, the law contains numerous protections for applicants, and communities that are unprepared may find themselves seemingly forced to approve an undesirable project. Preparing a local density bonus ordinance that clarifies ambiguities and requires detailed information from the applicant can give counties and cities the tools they need to achieve attractive projects while meeting the statute's intent.

[62] Section 65915(*l*)(1) states that a concession or incentive includes "a reduction . . . in the ratio of vehicular parking spaces that would otherwise be required." A public agency's view is that the parking standards included in the statute are below those that would otherwise be required by the zoning. However, applicants might argue that, since localities *must* grant the parking standards included in the statute, this is not a reduction below "what would otherwise be required," since more spaces could not be required.