Not Just Density Bonuses: Dealing with Demands Beyond the Bonus

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A GUIDE TO CALIFORNIA DENSITY BONUS LAW (*AT LEAST UNTIL THE NEXT LEGISLATIVE SESSION*)

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A GUIDE TO CALIFORNIA DENSITY BONUS LAW

The State's density bonus law (Government Code Section 65915 – 65918) has over the course of the last several legislative sessions been the subject of bills modifying the statute and once again is the subject of three bills currently poised for adoption by the California legislature. Although the goal of several past bills was to clarify the statutory language, the results have often been to create even more confusion for cities attempting to implement this poorly drafted law. The overall intent of the law is to create incentives for developers to include affordable housing within their projects by granting increased density and other regulatory incentives. The reality of the law is that developers who include only small amounts of affordable housing in their projects – as little as 5 percent – are entitled to receive large incentives: density bonuses of 20 to 35 percent, depending on the amount and type of affordable housing provided; parking reductions; up to three "concessions and incentives," and unlimited "waivers" from development standards.

This paper will discuss the background and current provisions of the state density bonus law, including calculation of the density bonus, incentives and concessions, waivers of development standards and reduced parking mandates; the relationship of state density bonus law to other planning documents; and some strategies to consider in the context of a city's overall regulatory planning scheme. We anticipate providing an addendum to this paper at the conference to address any new statutory provisions if the pending legislation is enacted.

A. Background of the State Density Bonus Law.

The State's density bonus law, prior to amendments adopted in 2004, 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. The Legislature has since amended the law six times.

Most recently, the density bonus law was amended in 2014 to increase the duration of affordability restrictions required for rental units, to require equity-sharing for all for-sale units, and to add replacement housing requirements for units occupied by or affordable to low and very low income households. In 2015 the statute was amended again to reduce parking requirements for certain projects located near transit stops. In the current legislative session there are three bills being considered to further amend the law. 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]

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[1] Government Code §65915(a). All further references are to the Government Code unless otherwise indicated. In addition, all references are to the statute as amended by SB744, Chapter 699, Statutes of 2015 (effective January 1, 2016.)

B. Basic Provisions.

Density bonuses must 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 the required amount of affordable housing qualify for various zoning modifications (defined as "incentives and concessions" or "waivers") and for reduced parking standards. If a development provides the required affordable housing, the applicable density bonus and reduced parking standards must be provided. There are no grounds in the statute to deny a developer's request. The density bonus law does contain specific findings by which incentives, concessions and waivers may be denied.

1. Projects Eligible for Density Bonuses. Density bonuses are available to five categories of residential projects:

a. Affordable Housing. Housing developments for 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 income or less;[4] *or*

- **Ten percent** are affordable to *lower income* households earning **80 percent** of median income or less;[5] *or*

- **Ten percent** are affordable to *moderate income* households earning **120 percent** of median income 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] Rental units affordable to moderate-income households are not eligible for a density bonus.

These required percentages of affordable housing apply only to the project *without* any density bonus, not the entire project.[8] For instance, assume that a 100-unit project is

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[2] §65918.

[3] §65915(i) (which states that the bonuses apply to housing developments consisting of five or more dwelling units but also defines "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, §65915(b)(1) states that a bonus is available when an applicant "agrees to *construct*" a housing development, implying that the bill does not apply to existing developments.

[4] §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] §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 §4100.

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

[8] §65915(b)(3).

entitled to a 20 percent density bonus, resulting in a total of 120 units. To qualify for the 20 percent bonus, the project need only provide:

- five very low income units (five percent of 100); *or*
- ten lower income units (ten percent 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 rental units must remain affordable for a specified period.

- **Rental Units:** All very low income and lower income rental units must remain affordable for **55 years** (unless a subsidy program requires a longer period of affordability).[9] Housing costs for very low income units cannot exceed 30 percent of 50 percent of median income. For lower income units, rents cannot exceed 30 percent of 60 percent of median income.[10]

- **Ownership Units:** For-sale units are *only* required to be affordable to the initial occupants of the units, who must be very low income, lower income or moderate income, as applicable. The for-sale unit must be sold to the initial occupant at an affordable housing cost as defined in Health and Safety Code Section 50052.5.[11] At resale, the local government must enforce an equity-sharing agreement (involving sale of the home at fair market value and sharing of the profits with the city) unless an equity sharing agreement conflicts with another public funding source or "law."[12] This latter provision is significant because it allows counties and cities to adopt their own laws imposing stricter resale controls on for-sale units, if desired. However, the requirement should be adopted by ordinance.

Any equity sharing agreement must provide for the local government to recapture the difference between the fair market value of the home at time of sale and the actual sales price to the initial occupants plus any other assistance provided by the city or county, as well as a proportionate share of the appreciation.[13] Any amounts recovered by the city or county must be used within five years to promote homeownership opportunities in the community.[14] In housing markets with rapidly increasing costs, the equity sharing formula mandated by the statute will rarely provide enough funds for the city to acquire another affordable unit at the same income level, with the result that the developer will have received permanent zoning concessions without the city's receiving long-term affordable housing.

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[9] §65915(c)(1).

[10] §65915(c)(1) (referring to Health & Safety Code §50053). 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.

[11] §65915(c)(2) (referring to Health & Safety Code §§50093 & 50052.5).

[12] §65915(c)(2).

[13] §65915(c)(2).

[14] §65915(c)(2)(A) requires that the funds be spent for the purposes described in subdivision (e) of §33334.2 of the Health and Safety Code, the statute that governed the expenditure of low and moderate income housing funds held by redevelopment agencies.

Affordable rents and sales prices for the affordable units must be determined by using the methodology included in the California Code of Regulations.[15] 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. 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,[16] or a mobile home park that limits residency to seniors in accordance with Civil Code Sections 798.76 or 799.5, 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.[17] A developer of senior affordable housing may elect either the low income or senior bonus, although the low income bonus is much more advantageous (as discussed below).

c. Replacement Units. The 2014 amendments to the density bonus law added replacement housing requirements for developments that result in the demolition or removal of rental units affordable to or occupied by very low or low income households. The language of the replacement housing sections of the statute is particularly confusing and difficult to implement. Under the statute, a density bonus is not allowed for a development proposed on property on which occupied rental dwellings exist at the time of application, or rental dwellings were vacated or demolished in the five year period preceding the application, if the dwelling unit was:

- Subject to a recorded covenant, ordinance or law that restricts rents to levels affordable to very low or lower income households;
- Subject to rent control; or
- Occupied by households with very low or lower incomes;18

unless the proposed development is 100 percent affordable (other than the manager's unit) to lower or very low income households or the proposed development replaces the units and provides enough total affordable units, which may include any replacement units, to be eligible for a density bonus. Projects with applications submitted before January 1, 2015, are exempt from this provision.

Many of the replacement housing requirements contained in the 2014 amendments are either ambiguous or cannot be ascertained from the statute. It appears that AB2556 will be enacted in the 2016 legislative session to clarify these requirements but at the time of this paper the bill is still pending.

[15] 25 CCR §§6910, 6918 & 6920.
[16] This code Section is applicable only to Riverside County.
[17] Civil Code §51.3(b)(4).
[18] §65915(c)(3).

d. **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 ten percent of the market-rate units at densities suitable for very low income housing.[19] 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 land donation must satisfy all of the following requirements:[20]

- Land must 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 ten percent of the units in the residential development;
- Be at least one acre in size or large enough to permit development of at least 40 units;
- Be served by adequate public facilities and infrastructure;
- Be 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;
- Be subject to a deed restriction to ensure continued affordability;
- Be transferred to either the local agency or a housing developer approved by the local agency; and
- Be transferred no later than the date of approval of the final map, parcel map, or discretionary approval of the housing development receiving the bonus.
- Proposed source of funds for the construction of the very low income units must be identified.

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 ten percent very low income units will normally include much less than ten percent of the projects land area. That is because very low income projects are usually built at densities of at least 20 units per 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.

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[19] §65915(g).
[20] §65915(g)(2)(A – H).

e. 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.[21] *The bonus units must be located entirely within the structures proposed for conversion.*[22]

f. 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.[23] 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 (55 years in the case of rental units affordable to very low and lower income households, the affordability duration on ownership units is not specified so it is unclear how long the child care facility would be required to operate in an ownership development); and

- Ensure that the children attending the facility come from households with the same or greater proportion of very low, lower, or moderate incomes as qualified the project for the density bonus.[24] In other words, if the housing development qualified for a density bonus because ten percent of the units were affordable to moderate-income households, then ten 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.

2. Density Bonuses Available.

a. Affordable Housing. The density bonus law gives 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;[25]

or

- Ten percent of units affordable to lower income households.[26]

Housing developments qualify for only a **five percent density bonus** if **ten percent** of the units are affordable to **moderate-income families**.[27]

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[21] §65915.5(a) (referring to Health & Safety Code §50093 for definition of moderate income households and to Health & Safety Code §50079.5 for definition of lower income households).
[22] §65915.5(b). Given how unusual it would be for existing rental apartments to accommodate a 25 percent increase in density, this Section must have been intended for one particular project.
[23] §65915(h). §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.
[24] §65915(h)(2).
[25] §65915(f)(2).
[26] §65915(f)(1).

In addition, there is a sliding scale that requires:

- An additional **2.5 percent density bonus** for each additional one percent increase in very low income units;[28]

- An additional **1.5 percent density bonus** for each additional one percent increase in lower income units;[29] and

- An additional **one percent density bonus** for each one percent increase in moderate income units.[30]

No total density bonus can be greater than **35 percent** unless the city or county by local ordinance allows for a higher density bonus.[31] 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 8 shows these calculations.[32]

A developer must choose a density bonus from ***only one affordability*** **category** and cannot combine categories.[33] Thus a project that includes, say, ten percent moderate-income units and ten 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 five 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. The effect is to encourage developers to concentrate units in either the lower or very low income categories.

b. Senior Housing. A project qualifying only as a senior citizen housing development is entitled to a **20 percent density bonus of additional senior units only**.[34] The bonus *cannot* be combined with the bonuses granted for affordable housing, but the developer of an affordable senior project can elect to use the very low or lower income bonus.[35] Because this bonus is so limited, it is typically used only by market-rate senior projects.

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.[36]

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[27] §65915(f)(4).
[28] §65915(f)(2).
[29] §65915(f)(1).
[30] §65915(f)(4).
[31] §65915(n).
[32] SB435 (2005) amended the law to include tables for each category showing the specific bonus granted for varying percentages of affordability.
[33] §65915(b)(2).
[34] §65915(f)(3).
[35] §65915(b)(2).
[36] §65915(g)(2).

A **density bonus of 15 percent** is available for a land donation that can accommodate ten **percent of the market-rate units** in the development. An additional **one percent density bonus** is available for each **one percent increase** in the number of units that can be accommodated on the donated land, up to a maximum of 35 percent.[37]

d. Condominium Conversions. A condominium conversion is entitled to a flat density bonus of 25 percent when either 33 percent of the units are moderate-income units or 15 percent of the units are lower income units.[38] 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.[39] Note that a conversion is ineligible for a bonus if the apartments to be converted received a density bonus when they were originally built.[40]

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.[41] 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 following table summarizes the available density bonuses.

Affordable Units or Category	Minimum Percent Units in Category	Bonus Granted	Additional Bonus for Each One Percent Increase in Units in Category	Percent Units in Category Required for Maximum 35 percent Bonus
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 (35 units or more; no affordable units required) or Senior Mobile Home Parks	100% senior	20% (senior units only)	--	--
Condominium conversion – moderate-income	33%	25%[a]	--	--
Condominium conversion – lower-income	15%	25%[a]	--	--
A density bonus may be selected from only one category above, except that bonuses for land				

[37] §65915(g)(1).
[38] §65915.5(a) & (b).
[39] §65915.5(a).
[40] §65915.5(f).
[41] §65915(h)(1).

Affordable Units or Category	Minimum Percent Units in Category	Bonus Granted	Additional Bonus for Each One Percent Increase in Units in Category	Percent Units in Category Required for Maximum 35 percent Bonus
donation may be combined with others, up to a maximum of 35%, and an additional sq. ft. bonus may be granted for a child care center.				
Land donation for very-low income housing	10% of market-rate units	15%	1%	30%
Child care center	--	Sq. ft. in day care center[a]	--	--
Notes: [a] Or an incentive of equal value, at the city's option.				

f. Calculating the Density Bonus.

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

The density bonus is to be calculated over the "maximum allowable residential density." Section 65915(o)(2) defines "maximum allowable residential density" as that allowed under the zoning ordinance and the land use element of the general plan, or, if a range of density is specified, the maximum allowed. If the density allowed under the zoning ordinance is inconsistent with the density allowed under the land use element of the general plan, the general plan density will prevail.

Effectively, this provision means that the bonus is calculated over that shown in the land use element of the general plan. In some cases the maximum density allowed by the zoning ordinance is considerably less than the maximum density range shown in the land use element. Cities should attempt to make these consistent to avoid a surprise request for a density bonus substantially greater than allowed by zoning.

Alternatively, developers may desire a bonus over the zoning maximum but have no interest in a bonus over a higher land use element maximum. While strict construction of the statutory language suggests this is not a request for a "density bonus," local agencies typically ignore this problem and treat the application as a density bonus request.

- **What If There's NO Maximum Density in the Zoning Ordinance?**

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. How is a density bonus calculated in that case?

In at least one court decision, the fact that the city did not have a maximum density standard in its zoning ordinance meant that the bonus was calculated over the density standards in the land use element. In *Wollmer v. City of Berkeley ("Wollmer II")*,[42] the petitioner argued that the city misapplied the density calculation by using the density standards of the zoning ordinance rather than the general plan. The city's zoning ordinance did not have a maximum density for the applicable zoning classification but rather relied upon the land use element of the general plan to determine density, which limited density by area rather than a particular property. The density bonus was based on the general plan densities and was upheld by the Court.

- **Rounding Up.**

Any density bonus calculation resulting in a fraction entitles the developer to another bonus unit.[43] For instance, a project with 102 units, ten percent of which are affordable to lower income households, is entitled to 21 bonus units (20% x 102 = 20.4, or 21 bonus units). 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 ten percent requirement (10% x 102 = 10.2, or 11 affordable units). With only ten affordable units, the developer would not reach the ten percent threshold.

3. Concessions, Incentives, Waivers and Reductions.

Of greatest concern to cities are the requirements in the statute that give applicants the right to modifications in local development standards: zoning, subdivision controls, and design review requirements. As developers have become more familiar with the density bonus laws, they have frequently proposed projects with large height and setback exceptions, creating substantial public opposition. Unfortunately, if faced with requests for even large variations from local ordinances, cities' discretion may be limited.

Applicants can have standards relaxed in two ways: by requesting "concessions and incentives;" and by asking for "waivers and reductions." In addition, applicants can request the reduced parking standards contained in the statute even if the applicant is not requesting a density bonus, as discussed in Section 4 below.

a. Concessions and Incentives. An applicant who: (1) applies for a density bonus; 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:

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[42] 193 Cal. App. 4th 1329 (2011).
[43] §65915(f)(5) & (g)(2).

- **Reductions in site development standards or modifications of zoning and architectural design requirements**, including reduced setbacks, increase in height limits, and square footage required, that result in "identifiable, financially sufficient, and actual cost reductions."[44]

- **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.[45]

- **Other regulatory incentives or concessions** that result in "identifiable, financially sufficient, and actual cost reductions."[46]

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.

Target Units or Category	**Percent of Target Units**		
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][47]		
Condominium conversion – 15% lower-income	[d][48]		
Day care center	[d][49]		
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.

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. Many jurisdictions offer a menu of incentives that the city will approve without further evidence from the developer. However, to deny the specific incentives proposed, the local government 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. Many communities

[44] §65915(k)(1).
[45] §65915(k)(2).
[46] §65915(k)(3).
[47] §65915.5(a).
[48] §65915.5(a).
[49] §65915(h).

require a pro forma to justify an incentive. As a consequence, developers have increasingly requested waivers rather than incentives. No published case evaluates incentives.

Note that there is *no* requirement that local government provide any "direct financial incentives" for a project. "Direct financial incentives" include provision of publicly owned land and waivers of fees and dedication requirements.[50]

b. "Waivers and Modifications" of "Development Standards."

Localities may not enforce any "development standard" that would physically preclude the construction of a project with the density bonus and the incentives or concessions to which the developer is entitled.[51] In addition to requesting "incentives and concessions," applicants may request the waiver of an unlimited number of "development standards" that would physically preclude the construction of a project with the density bonus and the incentives or concessions to which the developer is entitled. These waivers and modification do not change the number of incentives or concessions available to the developer. Waivers and modifications are not limited to 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.

The statute defines a "development standard" as "a site or construction condition, including, but not limited to, a height limitation, setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter or other local condition, law, policy, resolution or regulation."[52] "Site and construction conditions" appear 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. Given the overlap of the use of "development standard" in both the "concession or incentive" context and the "waiver" context, developers typically request any number of waivers of development standards and focus their limited requests for incentives or concessions on standards they could not justify as a waiver.

It is not clear how to determine that a development standard "physically precludes" a project with a density bonus. It means something less than "physically impossible." In *Wollmer II*, the plaintiff argued that height and setback waivers were not needed because ceiling heights could be reduced below nine feet, and amenities including an interior courtyard and community plaza could be eliminated. The court explicitly rejected this contention, stating: "Standards may be waived that physically preclude construction of a housing development meeting the requirements for a density bonus, period. The statute does not say that what must be precluded is a project with no amenities, or that amenities may not be the reason a waiver is needed."[53] No case examines what changes a city *can* require to be made in a project when a waiver is requested, or what evidence is required to deny a waiver.

[50] § 65915(l).
[51] § 65915(e).
[52] § 65915(o)(1).
[53] 193 Cal. App. 4th 1329, 1346-47 (2011) (citation omitted).

4. Reduced Parking Requirements.

The density bonus law entitles a developer who qualifies for a density bonus to parking reductions as a separate entitlement. A developer could request even lower parking ratios as a concession or waiver under the density bonus law.[54]

a. Basic 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; and
- four or more bedrooms – two and one-half on-site parking spaces.[55]

These numbers include guest parking and handicapped parking. The spaces may be 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.

b. Parking Standards Near Transit Stops

AB744, effective January 1, 2016, mandates additional parking reductions for affordable housing and housing located within one-half mile of major transit stops if requested by the developer, as shown in the table on the next page.[56]

A "major transit stop" is a site containing a rail station, a ferry terminal served by bus or rail, or the intersection of two or more bus routes that provide service every 15 minutes, or more frequently during the morning and afternoon peak commute periods, or a major transit stop identified in a regional transportation plan.[57] This definition permits lower parking requirements even where a major transit stop included in a regional transportation plan has not yet been constructed.

A site has "unobstructed access" if a resident can "access" the stop "without encountering natural or constructed impediments."[58] It is not clear how access must be obtained (on foot? by car?), but it is possible that some sites that appear to be within a one-half mile radius of a major transit stop may be excluded if the street network does not allow a driver or pedestrian to reach the stop in one-half mile.

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[54] §65915(p)(5) & (6).
[55] §65915(p)(1).
[56] §65915(p)(2).
[57] Public Resources Code § 21155(b).
[58] §65915(p)(2).

Type of Development	Maximum Ratio of Required Off-Street Parking Spaces
Rental or ownership housing development with: 1. At least 11% very low income or 20% low income units; **and** 2. Within one-half mile of a major transit stop; **and** 3. Unobstructed access to the major transit stop.	0.5 per bedroom
Rental housing development with: 1. All units affordable to lower income households except manager's unit(s); **and** 2. Within one-half mile of a major transit stop; **and** 3. Unobstructed access to the major transit stop.	0.5 per unit
Rental housing development with: 1. All units affordable to lower income households except manager's unit(s); **and** 2. A senior citizen housing development; **and either** 3. Has paratransit service; **or** 4. Is within one-half mile of fixed bus route service that operates 8 times per day, with unobstructed access to that service.	0.5 per unit
Rental housing development with: 1. All units affordable to lower income households except manager's unit(s); **and** 2. A special needs housing development[a]; **and either** 3. Has paratransit service; **or** 4. Is within one-half mile of fixed bus route service that operates 8 times per day, with unobstructed access to that service.	0.3 per unit
Notes: [a] "Special needs" housing is any housing designed to serve persons with needs related to mental health, physical or developmental disabilities, or risk of homelessness.[59]	

c. **Local Parking Studies**. Communities may require higher parking ratios than those mandated for the housing types located near transit stops described in subsection 4(b) of this paper if a community adopts findings supporting the need for higher parking ratios, which are **based on a study,** paid for by the community and conducted in the last seven years, that includes: (1) an analysis of available parking; (2) differing levels of transit access; (3) walkability to transit; (4) potential for shared parking; (5) effect of parking requirements on housing costs; and (6) car ownership rates for lower income households, seniors, and residents

[59] Health & Safety Code §51312.

with special needs. However, the *maximum* parking ratios that may be required by a city are those set forth in subsection 4.a above.[60]

d. Relationship to Density Bonuses. Although the new parking provisions are incorporated into state density bonus law, a developer need not request a density bonus nor any other regulatory incentive to take advantage of the lower parking requirements. However, any development that is eligible to use the AB744 parking standards will also be eligible for a 35 percent density bonus and incentives and concessions under state density bonus law. It is possible that the lower parking standards allowed for a project containing only 11 percent affordable housing may induce some market-rate developers to provide the affordable units and then seek a density bonus and other incentives.

5. Local Agency Discretion.

Can counties and cities deny requests for density bonuses, incentives, concessions, waivers, 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.

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 Health and Safety Code and California Code of Regulations. The applicant and local government must enter into appropriate restrictions to ensure affordability for rental units and equity sharing documents for ownership units.

- **For projects involving the demolition of residential rental units affordable to or occupied by lower income households:** The project must comply with the replacement housing requirements set forth in Section B.1.c. above.

- **For senior housing:** The project must meet the requirements of a senior housing development or mobile home park set forth in the Civil Code.

- **For land donations:** The project must comply with the long list of conditions included in Section 65915(g)(2).

- **For incentives and concessions:** The regulatory concessions requested must result in "identifiable, financially sufficient, and actual cost reductions."[61] 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 developer need not provide his or her own economic analysis.

[60] §65915(p)(7).
[61] §65915(k)(1) & (3).

- **For waivers and reductions:** The applicant must show that the development standard being waived will preclude the physical construction of the project with the density bonus, incentives and concessions to which the project is entitled.[62]

- **For additional reduction of parking requirements near transit stops:** The applicant must show that the project meets one of the three requirements set forth in Section 4.b. above.

Because projects are eligible for a density bonus, incentives, waivers and additional reduced parking ratios 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. The statute lists findings required to deny incentives, concessions, waivers and reductions, however, no findings are listed for the denial of a density bonus or the mandated reduction in parking requirements.[63]

Findings that may be used to deny incentives/concessions or waivers are listed in the table below.

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); (B) The concession or incentive would have a specific adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5,[(a)] 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; or (C) The concession or incentive is contrary to state or federal law.

[62] §65915(e)(1).
[63] §65915(p)(1) ("Upon the request of the developer, no city, county, or city and county shall require a vehicular parking ratio . . . that exceeds the following ratios . . .").

Code Section	Applicable To:	Procedural Requirements	Finding
65915(e)(1)	Waivers & modifications	Agency must adopt procedures for granting waivers[b]	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[a] 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, or to grant any waiver or reduction that would be contrary to state or federal law.
Notes: [a] Paragraph (2) of subdivision (d) of §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." [b]This requirement is in §65915(d)(3).			

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 Section 65915.[64]

6. Local Ordinances and Procedures.

The density bonus law requires all cities to adopt an ordinance that specifies how the city will implement compliance with the density bonus law. Failure to adopt an ordinance does not relieve a city from complying with the density bonus law.[65] Additionally, Section 65915(d)(3) mandates that communities establish procedures for dealing with incentive or concessions requests, which should be covered in the local ordinance or local guide to administering the density bonus law. Section D below discusses provisions that cities may want to consider including in their local ordinances.

In the past cities often prepared detailed density bonus ordinances that attempted to explain the requirements of the statute in more easily accessible language. Given the frequent amendments, cities may wish to confine their ordinances to procedural requirements and prepare informal guidance for the benefit of staff and applicants. Nonetheless, cities should consider updating their ordinances, procedures and application requirements in the near future to ensure that they are consistent with the recent amendments to the statute.

[64] §§65915(d)(3) & 65915(e)(1).
[65] §65915(a).

C. Issues.

1. Relationship to Local General and Specific Plans.

The density bonus law, at its heart, prioritizes the provision of incentives for affordable housing over local planning. By allowing 35 percent bonuses and unlimited waivers to accommodate density bonuses, the law assumes that the need for any amount of affordable housing 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 its review of housing elements. In calculating zoning capacity (the number of dwellings that can be built given present zoning), HCD does not allow communities to increase their presumed site 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*.[66] Consequently, cities cannot establish a "density bonus permit" or other special permit for projects that request density bonuses. Rather, the density bonus and any request for concessions or waivers should be heard as part of any other discretionary approval needed.

2. Relationship to Local Inclusionary Requirements.

a. **Inclusionary Units Count as Affordable Units for Density Bonus**. In *Latinos Unidos del Valle de Napa y Solano v. County of Napa*,67 the Court held that affordable units required by a local inclusionary ordinance could be used to make a project eligible for a density bonus. Napa County's ordinance had provided that the affordable units required under density bonus law were to be provided in addition to the affordable units required by the County's inclusionary ordinance. Although the County's ordinance resulted in the creation of more affordable units before a developer was entitled to a density bonus, the Court found that "[t]o the extent the ordinance requires a developer to dedicate a larger percentage of its units to affordable housing than required by Section 65915, the ordinance is void."68

However, any units proposed to meet the requirements of *both* a local inclusionary ordinance and to qualify the project for a density bonus must meet the requirements of *both* the local ordinance and state law. Similarly, if a local inclusionary ordinance requires more affordable units than required by density bonus law, nothing excuses the developer from compliance with the local inclusionary ordinance.

b. **Avoiding the Application of the Costa-Hawkins Act by Granting Density Bonuses.** The Costa-Hawkins Rental Housing Act (Civil Code Sections 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"). In *Palmer/Sixth*

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[66] §§ 5915(f)(5) & 65915(j)(1).
[67] 217 Cal. App. 4th 1160 (2013).
[68] 217 Cal. App. 4th at 1169.

Street Properties L.P. v. City of Los Angeles,[69] the Court found that the regulation of rents through inclusionary ordinances violates the Costa-Hawkins Rental Housing Act.

However, 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."[70] Inclusionary rental units are therefore exempt from Costa-Hawkins when the project 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 allows the provision of affordable rents in rental housing. To avoid the application of Costa-Hawkins, an agreement with the developer must recorded. It should recite that the developer has agreed to control rents in exchange for the incentives granted by the locality, consistent with Costa-Hawkins.

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.[71] However, it also provides that density bonuses, incentives, and concessions do not, in and of themselves, require an amendment to a local coastal plan.[72] Coastal communities should refer to their local coastal plan and Coastal Commission staff to coordinate implementation of density bonus law under their local ordinances with the local coastal plan requirements and process.

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, which would violate state law. CEQA is not limited by the statute.

Under the state density bonus law, the granting of a density bonus and incentives or concessions, *in and of themselves*, are not discretionary approvals,[73] so those actions are not subject to CEQA as ministerial acts.[74] The new mandatory parking requirements also leave no discretion to the local government and should also be considered exempt from CEQA. The density bonus statute does not address whether waivers or reductions of development standards are discretionary or ministerial. Most typically, however, cities require that requests for bonuses and all other incentives requested under the statute be submitted with all other required discretionary applications, and the CEQA analysis is completed on the project as a whole, including any requests submitted under the density bonus law.

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[69] 175 Cal. App. 4th 1396 (2009).
[70] *See* Civil Code §1954.52(b).
[71] §65915(m).
[72] §65915(f)(5) & §65915(j)(1).
[73] §65915(f)(5) & §65915(j)(1).
[74] Public Resources Code §21080(b)(1); 14 CCR §§15002(i)(1) & 15268.

Two recent appellate cases have discussed the density bonus statute relative to CEQA. In *Wollmer v. Berkeley* ("*Wollmer I*"),[75] the court found that appellant failed to demonstrate that the city's actions in interpreting and complying with the state density bonus law (including providing a larger density bonus than mandated under the state law) was a change in policy that constituted a project to which CEQA applied. In *Wollmer II*, the city waived a number of development standards and approved the CEQA categorical exemption for infill projects (CEQA Guideline Section 15332). That exemption requires compliance with *applicable* general plan and zoning code designations, policies and regulations. The Court noted that the density bonus law specifically states that a granting of a density bonus does not require any discretionary approval and that the city is prohibited by state density bonus law from applying any development standard that physically precludes the construction of a density bonus development. Accordingly, the court found that the waived development standards were not *applicable* general plan and zoning designations, policies, and regulations, and so the use of the infill exemption was not precluded by use of state density bonus law.

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; although, based on *Wollmer II,* a court could find that since the granting of a density bonus is not discretionary, no further environmental analysis may be required.

A local agency may deny a proposed incentive, concession, or waiver when there is substantial evidence that it would have a "specific adverse impact," as defined in Section 65589.5(d)(2), on "public health and safety" or the physical environment, 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." Similarly, a local government may deny a proposed incentive, concession or waiver that would have an adverse impact on a property listed on the California Register of Historical Resources, or that is contrary to state or federal law. An EIR would likely provide the basis for such findings. The agency could deny a proposed incentive, concession, or waiver if an EIR or other study identified: (1) significant public health or safety 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.

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. A local ordinance with defined requirements can also better protect the agency from legal challenge. Some provisions to include are these:

1. 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 analysis to show that any waivers are required to avoid physically precluding the construction of the project.

[75] 179 CA. App. 4th 933 (2009).

2. 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. There is also no requirement to subordinate these agreements to project financing.

3. 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 waivers.

4. 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.

5. 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, but will allow the public agency to grant the normal incentives pursuant to density bonus law.

6. Conduct a parking study. If the community anticipates a higher need for parking within 1/2 mile of major transit stops than allowed by AB744, the community should conduct a transit study to permit it to require the maximum parking ratios rather than the parking requirements mandated by the statute for projects within 1/2 mile of a major transit stop.

7. Require long term affordability for ownership units. To avoid losing affordable ownership units with the first resale, adopt a requirement that requires long-term affordability for ownership units that make a project eligible for a density bonus.

CONCLUSION

California's density bonus law is a confusing, poorly drafted statute that allows major exceptions to local planning and zoning requirements. 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 and procedures that clarify ambiguities and require detailed information from the applicant can give cities the tools they need to better evaluate these projects and achieve results similar to those intended by local planning.