



Planning & Development Department
Land Use Planning Division

City of Berkeley Procedures for Implementation of State Density Bonus Law

September 15, 2014

Overview:

The state density bonus law (Government Code Section 65915) requires local governments to grant “density bonuses” to projects that provide specified percentage of below-market rate units.

The law defines a “density bonus” as “a density increase over the *otherwise maximum allowable residential density* as of the date of application...” (§ 65915(f)). “Maximum allowable residential density” in turn, means “the density allowed under the zoning ordinance and land use element of the general plan, or if a range of density is permitted, means the maximum allowable density for the specific zoning range and land use element of the general plan applicable to the project” (§ 65915(o)(2)).

Thus, in order to calculate the density bonus in any given case, it is necessary to start with the “maximum allowable residential density”.

In Berkeley, most new multi-family housing projects are located in zoning districts that do not have density standards that are applied on a parcel by parcel basis.¹ Therefore, over the years, staff has developed and refined procedures for deriving the “maximum allowable density” for any density bonus projects.² The basic approach is as follows:

- Step 1: Calculate the “base project,” i.e., the largest project allowed on the project site that is fully consistent³ with the lot development, parking and open space standards in the Zoning Ordinance, using the average unit size and other basic characteristics of the proposed project.
- Step 2: Calculate the density bonus based on the number of below market rate (BMR) units in the proposed project and the size of the base project (i.e., the percentage of below market rate units in the base project).
- Step 3: If concessions/incentives are requested, determine whether these are necessary to provide for the project’s affordable housing costs.

¹ Although the City’s *General Plan* includes land use classifications with density ranges, the Plan states that these classifications “are not intended to be used as standards to determine the maximum allowable density on a specific parcel.” (2002 *General Plan*, page LU-23)

² These procedures have been challenged multiple times in court, and upheld each time.

³ Many such standards can be modified with an AUP or Use Permit. The “base project” assumes no such modifications.

- Step 4: Waive or reduce development standards as needed to accommodate the project, with the density bonus and concessions.

These steps are described in greater detail below.

Step 1: Determine Base Project (65915(f))

1.1 Calculate residential floor area:

Procedures: The base project:

- a. Must comply with all applicable development standards, without any discretionary permits to waive or modify a standard (e.g., additional height, reduced parking, etc.).
- b. Must comply with applicable building and fire codes.
- c. Must be substantially consistent with the footprint, setbacks, and ceiling heights of the proposed project (not including waivers/reductions to allow the density bonus and any concessions).⁴
- d. Must include any non-residential uses, including non-dwelling residential amenities (such as common laundry rooms, lounges, etc.) in proposed project, unless these uses are requested as a concession.⁵

1.2 Calculate Average Unit Size

Procedures:

- a. Using the proposed project's plans, calculate the total floor area dedicated to residential uses (living areas, corridors, residential amenities) on each floor.
- b. Identify the total number of proposed residential units.⁶
- c. Divide total floor area by number of units. [Note: this size will be larger than that typically placed on project plans, since it includes circulation space and other residential amenities.]
- d. This average unit size must be maintained in the final approved project, unless a concession is granted to increase the size.

⁴ This requirement is intended to prevent applicants from creating a base project that would be far denser and/or poorer in design quality than the applicant actually desires to build, for the purpose of obtaining a larger density bonus.

⁵ This requirement is intended to prevent an applicant from counting non-residential space in the base project that is not actually intended for residential use, which would lead to a calculation of a larger bonus.

⁶ The average unit size of the proposed project is used in order to prevent applicants from obtaining a larger bonus by assuming smaller units than those they actually intend to build.

1.3 Calculate number of base project units

Procedures:

- a. Divide residential floor area (Step 1.1) by average unit size (Step 1.2).
- b. Deduct any fractional unit.⁷

Step 2: Calculate Density Bonus (65915(f))

- 2.1 Determine proposed number and income level of below market rate (BMR) units.**
- 2.2 Calculate density increase (%) based on 65915(f) and information from step 2.1.**
- 2.3 Calculate number of bonus units by applying percentage from step 2.2 to Base Project. Round any fraction up to next whole number.**

Step 3: Review Concessions/Incentives (65915(d)(1))

- 3.1 Applicant provides written statement describing requested concessions/incentives.**
- 3.2 Staff verifies that project qualifies for requested number of concessions.**
- 3.3 Applicant submits “pencil out pro forma” statement, using the following scenarios:**
 - A. Base Project, as 100% market rate, paying City’s affordable housing impact fee⁸ (Scenario I)
 - B. Base Project, with proposed BMR units (Scenario II)
 - C. Density Bonus Project, with BMR units with density bonus (market rate) units (Scenario III)
 - D. Proposed Project, incorporating requested concessions/incentives (Scenario IV)

⁷ Because the fraction represents a portion of a whole unit that could not be created in compliance with applicable zoning standards, the fraction is not included in the base project. This is consistent with 65915(f)(5), which applies to the calculation of the density bonus, not the “otherwise maximum allowable residential density”.

⁸ See BMC Section 22.20.065.

Notes:

- Cost and income assumptions used in the pro forma must be consistent across all scenarios, unless a compelling reason is given for a particular variation (e.g., higher rental income in Scenarios III and IV due to improved views on upper floor(s), larger units, etc.).
- At the ZAB's discretion, the requirement for a pro forma may be waived in certain cases, for example when the requested concession/incentive is very minor in nature, or when the applicant has chosen to forego some of the density bonus that the project is otherwise entitled to.

3.4 Staff submits pro forma to qualified consultant for peer review and verification of cost and income figures.

3.5 Staff determines whether the concession is “required to provide for affordable housing costs” (Section 65915(d)(1)(A)).

Note: This determination is based on the whether the pro forma shows a substantially higher rate of return for Scenario IV than Scenario I. If it does, the finding in 65915(d)(1)(A) can (but not must) be made.⁹ If the ZAB decides not to grant a concession, it may give the applicant the opportunity to modify the concession request so that the rate of return in Scenario IV does not substantially exceed that of Scenario I.

Step 4: Review Waivers/Reductions of Development Standards (65915(e)(1))

4.1 Applicant Requests Waivers/Reductions

The applicant provides a written statement identifying the development standards to be waived or reduced, and explaining why these are the least detrimental (or only) option for accommodating the density bonus and any requested concessions. For example, if a waiver of the height limit is requested, but the bonus and concessions could also be accommodate through reduced setbacks and lot coverage, the statement should explain

⁹ Per Section 65915(d)(1), a requested concession shall be granted unless the City makes one of the following findings, based upon 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, 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. (C) The concession or incentive would be contrary to state or federal law.

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why the increased height would be less detrimental (e.g., reduced shadow, bulk and privacy impacts on adjacent neighbors).

4.2 ZAB Evaluates Waivers/Reductions

The ZAB evaluates the requested waivers/reductions and either approves them or, if it believes that other waivers/reductions could accommodate the density bonus and concessions in a manner that would be more compatible with the surrounding area/neighborhood, requests that the applicant revise the project using these other waivers/reductions.¹⁰ In some cases, alternate designs may be presented simultaneously to the ZAB (and/or DRC) to determine the preferred design approach. If the ZAB has determined pursuant to Section 65915(d)(1)(A) that a concession is not required, it may deny the waivers/reductions requested to accommodate the concession, and approve the other waivers/reductions.

4.3 ZAB Makes Findings for Approval or Denial of Waivers/Reductions

Procedures:

- a. For all waivers/reductions being granted, the ZAB makes a finding that the waiver or reduction is being granted pursuant to State density bonus law and is necessary to accommodate the project's density bonus or concessions.
- b. Where a requested waiver or modification may also be granted under the Zoning Ordinance by Use Permit or Administrative Use Permit (but not by Variance), the ZAB includes language in the findings in paragraph (a) above indicating how the Zoning Ordinance findings can be made.
- c. For any waivers/reductions being denied, the ZAB makes the required findings under Section 65915(d)(1), (d)(3), or (e)(1).

¹⁰ Per Section 65915(e)(1), a requested waiver or reduction may be denied if it would have "a specific, adverse impact, as defined in Section 65589.5, upon health, safety, or the physical environment, and for which there is no feasible method to satisfactorily mitigate or avoid the impact." Section 65589.5(j)(1) defines "specific adverse impact" as "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." The waivers and reductions typically requested for infill housing projects, such as additional height or reduced setbacks, parking or open space, would not generally cause impacts that meet this definition.