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DATE: AUGUST 15, 2013

## STAFF REPORT

AGENDA ITEM NO. 7.3

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TO: FOSTER CITY PLANNING COMMISSION

PREPARED BY: LESLIE CARMICHAEL, CONSULTING PLANNER

CASE NO.: RZ-13-005

SUBJECT: DENSITY BONUS REGULATIONS

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### **REQUESTED ACTION/PURPOSE**

To consider and adopt a Resolution recommending City Council approval of an amendment to Title 17, Zoning, of the Foster City Municipal Code to create a new Chapter 17.86, Density Bonuses, to implement the requirements of California Density Bonus Law.

### **KEY PLANNING OR DESIGN ISSUES**

- Creation of a new Chapter 17.86 to implement the requirements of California Government Code 65915 regarding density bonuses for developments containing affordable and/or senior housing.
- Application requirements for density bonuses, incentives and waivers.

### **BACKGROUND**

State Density Bonus Law, Government Code Section 65915, was first enacted in 1979. The law requires local governments to provide density bonuses and other incentives to developers of affordable housing who commit to providing a certain percentage of dwelling units to persons whose income do not exceed specific thresholds. Cities also must provide bonuses to certain developers of senior housing developments, and in response to certain donations of land and the inclusion of childcare centers in some developments.

Essentially, state density bonus law establishes that a residential project of five or more units that provides affordable or senior housing at specific affordability levels may be eligible for:

- a “density bonus” to allow more dwelling units than otherwise allowed on the site by the applicable General Plan Land Use Map and Zoning;
- use of density bonus parking standards;
- incentives reducing site development standards or a modification of zoning code or architectural requirements that result in financially sufficient and actual cost reductions;
- waiver of development standards that would otherwise make the increased density physically impossible to construct;
- an additional density bonus if a childcare facility is provided.

The density bonus may be approved only in conjunction with a development permit (i.e., tentative map, parcel map, use permit or design review). Under State law, a jurisdiction must

August 15, 2013

provide a density bonus, and incentives will be granted at the applicant's request based on specific criteria. These bonuses and incentives will be granted based on the following criteria:

**Table 1: Criteria for Density Bonuses and Incentives for Affordable Housing**

<b>TARGET GROUP*</b>	<b>Target Units</b>	<b>Density Bonus</b>	<b>Incentives</b>
Very Low Income <sup>(1)</sup>	5%	20%	1
	10%	33%	2
	15% or above	35%	3
Lower Income <sup>(2)</sup>	10%	20%	1
	20%	35%	2
	30% or above	35%	3
Moderate Income <sup>(3)</sup> (condominium or planned development)	10%	5%	1
	20%	15%	2
	30% or above	25%	3

\* California Civil Code Section 65915 applies only to proposed developments of five (5) or more units.

(1) For each 1% increase over 5% of the Target Units the Density Bonus shall be increased by 2.5% up to a maximum of 35%

(2) For each 1% increase over 10% of the Target Units the Density Bonus shall be increased by 1.5% up to a maximum of 35%

(3) For each 1% increase over 10% of the Target Units the Density Bonus shall be increased by 1% up to a maximum of 35%

**Table 2: Criteria for Density Bonuses and Incentives for Senior Housing and Land Donation**

<b>Target Group</b>	<b>Target Units</b>	<b>Density Bonus</b>	<b>Concessions or Incentives</b>
Senior Housing (1)	100%	20%	1
Land Donation (2)	10% (very low income)	15-35%	1

(1) 35 units dedicated to senior housing as defined in Civil Code Sections 51.3 and 51.12

(2) For each 1% increase over 10% of the Target Units the Density Bonus shall be increased by 1% up to a maximum of 35%

**Table 3: Density Bonus Parking Standards Compared to Foster City Municipal Code**

<b>Type of Use</b>	<b>Municipal Code Standards</b>	<b>Density Bonus Standards</b>
Studio	1 stall/unit	1 stall/unit
1 bedroom	1.5 stalls/unit	1 stall/unit
2 bedroom	2 stalls/unit	2 stalls/unit
3 bedroom	2 stalls/unit	2 stalls/unit
Guest parking	0.5 stalls/unit	0 stalls/unit

State Density Bonus law provides that if the criteria above are met then the jurisdiction essentially has no grounds for denying density bonuses or use of the density bonus parking standards. A jurisdiction has limited grounds for denying incentives and waivers. A jurisdiction can deny incentives and waivers if, for example, (1) it violates state or federal laws, (2) it is not needed economically (for incentives only), (3) there are adverse health and safety effects, (4) there is an impact on an historic structure, and, for waivers only, (5) it does not physically preclude development.

If a child care center is also included in the affordable or senior housing development, the local agency shall grant either an additional density bonus equal to or greater than the amount of square feet of the child care center or grant an additional incentive that contributes significantly to the economic feasibility of the construction of the child care facility, with the following additional requirements:

1. The child care facility shall remain in operation for a period of time as long as the term of the affordable units;
2. The percentage of children from very low-, low- and moderate income-families reflects the percentage of affordable units in the development;
3. The local agency shall not be required to provide a density bonus or concession for a child care facility if it finds that the community has adequate child care facilities.

Foster City's current Housing Element was adopted in February 2010. The Housing Element includes the following policies and implementation programs related to density bonuses:

***H-E-2 Private Development of Affordable Housing.*** Encourage the provision of affordable housing by the private sector through:

- a. Requiring that 20% of the units, excluding bonus units, in specified residential projects be affordable (an inclusionary requirement).
- b. Requiring construction or subsidy of new affordable housing as a condition for approval of any commercial development which affects the demand for housing in the City.
- c. Providing incentives to encourage the provision of affordable housing as provided in Policy H-E-3.

***H-E-3 Incentives for Affordable Housing.*** The City shall consider offering development incentives to developers of multifamily housing projects which meet the City's housing needs, in exchange for an agreement that a minimum of twenty percent (20%) of the total number of units constructed (or another percent, depending upon the project) shall be affordable to very low as defined by State Health and Safety Code Section 50105, low and moderate income persons and families as defined by Section 50093 of the State of California Health and Safety Code for a minimum period of 45 years. Incentives to be considered include the following:

- a. Financial contributions for the construction of utilities, public road improvements and other traffic improvements; soils remediation; Plan preparation and development;
- b. Rent subsidies for the affordable units.
- c. Density bonuses.
- d. Pre-scheduled, fast track permit processing.
- e. Design flexibility.
- f. Reduced or waived fees
- g. Reduced parking requirements and/or use of shared parking.
- h. Assistance and support in securing public financing, such as bonds or tax credits.

***H-E-3-a Density Bonuses for Affordable Housing Projects Consistent with State Density Bonus Law.*** *The City will offer density bonuses consistent with the State Density Bonus Law. Target: Apply State Density Bonus Law as requested by developers of projects meeting applicable standards; review and modify the Zoning Ordinance as appropriate by 2010. Responsible Agency: Community Development.*

## **ANALYSIS**

Foster City has been applying the provisions of the State Density Bonus Law to development projects, including the approval of density above the maximum of 35 units per acre specified for apartment residential in the General Plan (Miramar) and the use of density bonus parking standards (Triton Pointe). Reduced parking standards are also part of the proposal for The Waverly (Phase B of the Pilgrim Triton Master Plan), which is currently under review.

The proposed ordinance would formalize the process for implementing the review of density bonuses and related parking standards, incentives and waivers. Staff has crafted the ordinance to rely, as much as possible, on the standards and requirements contained in State law, so that if provisions in State law are amended in the future, the City's regulations will not need to also be amended.

State Density Bonus Law includes the following definitions of terms used in the proposed regulations:

### **Density Bonus (Section 65915(f))**

For the purposes of this chapter, "density bonus" means a density increase over the otherwise maximum allowable residential density as of the date of application by the applicant to the city, county or city and county. The applicant may elect to accept a lesser percentage of density bonus. The amount of density bonus to which the applicant is entitled shall vary according to the amount by which the percentage of affordable housing units exceeds the percentage established in subdivision (b).

### **Concession or incentive (Section 65915(k))**

For the purposes of this chapter, concession or incentive means any of the following:

1. A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission as provide din Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable, financially sufficient, and actual cost reductions.
2. Approval of mixed use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and if the commercial, office, industrial, or other land uses are compatible with the housing project and the existing or planned development in the area where the proposed housing project will be located.
3. Other regulatory incentives or concessions proposed by the developer of the city, county or city and county that result in identifiable, financially sufficient, and actual cost reductions.

The provisions of the proposed density bonus regulations are explained in Table 4, below.

**Table 4: Proposed Density Bonus Provisions**

<b>Proposed</b>		<b>Comments/Options</b>
<b>Purpose</b>	The purpose of this Chapter is to adopt an ordinance that specifies how compliance with Government Code Section 65915 ("State Density Bonus Law") will be implemented in an effort to encourage the production of affordable housing units in developments proposed within the City.	The purpose is to implement State Density Bonus Law and encourage production of affordable housing.
<b>Definitions</b>	Unless otherwise specified in this Chapter, the definitions found in State Density Bonus Law shall apply to the terms contained herein.	Definitions in State Bonus Density law will apply.
<b>Applicability</b>	This Chapter shall apply to all zoning districts, including mixed use zoning districts, where residential developments of five or more dwelling units are proposed and where the applicant seeks and agrees to provide low, very-low or moderate income or senior housing units in the threshold amounts specified in State Density Bonus Law such that the resulting density is beyond that which is permitted by the applicable zoning. This Chapter and State Density Bonus Law shall apply only to the residential component of a mixed use project and shall not operate to increase the allowable density of the non-residential component of any proposed project.	Applicability is for development of five units or more, per the definition of "housing development" provided in Section 65915(i).
<b>Application Requirements</b>	A. Any applicant requesting a density bonus, incentive(s), waiver(s) and/or use of density bonus parking standards pursuant to State Density Bonus Law shall provide the City with a written proposal. The proposal shall be submitted prior to or concurrently with the filing of the planning application for the housing development and shall be processed in conjunction with the underlying application.	A request for a density bonus shall be made in writing, as has been the current practice. A request for an incentive will require a pro forma or other report showing "identifiable, financially sufficient and actual cost reductions" because that is the standard the City is allowed to utilize to review the request.  A request for a waiver of development standards shall

Provision	Proposed	Comments/Options
	<p>B. The proposal for a density bonus, incentive(s) and/or waiver(s) pursuant to State Density Bonus Law shall include the following information:</p> <ol style="list-style-type: none"> <li>1. Requested density bonus. The specific requested density bonus proposal shall include evidence that the project meets the thresholds for State Density Bonus Law. The proposal shall also include calculations showing the maximum base density, the number/percentage of affordable units and identification of the income level at which such units will be restricted, additional market rate units resulting from the density bonus allowable under State Density Bonus Law and the resulting unit per acre density. The density bonus units shall not be included in determining the percentage of base units that qualify a project for a density bonus pursuant to State Density Bonus Law.</li> <li>2. Requested incentive(s). The request for particular incentive(s) shall include a pro forma or other report evidencing that the requested incentive(s) results in identifiable, financially sufficient and actual cost reductions that are necessary to make the housing units economically feasible. The report shall be sufficiently detailed to allow the City to verify its conclusions. If the City requires the services of specialized financial consultants to review and corroborate the analysis, the applicant will be responsible for all costs incurred in reviewing the documentation.</li> <li>3. Requested Waiver(s). The written proposal shall include an explanation of the waiver(s) of development standards requested and why they are necessary to make the construction of the project physically possible. Any requested waiver(s) shall not exceed the limitations provided by Section 17.86.080 and to the extent such</li> </ol>	<p>specify why the waiver is necessary to make the construction of the project physically possible.</p> <p>A filing fee is proposed to cover the staff time to review the density bonus request. This would be an "actual cost" fee with a minimum deposit. Staff will recommend that the City Council establish the minimum deposit at \$500.</p>

<b>Provision</b>	<b>Proposed</b>	<b>Comments/Options</b>
	<p>limitations are exceeded will be considered as a request for an incentive pursuant to Section 17.86.060.</p> <p>4. Fee. Payment of the fee in an amount set by resolution of the City Council to reimburse the City for staff time spent reviewing and processing the State Density Bonus Law application submitted pursuant to this Chapter.</p>	
<b>Density Bonus</b>	<p>A. A density bonus for a housing development means a density increase over the otherwise maximum allowable residential density under the applicable zoning and land use designation on the date the application is deemed complete. The amount of the allowable density bonus shall be calculated as provided in State Density Bonus Law. The applicant may select from only one of the income categories identified in State Density Bonus Law and may not combine density bonuses from different income categories to achieve a larger density bonus.</p> <p>B. The body with approval authority for the planning approval sought will approve, deny or modify the request for a density bonus, incentive, waiver or use of density bonus parking standards in accordance with State Density Bonus Law and this chapter. Additionally, nothing herein prevents the City from granting a greater density bonus and additional incentives or waivers than that provided for herein, or from providing a lesser density bonus and fewer incentives and waivers than that provided for herein, when the housing development does not meet the minimum thresholds.</p>	<p>The review and approval of the request would be by the body with approval authority for the planning approval sought. For example, the Planning Commission would review a request submitted with a Use Permit. The Planning Commission and City Council would review a request submitted with a Rezoning/General Development Plan.</p>
<b>Incentives</b>	<p>A. The number of incentives granted shall be based upon the number the applicant is entitled to pursuant to State Density Bonus Law.</p> <p>B. An incentive includes a reduction in site development standards or a modification of zoning code requirements or architectural requirements that result in identifiable.</p>	<p>This section references State Density Bonus Law for the review of incentives, including grounds for denial.</p>

<b>Provision</b>	<b>Proposed</b>	<b>Comments/Options</b>
	<p>financially sufficient and actual cost reductions. An incentive may be the approval of mixed use zoning (e.g. commercial) in conjunction with a housing project if the mixed use will reduce the cost of the housing development and is compatible with the housing project. An incentive may, but need not be, the provision of a direct financial incentive, such as the waiver of fees.</p> <p>C. A requested incentive may be denied only for those reasons provided in State Density Bonus Law. Denial of an incentive is a separate and distinct act from a decision to deny or approve the entirety of the project.</p>	
<p><b>Discretionary Approval Authority Retained</b></p>	<p>The granting of a density bonus or incentive(s) shall not be interpreted in and of itself to require a general plan amendment, zoning change or other discretionary approval. If an incentive would otherwise trigger one of these approvals, when it is granted as an incentive, no general plan amendment, zoning change or other discretionary approval is required. However, if the base project without the incentive requires a general plan amendment, zoning change or other discretionary approval, the City retains discretion to make or not make the required findings for approval of the base project.</p>	<p>The granting of a density bonus or incentive, does not trigger the need for a general plan amendment, zoning change or other approval (65915(j)). As an example, if a Use Permit for a development project at 35 units per acre is consistent with the maximum density allowed by the General Plan and Zoning, but the applicant seeks a density bonus that results in a density of more than 35 units per acre, a General Plan Amendment or Rezoning is not required.</p>
<p><b>Waivers</b></p>	<p>A waiver is a modification to a development standard such that construction at the increased density would be physically possible. Development standards, include, but are not limited to, a height limitation, a setback requirement, minimum floor areas, an onsite open space requirement, or a parking ratio that applies to a residential development. An applicant may request a waiver of any development standard to make the project physically possible to construct at the increased density. To be entitled to the requested waiver, the applicant</p>	<p>To request a waiver of a development standard, the applicant must show that without the waiver, the project would be physically impossible to construct (65915(e)).</p>

Provision	Proposed	Comments/Options
<p><b>Affordable Housing Agreement</b></p>	<p>must show that without the waiver, the project would be physically impossible to construct. There is no limit on the number of waivers.</p> <p>Prior to issuance of a building permit, the applicant shall enter into an Affordable Housing Agreement with the City to the satisfaction of the City Attorney guaranteeing the affordability of the rental or ownership units for a minimum of thirty (30) years, identifying the type, size and location of each affordable unit and containing requirements for administration, reporting and monitoring. Such Affordable Housing Agreement shall be recorded in the San Mateo County Recorder's Office.</p>	<p>The minimum term of 30 years for affordable units is specified in Section 65915(c)(1). Previously, California Redevelopment Law required a longer term of affordability for projects that received Redevelopment Agency financial assistance. . .</p>
<p><b>Design and Quality</b></p>	<p>A. Affordable units must be constructed concurrently with market-rate units and shall be integrated into the project. Affordable units shall be of equal design and quality as the market rate unit. Exteriors and interiors, including architecture, elevations, floor plans, interior finishes and amenities of the affordable units shall be similar to the market rate units. The number of bedrooms in the affordable units shall be consistent with the mix of market rate units. This section may be waived or modified on a case by case basis for affordable housing units developed for special groups, including housing for special needs or seniors.</p> <p>B. Parking standards may be modified as allowable under the State Density Bonus Law and anything beyond those standards shall be considered a request for an incentive.</p>	<p>Affordable units shall be constructed concurrently and integrated into the project with equal design and quality as the market rate units. This has been the City's policy in affordable housing developments.</p> <p>This section may be waived or modified for affordable units developed for special groups, such as housing for special needs or seniors. Such housing may need to be grouped for financing or design reasons.</p>

## **NEXT STEPS**

The Planning Commission's recommendation will be forwarded to the City Council for their consideration at a noticed Public Hearing.

## **INDIVIDUALS, ORGANIZATIONS AND DOCUMENTS CONSULTED**

Foster City General Plan

Foster City Municipal Code

Jean Savaree, City Attorney

Camas Steinmetz, Deputy City Attorney

21 Elements website: [www.21elements.org](http://www.21elements.org)

California Government Code

Menlo Park Municipal Code

Belmont Municipal Code

San Mateo Municipal Code

"The Density Bonus Law: Has Its Time Finally Arrived?" by David Blackwell, California Real Property Journal, Volume 29, Number 4, 2011.

Curtin's California Land Use & Planning Law, Barclay & Gray, 2013

"Maximizing Density Through Affordability," by Jon E. Goetz and Tom Sakai, Kronick Moskowitz Tiedemann & Girard, 2012

## **ATTACHMENTS**

Resolution

Draft Ordinance

"The Density Bonus Law: Has Its Time Finally Arrived?" by David Blackwell, California Real Property Journal, Volume 29, Number 4, 2011.

"Maximizing Density Through Affordability," by Jon E. Goetz and Tom Sakai, Kronick Moskowitz Tiedemann & Girard, 2012

August 15, 2013

RESOLUTION OF THE PLANNING COMMISSION OF THE CITY OF FOSTER CITY  
RECOMMENDING CITY COUNCIL ADOPTION OF AMENDMENTS TO TITLE 17, ZONING,  
OF THE FOSTER CITY MUNICIPAL CODE BY ADDING CHAPTER 17.86, DENSITY  
BONUSES – RZ-13-005

CITY OF FOSTER CITY PLANNING COMMISSION

WHEREAS, California Government Code Section 65915 (“State Density Bonus Law”) requires all cities to adopt an ordinance that specifies how compliance with State Density Bonus Law will be implemented; and;

WHEREAS, the following provisions of the Housing Element of the City of Foster City’s General Plan reflect the City’s intention to adopt Density Bonus regulations:

- H-E-2 Private Development of Affordable Housing. Encourage the provision of affordable housing by the private sector through:
  - a. Requiring that 20% of the units, excluding bonus units, in specified residential projects be affordable (an inclusionary requirement).
  - b. Requiring construction or subsidy of new affordable housing as a condition for approval of any commercial development which affects the demand for housing in the City.
  - c. Providing incentives to encourage the provision of affordable housing as provided in Policy H-E-3.
- H-E-3 Incentives for Affordable Housing. The City shall consider offering development incentives to developers of multifamily housing projects which meet the City’s housing needs, in exchange for an agreement that a minimum of twenty percent (20%) of the total number of units constructed (or another percent, depending upon the project) shall be affordable to very low as defined by State Health and Safety Code Section 50105, low and moderate income persons and families as defined by Section 50093 of the State of California Health and Safety Code for a minimum period of 45 years. Incentives to be considered include the following:
  - a. Financial contributions for the construction of utilities, public road improvements and other traffic improvements; soils remediation; Plan preparation and development;
  - b. Rent subsidies for the affordable units.
  - c. Density bonuses.
  - d. Pre-scheduled, fast track permit processing.
  - e. Design flexibility.
  - f. Reduced or waived fees
  - g. Reduced parking requirements and/or use of shared parking.
  - h. Assistance and support in securing public financing, such as bonds or tax credits.
- H-E-3-a Density Bonuses for Affordable Housing Projects Consistent with State Density Bonus Law. The City will offer density bonuses consistent with the State Density Bonus Law. Target: Apply State Density Bonus Law as requested by developers of projects meeting applicable standards; review and modify the Zoning Ordinance as appropriate by 2010. Responsible Agency: Community Development.

WHEREAS, the proposed ordinance is exempt from the California Environmental Quality Act (CEQA) under Public Resources Code Section 15061(b)(3) because it does not have the potential for causing a significant effect on the environment; and

WHEREAS, a Notice of Public Hearing was duly posted and published for consideration at the Planning Commission meeting of August 15, 2013, and, on said date, the Public Hearing was opened, held, and closed.

NOW, THEREFORE, BE IT RESOLVED that the Planning Commission, based on facts and analysis in the staff report, written and oral testimony, and exhibits presented, finds that:

1. The proposed amendments are consistent with the Foster City General Plan, specifically Housing Element Policies H-E-2, H-E-3 and Housing Implementation Measures H-E-3a; and
2. The proposed amendments will assist the City to facilitate the provision of affordable housing.

BE IT FURTHER RESOLVED that the Planning Commission of the City of Foster City hereby recommends that the City Council adopt the proposed amendments to Title 17, Zoning, of the Foster City Municipal Code (RZ-13-005) as presented in the attached draft ordinance, Exhibit A, attached hereto and incorporated herein.

PASSED AND ADOPTED by the Planning Commission of the City of Foster City at a Regular Meeting thereof held on August 15, 2013 by the following vote:

AYES, COMMISSIONERS:

NOES, COMMISSIONERS:

ABSTAIN, COMMISSIONERS:

ABSENT, COMMISSIONERS:

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DAN DYCKMAN, CHAIR

ATTEST:

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CURTIS BANKS, SECRETARY

ORDINANCE NO. \_\_\_\_\_

AN ORDINANCE OF THE CITY OF FOSTER CITY AMENDING TITLE 17, ZONING, OF THE FOSTER CITY MUNICIPAL CODE BY ADDING CHAPTER 17.86, DENSITY BONUSES – RZ-13-005

CITY OF FOSTER CITY

Section 1. THE CITY COUNCIL OF THE CITY OF FOSTER CITY DOES FIND AND ORDAIN as follows:

WHEREAS, California Government Code Section 65915 (“State Density Bonus Law”) requires all cities to adopt an ordinance that specifies how compliance with State Density Bonus Law will be implemented; and;

WHEREAS, the following provisions of the Housing Element of the City of Foster City’s General Plan reflect the City’s intention to adopt Density Bonus regulations:

- **H-E-2 Private Development of Affordable Housing.** Encourage the provision of affordable housing by the private sector through:
  - a. Requiring that 20% of the units, excluding bonus units, in specified residential projects be affordable (an inclusionary requirement).
  - b. Requiring construction or subsidy of new affordable housing as a condition for approval of any commercial development which affects the demand for housing in the City.
  - c. Providing incentives to encourage the provision of affordable housing as provided in Policy H-E-3.
- **H-E-3 Incentives for Affordable Housing.** The City shall consider offering development incentives to developers of multifamily housing projects which meet the City’s housing needs, in exchange for an agreement that a minimum of twenty percent (20%) of the total number of units constructed (or another percent, depending upon the project) shall be affordable to very low as defined by State Health and Safety Code Section 50105, low and moderate income persons and families as defined by Section 50093 of the State of California Health and Safety Code for a minimum period of 45 years. Incentives to be considered include the following:
  - a. Financial contributions for the construction of utilities, public road improvements and other traffic improvements; soils remediation; Plan preparation and development;
  - b. Rent subsidies for the affordable units.
  - c. Density bonuses.
  - d. Pre-scheduled, fast track permit processing.
  - e. Design flexibility.

- f. Reduced or waived fees
  - g. Reduced parking requirements and/or use of shared parking.
  - h. Assistance and support in securing public financing, such as bonds or tax credits.
- ***H-E-3-a Density Bonuses for Affordable Housing Projects Consistent with State Density Bonus Law.*** *The City will offer density bonuses consistent with the State Density Bonus Law. Target: Apply State Density Bonus Law as requested by developers of projects meeting applicable standards; review and modify the Zoning Ordinance as appropriate by 2010. Responsible Agency: Community Development.*

WHEREAS, the Planning Commission by adoption of Resolution P-\_\_\_\_-13 on August 15, 2013, recommended approval of the proposed amendment; and

WHEREAS, the proposed ordinance is exempt from the California Environmental Quality Act (CEQA) under Public Resources Code Section 15061(b)(3) because it does not have the potential for causing a significant effect on the environment.

NOW, THEREFORE THE CITY COUNCIL OF THE CITY OF FOSTER CITY, CALIFORNIA, ORDAINS THAT:

Section 2. A new Chapter 17.86, Density Bonuses, shall be added to Title 17, Zoning, of the Foster City Municipal Code as follows:

#### Chapter 17.86, Density Bonuses

- Section 17.86.010 Purpose
- Section 17.86.020 Definitions
- Section 17.86.030 Applicability
- Section 17.86.040 Application Requirements
- Section 17.86.050 Density Bonus
- Section 17.86.060 Incentives
- Section 17.86.070 Discretionary Approval Authority Retained
- Section 17.86.080 Waivers
- Section 17.86.090 Affordable Housing Agreement
- Section 17.86.100 Design and Quality

Section 17.86.010 Purpose.

The purpose of this Chapter is to adopt an ordinance that specifies how compliance with Government Code Section 65915 (“State Density Bonus Law”) will be implemented in an effort to encourage the production of affordable housing units in developments proposed within the City.

Section 17.86.020 Definitions.

Unless otherwise specified in this Chapter, the definitions found in State Density Bonus

Law shall apply to the terms contained herein.

Section 17.86.030 Applicability.

This Chapter shall apply to all zoning districts, including mixed use zoning districts, where residential developments of five or more dwelling units are proposed and where the applicant seeks and agrees to provide low, very-low or moderate income or senior housing units in the threshold amounts specified in State Density Bonus Law such that the resulting density is beyond that which is permitted by the applicable zoning. This Chapter and State Density Bonus Law shall apply only to the residential component of a mixed use project and shall not operate to increase the allowable density of the non-residential component of any proposed project.

Section 17.86.040 Application Requirements.

A. Any applicant requesting a density bonus, incentive(s), waiver(s) and/or use of density bonus parking standards. The proposal shall be submitted prior to or concurrently with the filing of the planning application for the housing development and shall be processed in conjunction with the underlying application.

B. The proposal for a density bonus, incentive(s) and/or waiver(s) pursuant to State Density Bonus Law shall include the following information:

1. Requested density bonus. The specific requested density bonus proposal shall include evidence that the project meets the thresholds for State Density Bonus Law. The proposal shall also include calculations showing the maximum base density, the number/percentage of affordable units and identification of the income level at which such units will be restricted, additional market rate units resulting from the density bonus allowable under State Density Bonus Law and the resulting unit per acre density. The density bonus units shall not be included in determining the percentage of base units that qualify a project for a density bonus pursuant to State Density Bonus Law.
2. Requested incentive(s). The request for particular incentive(s) shall include a pro forma or other report evidencing that the requested incentive(s) results in identifiable, financially sufficient and actual cost reductions that are necessary to make the housing units economically feasible. The report shall be sufficiently detailed to allow the City to verify its conclusions. If the City requires the services of specialized financial consultants to review and corroborate the analysis, the applicant will be responsible for all costs incurred in reviewing the documentation.
3. Requested Waiver(s). The written proposal shall include an explanation of the waiver(s) of development standards requested and why they are necessary to make the construction of the project physically possible. Any requested waiver(s) shall not exceed the limitations provided by Section 17.86.080 and to the extent such limitations are exceeded will be considered as a request for an incentive pursuant to Section 17.86.060.

4. Fee. Payment of the fee in an amount set by resolution of the City Council to reimburse the City for staff time spent reviewing and processing the State Density Bonus Law application submitted pursuant to this Chapter.

#### Section 17.86.050 Density Bonus.

A. A density bonus for a housing development means a density increase over the otherwise maximum allowable residential density under the applicable zoning and land use designation on the date the application is deemed complete. The amount of the allowable density bonus shall be calculated as provided in State Density Bonus Law. The applicant may select from only one of the income categories identified in State Density Bonus Law and may not combine density bonuses from different income categories to achieve a larger density bonus.

B. The body with approval authority for the planning approval sought will approve, deny or modify the request for a density bonus, incentive, waiver or use of density bonus parking standards in accordance with State Density Bonus Law and this chapter. Additionally, nothing herein prevents the City from granting a greater density bonus and additional incentives or waivers than that provided for herein, or from providing a lesser density bonus and fewer incentives and waivers than that provided for herein, when the housing development does not meet the minimum thresholds.

#### Section 17.86.060 Incentives

A. The number of incentives granted shall be based upon the number the applicant is entitled to pursuant to State Density Bonus Law.

B. An incentive includes a reduction in site development standards or a modification of zoning code requirements or architectural requirements that result in identifiable, financially sufficient and actual cost reductions. An incentive may be the approval of mixed use zoning (e.g. commercial) in conjunction with a housing project if the mixed use will reduce the cost of the housing development and is compatible with the housing project. An incentive may, but need not be, the provision of a direct financial incentive, such as the waiver of fees.

C. A requested incentive may be denied only for those reasons provided in State Density Bonus Law. Denial of an incentive is a separate and distinct act from a decision to deny or approve the entirety of the project.

#### Section 17.86.070 Discretionary Approval Authority Retained.

The granting of a density bonus or incentive(s) shall not be interpreted in and of itself to require a general plan amendment, zoning change or other discretionary approval. If an incentive would otherwise trigger one of these approvals, when it is granted as an incentive, no general plan amendment, zoning change or other discretionary approval is required. However, if the base project without the incentive requires a general plan amendment, zoning change or other discretionary approval, the City retains discretion to make or not make the required findings for approval of the base project.

#### Section 17.86.080 Waivers.

A waiver is a modification to a development standard such that construction at the increased density would be physically possible. Development standards, include, but

are not limited to, a height limitation, a setback requirement, minimum floor areas, an onsite open space requirement, or a parking ratio that applies to a residential development. An applicant may request a waiver of any development standard to make the project physically possible to construct at the increased density. To be entitled to the requested waiver, the applicant must show that without the waiver, the project would be physically impossible to construct. There is no limit on the number of waivers.

#### Section 17.86.090 Affordable Housing Agreement

Prior to issuance of a building permit, the applicant shall enter into an Affordable Housing Agreement with the City to the satisfaction of the City Attorney guaranteeing the affordability of the rental or ownership units for a minimum of thirty (30) years, identifying the type, size and location of each affordable unit and containing requirements for administration, reporting and monitoring. Such Affordable Housing Agreement shall be recorded in the San Mateo County Recorder's Office.

#### Section 17.86.100 Design and Quality.

A. Affordable units must be constructed concurrently with market-rate units and shall be integrated into the project. Affordable units shall be of equal design and quality as the market rate unit. Exteriors and interiors, including architecture, elevations, floor plans, interior finishes and amenities of the affordable units shall be similar to the market rate units. The number of bedrooms in the affordable units shall be consistent with the mix of market rate units. This section may be waived or modified on a case by case basis for affordable housing units developed for special groups, including housing for special needs or seniors.

B. Parking standards may be modified as allowable under the State Density Bonus Law and anything beyond those standards shall be considered a request for an incentive.

Section 3. Severability. If any section, subsection, sentence, clause or phrase of this Ordinance is for any reason held to be invalid, such decision shall not affect the validity of the remaining portions of this Ordinance. The City Council hereby declares that it should have adopted the Ordinance and each section, subsection, sentence, clause or phrase thereof, irrespective of the fact that any one or more sections, subsections, sentences, clauses or phrases be declared unconstitutional.

Section 4. Taking Effect. This Ordinance shall take effect and be in force thirty (30) days from and after its adoption.

Section 5. Posting. Within fifteen (15) days after the adoption of this Ordinance, the City Clerk shall have it posted in three (3) public places designated by the City Council.

This Ordinance was introduced and read on the \_\_\_ day of \_\_\_\_\_, 2013, and passed and adopted on the \_\_\_\_\_ day of \_\_\_\_\_, 2013, by the following vote:

AYES:

NOES:

ABSENT:

ABSTAIN:

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PAM FRISELLA, MAYOR

ATTEST:

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DORIS L. PALMER, CITY CLERK

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# The Density Bonus Law: Has Its Time Finally Arrived?

By David H. Blackwell

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## I. INTRODUCTION

The confluence of a declining single-family market and a growing emphasis on “smart growth” infill projects has created an increased demand for urban multifamily development.<sup>1</sup> These projects, particularly those that include affordable housing units, face considerable financial and political constraints. To make such projects feasible, some California developers rely on California’s Density Bonus Law.<sup>2</sup> In general, this statute allows developers whose housing development<sup>3</sup> proposals meet certain thresholds of affordability to receive density bonuses,<sup>4</sup> incentives, and development waivers from the local agency.

The Density Bonus Law is not well-organized, however, and its application by cities and counties (collectively “cities”) varies considerably throughout the state. As noted during the most recent attempt to clean up the statute in 2008:

Due to the substantial changes the law has undergone over the years, it is confusing to interpret and is the subject of numerous debates as to both its intent and its actual requirements. Developers and cities frequently clash over what the law dictates, with developers increasingly demanding concessions and waivers that cities do not feel they should have to grant under the law.<sup>5</sup>

Unfortunately, there is little guidance from the courts, as only a handful of published appellate court decisions have examined the Density Bonus Law since its adoption in 1979. In particular, the courts have not yet addressed in any detail how much discretion a city retains to condition or *deny* a proposed project that otherwise qualifies under the Density Bonus Law. As with any exercise of police power, local development requirements cannot be imposed in a manner that conflicts with state statutes. However, the application of this limitation to specific projects is often disputed.

A few key cases, however, have provided limited insight into the application of the Density Bonus Law to promote development and the corresponding limitations imposed upon cities. Most recently, the court in *Wollmer v. City of Berkeley* (“*Wollmer IP*”)<sup>6</sup> provided some guidance concerning the scope of the statute and underscored the courts’ growing reluctance to constrain cities’ ability to use the Density Bonus Law to promote the development of affordable housing units. However, even the *Wollmer II* decision leaves questions unanswered.

The Density Bonus Law has the potential to provide developers of multifamily housing projects considerable leverage during the entitlement process. The awkwardness of the statute and the uncertainty of its application sometimes dissuades developers (and practitioners) from utilizing its provisions. Indeed, many cities exhibit an inherent distrust of the statute or are uncertain about

what it actually requires a city to do. This article explores some of these practical and political realities, while positing that the Density Bonus Law is an often-neglected device that developers should consider using more frequently in this challenging real estate market.

## II. BACKGROUND

The Density Bonus Law is one of several California statutes designed to implement “an important state policy to promote the construction of low-income housing and to remove impediments to the same.”<sup>7</sup> As summarized in *Wollmer II*, the Density Bonus Law “is a powerful tool for enabling developers to include very low, low, and moderate-income housing units in their new developments.”<sup>8</sup> The purpose of the Density Bonus Law is to encourage cities to offer bonuses and incentives to housing developers that will “contribute significantly to the economic feasibility of lower income housing in proposed housing developments.”<sup>9</sup> As recognized by California courts, “the Density Bonus Law ‘reward[s] a developer who agrees to build a certain percentage of low-income housing with the opportunity to build more residences than would otherwise be permitted by the applicable local regulations.’”<sup>10</sup> By incentivizing developers, the Density Bonus Law promotes the construction of housing for seniors and low-income families.<sup>11</sup>

When the Legislature adopted the Density Bonus Law, it declared that a housing shortage crisis must be addressed and that the State should rely on local governments to provide the necessary increased housing stock “provided, that such local discretion and powers not be exercised in a manner to frustrate the purposes of this act.”<sup>12</sup> The author of a successful 2002 amendment to the statute noted that “too many local governments have undercut [the Density Bonus Law] by layering density bonus and second unit projects with unnecessary and procedural obstacles.”<sup>13</sup> According to the author and sponsors of the 2002 amendment bill, its purpose was to simplify the process for obtaining density bonuses “in order to increase California’s supply of affordable housing.”<sup>14</sup>

The Density Bonus Law applies to both general law and charter cities.<sup>15</sup> It requires cities to adopt an ordinance that specifies how local compliance with the statute will be implemented, though failure to adopt such an ordinance does not relieve the city from complying with the law.<sup>16</sup>

## III. DENSITY BONUS LAW MECHANICS

### A. Density Bonuses

#### 1. Density Bonus Thresholds

A housing project must first meet certain thresholds of affordability in order to qualify for a density bonus. As

explained in *Wollmer II*:

Section 65915 mandates that local governments provide a density bonus when a developer agrees to construct any of the following: (1) 10 percent of the total units within the project for lower income<sup>17</sup> households; (2) 5 percent of total units for very low income<sup>18</sup> households; (3) a senior citizen housing development or mobilehome park restricted to older persons, each as defined by separate statute; or (4) 10 percent of units in a common interest development for moderate-income<sup>19</sup> families or persons.<sup>20</sup>

Section 65915(b)(1) of the Density Bonus Law provides that requests for a density bonus and incentives<sup>21</sup> *must* be granted “when an applicant for a housing development seeks and agrees to construct a housing development” that meets one or more of the statute’s thresholds. Although a city may eventually deny a request for an *incentive* if certain limited findings are made,<sup>22</sup> the Density Bonus Law does not identify any findings that would allow a city to deny a *density bonus* request.

Some have argued that the “seeks and agrees” phrase in the Density Bonus law limits its application to housing developments that are not otherwise required to provide affordable units under an inclusionary zoning ordinance. Indeed, this issue was the subject of a 2005 debate in the legislature concerning the intent of SB 1818 and SB 435, which were proposed amendments to the Density Bonus Law.<sup>23</sup> If that interpretation were followed, however, cities could thwart the Density Bonus Law by imposing inclusionary zoning requirements at or above the qualifying thresholds in the Density Bonus Law, thereby preventing any project from qualifying for a density bonus.

Despite these uncertainties with the Density Bonus Law, it is clear that cities cannot impose thresholds higher than those provided under the Density Bonus Law for a project to qualify for a density bonus. In *Friends of Lagoon Valley v. City of Vacaville*,<sup>24</sup> the city’s density bonus ordinance contained thresholds similar to those set forth in an earlier version of the Density Bonus Law. “However, once the Legislature amended Section 65915 [to impose lower thresholds], state law preempted inconsistent provisions in these municipal ordinances.”<sup>25</sup> Therefore, as a matter of practice, applicants should compare any local density bonus thresholds to those set forth in Section 65915(b) to ensure that the city is applying the correct figures.

## 2. Density Bonus Calculations

Once a project meets one of the minimum thresholds,<sup>26</sup> the size of the density bonus is governed by the number of affordable units the project will provide. “In its specifics, section 65915 establishes a progressive scale in which the density bonus percentage available to an applicant increases based on the nature of the applicant’s offer of below market rate housing.”<sup>27</sup> By linking the size of the density bonus to the number of affordable units offered by the developer, the statute promotes the voluntary production of more affordable housing. “The progressive level of benefits for deeper affordability is the mechanism by which municipalities entice developers to build low-income housing.”<sup>28</sup>

Proposed projects reserving a minimum of 10% of total

units for moderate-income households receive a 5% density bonus, with every additional percentage point increase in applicable units above the minimum (up to 40%) receiving a 1% increase in the density bonus, up to a maximum 35% bonus.<sup>29</sup> Developers agreeing to construct a minimum of 10% of units for low-income households are eligible for a 20% density bonus, and the multiplier for each additional increase in units above the minimum amount (up to 20%) is 1.5%.<sup>30</sup> A similar scale applies to construction of very low-income units, except the minimum 20% density bonus kicks in when only 5% of units are reserved for this classification, and the multiplier for each additional percent increase in units above the minimum amount (up to 11%) is 2.5%.<sup>31</sup> Finally, for a senior housing development or age-restricted mobilehome park, the density bonus is 20% of the number of senior housing units.<sup>32</sup>

The total number of units for the purpose of calculating the percentages described above does not include units added by a density bonus awarded under the Density Bonus Law or any local law granting a greater density bonus.<sup>33</sup> If permitted by local ordinance, nothing prohibits cities from granting a density bonus greater than what is described in the Density Bonus Law.<sup>34</sup>

## B. Incentives and Concessions

### 1. Defined

Applicants for density bonuses may also request specific incentives or concessions from cities.<sup>35</sup> Thus, “when an applicant seeks a density bonus for a housing development that includes the required percentage of affordable housing, section 65915 *requires* that the city not only grant the density bonus, but provide *additional* incentives or concessions where needed based on the percentage of low income housing units.”<sup>36</sup> A “concession or incentive” (together, “incentive” as the statute does not distinguish the terms) includes:

- a reduction in site development standards, or a modification of zoning code or architectural design requirements, including reductions in otherwise mandated setback, square footage, and parking ratio requirements, resulting in identifiable, financially sufficient, and actual cost reductions;
- approval of mixed-use zoning in conjunction with the housing project if the nonresidential land uses would reduce the cost of the housing development and are compatible with the housing project and the surrounding area;
- other regulatory incentives proposed by the developer or city that result in identifiable, financially sufficient, and actual cost reductions.<sup>37</sup>

The legislative history indicates that the “identifiable, financially sufficient, and actual cost reductions” text in the incentive definitions was added to protect the developer from a city’s attempt to force a developer to accept marginal incentives.<sup>38</sup> The intent of the Density Bonus Law is to ensure that incentives offered by the city “contribute significantly” to the development of affordable housing and, therefore, unless the developer expressly agrees otherwise, “a locality shall not offer a

density bonus or any other incentive that would undermine the intent of” the Density Bonus Law.<sup>39</sup>

The “incentive” definition does not limit or require the provision of direct financial incentives by a city.<sup>40</sup> Some commentators believe that an incentive also includes designating the development as “by right,” and exemptions from any local ordinances that would indirectly increase the cost of the housing units to be developed.<sup>41</sup>

## 2. Calculations

As with density bonus calculations, the number of incentives to which a developer is entitled depends upon the percentage of very low, low, or moderate-income units provided (no incentive is provided for the provision of non-income restricted senior units). The developer must receive the following number of incentives:

- One incentive for projects that include at least 10% of the total units for low-income, at least 5% for very low income, or at least 10% for moderate-income households.<sup>42</sup>
- Two incentives for projects that include at least 20% of the total units for low-income, at least 10% for very low income, or at least 20% for moderate-income households.
- Three incentives for projects that include at least 30% of the total units for low-income, at least 15% for very low income, or at least 30% for moderate-income households.<sup>43</sup>

In addition, an applicant may request that the city not require a vehicular parking ratio for a density bonus project that exceeds the following: 1 onsite space for 0-1 bedroom; 2 onsite spaces for 2-3 bedrooms; and 2.5 onsite spaces for four or more bedrooms.<sup>44</sup> An applicant also may request parking incentives beyond those expressly set forth in the Density Bonus Law.<sup>45</sup>

## 3. Required Findings for Denial of an Incentive Request

A city must establish local procedures, approved by the city council, for complying with incentive provisions of the Density Bonus Law.<sup>46</sup> Even if local procedures are not established, a city *must* grant the incentive requested by the applicant unless the city makes a written finding, based upon substantial evidence,<sup>47</sup> that the incentive:

- is not required in order to provide for affordable housing costs;
- would have a “specific adverse impact . . . upon public health and safety or the physical environment” that cannot be feasibly mitigated without rendering the development unaffordable to low- and moderate-income households; or
- would be contrary to state or federal law.<sup>48</sup>

The statute does not provide guidance on how a city should demonstrate that the incentive is not required in order “to provide for affordable housing costs.” A 2002 amendment to the Density Bonus Law generated opposition from local government advocates who argued that this provision would require cities to

prepare separate project feasibility analyses in order to refute an incentive request.<sup>49</sup> Even though there is no generally accepted methodology to date, one potential approach is to subtract the mandated lower sales price for the affordable unit from the actual cost to build the unit, and then to compare that developer cost to the financial benefit created by the incentive. Local attempts to restrict the developer’s profit margin by denying an incentive request under the first criterion, however, are suspect and may be considered hostile to the Density Bonus Law.<sup>50</sup>

The second finding expressly borrows the definition of a “specific adverse impact” from the Housing Accountability Act,<sup>51</sup> specifically, “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.”<sup>52</sup> This finding is narrower than the local standards used to deny use permit applications, which often invoke broader “general welfare” considerations. “Moreover, mere [i]nconsistency with the zoning ordinance or general plan land use designation shall not constitute a specific, adverse impact upon the public health or safety.”<sup>53</sup>

The third finding is self-explanatory, although as discussed below,<sup>54</sup> issues may arise if a city attempts to rely on other development-related statutes such as the California Environmental Quality Act, the Subdivision Map Act, or other provisions of the Planning and Zoning Law to provide justification for denying an incentive.

To add some teeth to a city’s application of these findings, the Density Bonus Law mandates that a court award the successful plaintiff reasonable attorney’s fees and costs if a city refused to grant a requested incentive and the court later determines that the refusal lacks the requisite written findings and evidence.<sup>55</sup>

## C. DEVELOPMENT STANDARD WAIVERS

In addition to, and separate from, requests for incentives, a density bonus applicant may request a waiver or reduction of development standards that would have the effect of physically precluding the construction of the project at the densities or with the incentives permitted under the statute.<sup>56</sup> “Development standard” means a site or construction condition, including, without limitation, local height, setback, floor area ratio, onsite open space, and parking area ratio requirements that would otherwise apply to residential development under local ordinances, general plan elements, specific plans, charters, or other local condition, law, policy, resolution, or regulation.<sup>57</sup>

A request for a development standard waiver neither reduces nor increases the number of incentives to which the developer is otherwise entitled.<sup>58</sup> Furthermore, there is no limit on the number of waivers that may be issued.

As with incentives, although a city might ask a developer to modify a requested development standard waiver, it cannot force the developer to do so. Instead, a city’s refusal to waive or reduce development standards must be supported by one or more findings similar to those available for denying a request for an incentive.<sup>59</sup> Again, if a court determines that such refusal was unwarranted, it must award the developer attorney’s fees and costs of suit.<sup>60</sup>

Importantly, even if the developer does not submit a request for a development standard waiver, a city is prohibited from

applying a development standard that would have the effect of physically precluding the construction of the project at the densities or with the incentives permitted under the Density Bonus Law.<sup>61</sup> This statutory restriction on a city's planning and zoning powers raises important questions about what a city can and cannot do when considering a project that qualifies for a density bonus.

#### IV. RELATIONSHIP TO THE HOUSING ACCOUNTABILITY ACT

Context for the interplay between the state mandates under the Density Bonus Law and local government discretion is afforded by the Housing Accountability Act for guidance,<sup>62</sup> which similarly promotes the development of affordable housing (and housing generally).

The Housing Accountability Act implements the state policy "that a local government not reject or make infeasible housing developments" that contribute to meeting the state's housing need "without a thorough analysis of the economic, social and environmental effects of the action and without complying with subdivision (d)."<sup>63</sup> Courts have clarified that subdivision (d) of the Housing Accountability Act imposes strict limitations on a city's ability to disapprove or conditionally approve certain low-income housing projects, while subdivision (j) applies to housing development projects generally.<sup>64</sup> Both subdivisions apply to affordable housing developments.

Under subdivision (d), a city cannot disapprove or conditionally approve an affordable housing project in a manner that renders it infeasible (including through the use of design review standards) unless it makes one of five written findings based on substantial evidence in the record.<sup>65</sup> One of those findings is that the development project would have a "specific, adverse impact upon the public health or safety," which is similar to the finding available for denying an incentive request under the Density Bonus Law, although the latter includes consideration of impacts to the "physical environment."<sup>66</sup> An affordable housing project under subdivision (d), however, differs slightly from a project that may qualify for a density bonus because the former requires that at least 20% of the units be sold or rented to "lower-income households" or 100% of the units be sold or rented to "moderate-income households."<sup>67</sup> Therefore, a project that may qualify for a density bonus by providing only 10% of its units for lower-income households<sup>68</sup> may not qualify for the protections under subdivision (d) of the Housing Accountability Act.

Subdivision (j), which is not limited to affordable housing projects but applies to housing development projects generally, provides that if the proposed development project complies with applicable planning and zoning standards and criteria (including design review standards) that are in effect at the time of project application completion, a city *cannot* disapprove or conditionally approve the project with a lower density unless it makes written findings supported by substantial evidence in the record that the proposed project "would have a specific, adverse impact<sup>69</sup> on the public health or safety" and that there is no feasible mitigation.<sup>70</sup> Notably, this limitation on a local agency's discretion is similar to the Density Bonus Law's restrictions for denying an incentive request or a proposed waiver or reduction of development standards.

Section 65589.5(j) of the Housing Accountability Act thus

imposes mandatory conditions limiting cities' discretion to deny the permit, and "does so by setting forth the *only* conditions under which an application may be disapproved."<sup>71</sup> In addition, the Act places the burden of proof on cities if its project disapproval or conditional approval is challenged in court.<sup>72</sup>

#### V. CITY DISCRETION TO TAKE ACTIONS NECESSARY TO EFFECTUATE THE DENSITY BONUS LAW

Keeping the above framework in mind and understanding the interplay between the various requirements will help to understand the 2011 appellate decision in *Wollmer II*.

*Wollmer II* continued the trend begun by *Friends of Lagoon Valley* and *Wollmer I* in 2007 and 2009, respectively, in which the courts deferred to a city's decisions promoting the supply of affordable housing.<sup>73</sup> The key facts in *Wollmer II* involved the City of Berkeley's ("City") approval of a use permit to construct a five-story, mixed-use building with 98 residential units (74 base units plus 24 bonus units), including 15 affordable units, commercial space, and parking. In addition to a 20.3% density bonus, the City granted the developer's requests for development standard waivers applicable to building height, number of stories, and setbacks. Project opponent Wollmer sued, but the trial court denied his petition for writ of administrative mandate and entered judgment in favor of the City.

On appeal, Wollmer raised three density bonus related arguments (in addition to unsuccessful CEQA-based arguments): "(1) condition 68 of the use permit allowed the Developers to receive Section 8 subsidies for density-bonus-qualifying units, thereby exceeding the maximum 'affordable rent' established in Health and Safety Code section 50053; (2) the City's approval of amenities should not have been considered when deciding what standards should be waived to accommodate the project; and (3) the City improperly calculated the project's density bonus."<sup>74</sup> The court of appeal rejected all three arguments.

Wollmer first argued that the total amount of rent the developer would receive from very low income tenants qualifying for Section 8 subsidies would exceed the "affordable rent" allowed under the Density Bonus Law because the additional federal subsidies would exceed the statutory amount. In determining the merits of this argument, the court concluded: "Under this reasoning, the density bonus law *caps* the total rent a housing provider can receive *from any source* to the above amount, whether that rent comes from direct tenant payment or a combination of tenant contributions and a Section 8 subsidy. This is not the law."<sup>75</sup> The court continued, "'affordable rent' within the meaning of our density bonus law is concerned with the rent that a tenant pays, not with the compensation received by the housing provider. . . . It would be nonsensical to equate the notion of setting of 'an affordable rent' with that of setting and capping the developer's compensation."<sup>76</sup> Finally, "imposing 'costs' on a developer attempting to build affordable units is hostile to the letter and spirit of the density bonus law."<sup>77</sup>

Next, Wollmer argued that by granting a development standard waiver, the City violated the Density Bonus Law because it was granted to accommodate certain project amenities, including an interior courtyard, a community plaza, and higher ceilings. The appellate court again rejected this argument,

holding that “nothing in the statute requires the applicant to strip the project of amenities. . . . Standards may be waived that physically preclude construction of a housing development meeting the requirements for a density bonus, period.”<sup>78</sup> The court’s reasoning suggests that a city may not micromanage the design of a project. If the project meets the requirements of the Density Bonus Law, the city must grant development standard waiver requests to ensure the project as designed is not physically prevented from being developed. Quoting the prohibition contained in section 65915(d)(1), the *Wollmer II* court warned, as it did in *Wollmer I*: “Had the City failed to grant the waiver and variances, such action would have had ‘the effect of physically precluding the construction of a development’ meeting the criteria of the density bonus law.”<sup>79</sup>

Third, *Wollmer* argued that the City’s calculation of the density bonus was improper because the City relied on the densities set forth in its zoning ordinance instead of its general plan. In rejecting *Wollmer*’s third argument, the court explained that the City does not apply the general plan density standards to specific parcels, and found that the City properly calculated the density bonus based on the more specific provisions of its zoning code.<sup>80</sup>

The *Wollmer II* decision reaffirms cities’ ability to apply broadly the Density Bonus Law to promote its goals through the award of density bonuses and incentives, and by providing flexibility in granting development standard waivers.

## VI. LIMITS ON ABILITY TO CONDITION OR DENY A QUALIFIED HOUSING DEVELOPMENT

What happens, though, if a city wants to *deny* a density bonus project or impose conditions that make the project infeasible? As explained above,<sup>81</sup> the Housing Accountability Act expressly provides that a city may not take such action against a qualified affordable housing project unless one of that statute’s limited findings can be made, and similarly, the Density Bonus Law prohibits a city from denying a request for an incentive or development standard waiver on grounds not identified in that statute.

There is less certainty, however, about whether a city can grant the density bonus, and incentive and waiver requests, then deny the project on other grounds. The Density Bonus Law provides that if a general plan amendment, zoning amendment, or other discretionary approval would not otherwise be required for a proposed project, approval of a density bonus or incentives does not require such approvals.<sup>82</sup> For example, even if an approved density bonus makes the project’s density exceed what was otherwise allowed under the applicable general plan land use designation and zoning district, the applicant would not be required to seek amendments of those local regulations.

There may be situations, however, where a project may nonetheless require discretionary approvals not directly related to the density bonus or incentives. In such cases, some cities may argue that the Density Bonus Law does not affect their ability to deny or condition a project under their broad police powers: “A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws.”<sup>83</sup> This constitutional authority given to cities to adopt local ordinances is derived from the “inherent reserved power of the state to subject individual rights

to reasonable regulation for the general welfare.”<sup>84</sup> A city’s police power “is as broad as that of the state Legislature itself.”<sup>85</sup> For example, local regulations based on aesthetics are permissible so long as they are reasonably related to the general welfare.<sup>86</sup> Even though the police power is broad, it must not “conflict with the general laws.”<sup>87</sup> A local regulation conflicts with the “general laws,” including statutes such as the Density Bonus Law, if it “duplicates, contradicts or enters an area fully occupied by general law, either expressly or by legislative implication.”<sup>88</sup>

It is important to consider this issue in its historical context. Throughout the Density Bonus Law’s development, the Legislature declared that affordable housing was critical to California and that cities should not create obstacles to developing affordable housing. This mandate is not limited to the Density Bonus Law, but is also embodied in other statutes, many of which are identified in Government Code section 65582.1. This legislative directive has been accepted by the courts, which have held that the Density Bonus Law should be fully implemented to encourage the creation of more affordable units.<sup>89</sup> Therefore, the Legislature and the courts recognize that more affordable housing is badly needed in California, and local agencies should not impose roadblocks to thwart such development unless they can make one of the statutory findings.<sup>90</sup>

For example, in *Building Industry Association v. City of Oceanside*, the court held that a local ballot measure facially conflicted with, and was preempted by, the Density Bonus Law when it impeded the Density Bonus Law’s promotion of construction of low-income housing.<sup>91</sup> Similarly, in *Friends of Lagoon Valley*,<sup>92</sup> the court examined the Density Bonus Law and its relationship to the city’s police powers, and held that a local ordinance’s imposition of a higher threshold for a project to qualify for a density bonus would be preempted by the Density Bonus Law and therefore void. Finally, *Wollmer I* and *Wollmer II* suggest that disapproving a density bonus project would invoke the prohibition in the Density Bonus Law against applying development standards that would physically preclude construction of the project.<sup>93</sup>

In *Wollmer I*, the City of Berkeley approved use permits and variances for a mixed-use density bonus project consisting of residential units and retail commercial space.<sup>94</sup> When the legality of the City’s approval was challenged, the appellate court held:

Had the City failed to grant the variances the result would “have the effect of precluding the construction of a development” (§ 65915, subd. (e)), which met the criteria of the Density Bonus Law. If the Project as a whole was not economically feasible, then the below market rate housing units would not be built, and the purpose of the Density Bonus Law to encourage the development of low and moderate income housing would not be achieved.<sup>95</sup>

A similar conclusion was reached in *Wollmer II* regarding the City’s consideration of the project’s use permit application.<sup>96</sup> Thus, both *Wollmer* courts have warned that denial of a use permit or variance might be contrary to the Density Bonus law, specifically, section 65915(e)(1). This judicial language implies that if a city

disapproves a density bonus project's application for a use permit, variance, design review, or similar permit, and the city cannot make any of the findings set forth in the Density Bonus Law to justify the disapproval, then the action would be contrary to the purpose of the Density Bonus Law and vulnerable to a writ of mandate issued by the courts,<sup>97</sup> including attorney's fees and costs.

To interpret the law otherwise would allow a city to undermine the purpose of the Density Bonus Law by subjecting the project to a discretionary approval process such as a conditional use permit, then disapproving the project based on broad "general welfare" concerns or similar grounds. Even though such an adjudicatory action would be subject to the standard of review in Code of Civil Procedure section 1094.5, which is a less deferential standard than is typical for legislative actions,<sup>98</sup> it is a far easier to meet than the "specific adverse impact" standard provided in the Density Bonus Law. Denying density bonus projects or rendering them infeasible through excessive conditions would mean "that housing units for lower-income households would not be built and the purpose of the density bonus law to encourage such development would not be achieved."<sup>99</sup>

As a practical note, an applicant should consider formally requesting an incentive or development standard waiver that addresses potential grounds for denial (or excessive conditions of approval). This will invoke the restrictions on denial set forth in subdivisions (d)(3) and (e)(1) of the Density Bonus Law, thereby preserving the opportunity to recover attorney's fees if a subsequent lawsuit is successful.

## VII. POLITICAL REALITIES

Although many cities struggle to meet their fair share of their respective regional housing need,<sup>100</sup> particularly the provision of affordable housing units, developers often encounter local resistance when proposing density bonus projects that would help remedy this shortfall. Indeed, affordable multifamily projects are regularly opposed by neighborhood groups. (These groups often include citizens who identify themselves with "anti-sprawl" and "smart growth" policies — an irony not lost on the development community.) Project opposition in California's urban centers is often highly-educated and organized, and exerts significant influence on city staff and elected officials. As a result, density bonus projects regularly confront strong third-party opposition and unenthused local officials.

A related political consideration is the resistance that developers encounter when city staff and elected officials perceive a development project is forced upon them. If a city believes that a developer is using the Density Bonus Law as a hammer without considering the effect of the project on the community, the city might resist the project with the tools it has available. Given this potential agency reaction, a developer should consider spending time with city staff and officials to discuss not only how the Density Bonus Law affects the project, but also how the project positively affects the city (e.g., by helping attain regional housing requirements, and promoting transit-oriented and sustainable development policies). A mutual understanding of the applicable legal environment and the impact of the project on the community should be viewed as a means for advancing the dialogue between the developer and the city, and need not be characterized as a confrontation.

The reality, however, is that even if the statute limits a city's discretion to condition or deny a density bonus project, a city may decide to do so anyway due to neighborhood pressure or as a reaction to perceived strong-arming by the developer. A developer then must decide whether to seek judicial relief, which many are reluctant to do despite the potential to recover attorney's fees and costs, especially if the developer fears repercussions on future projects within that jurisdiction.

Because key elements of the Density Bonus Law are still subject to various interpretations that have not been clarified by the Legislature, it will likely be the courts that provide guidance to both developers and cities on future projects.

## VIII. CONCLUSION

The Density Bonus Law is a potentially powerful tool for developers of multifamily projects. Although the Density Bonus Law has existed for over thirty years, both developers and cities have struggled with its application. The statute "is confusing, convoluted, and subject to endless debate about its requirements."<sup>101</sup> As a result, many developers are either unaware of the law or unsure about how it works. Many cities share this unfamiliarity and are resistant to attempts to limit their police powers when considering multifamily development applications. The current residential real estate market has begun to sharpen the focus of developers, cities, and practitioners with regard to this statute, and all parties should expect the Density Bonus Law to become a more integral component of the local multifamily housing projects entitlement process.



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## ENDNOTES

- 1 See, e.g., J.K. Dineen, *Peninsula Housing: If You Build It, They Will Rent*, S.F. BUS. TIMES, Aug. 26, 2011, available at <http://www.bizjournals.com/sanfrancisco/print-edition/2011/08/26/peninsula-housing-if-you-build-it.html>; Roger Vincent, *Apartments Are the Development Du Jour Among Builders*, L.A. TIMES, July 17, 2011, available at <http://www.latimes.com/business/la-fi-commre-quarterly-apartments-20110717,0,4977484,print.story>.
- 2 CAL. GOV'T CODE § 65915. All statutory references are to the California Government Code unless otherwise specified.
- 3 Defined as a "development project for five or more residential units." *Id.* § 65915(i).
- 4 Defined as "a density increase over the otherwise maximum allowable density as of the date of application" to the local agency. *Id.* § 65915(f).
- 5 A.B. 2280 Bill Analysis, at 8 (Cal. Apr. 21, 2008).
- 6 *Wollmer v. City of Berkeley*, 193 Cal. App. 4th 1329 (2011)

- [hereinafter *Wollmer II*]. An earlier First District opinion involving Mr. Wollmer's challenge to the City of Berkeley's application of the Density Bonus Law to a different project is *Wollmer v. City of Berkeley*, 179 Cal. App. 4th 933 (2009) [hereinafter *Wollmer I*].
- 7 *Bldg. Indus. Ass'n v. City of Oceanside*, 27 Cal. App. 4th 744, 770 (1994); CAL. GOV'T CODE § 65582.1(f).
- 8 *Wollmer II*, 193 Cal. App. 4th at 1339.
- 9 CAL. GOV'T CODE § 65917.
- 10 *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 824 (2007) (quoting *Shea Homes Ltd. P'ship v. County of Alameda*, 110 Cal. App. 4th 1246, 1263 (2003)).
- 11 *Friends of Lagoon Valley*, 154 Cal. App. 4th at 825.
- 12 Notes to Stats. 1979, ch. 1207, at 4738, sec. 3 (Cal. 1979).
- 13 A.B. 1866 Bill Analysis, at 3-4 (Cal. Aug. 28, 2002).
- 14 *Id.* at 4.
- 15 CAL. GOV'T CODE § 65918.
- 16 *Id.* § 65915(a).
- 17 CAL. HEALTH & SAFETY CODE § 50079.5.
- 18 *Id.* § 50105.
- 19 *Id.* § 50093.
- 20 *Wollmer II*, 193 Cal. App. 4th at 1339; see CAL. GOV'T CODE § 65915(b)(1)(A)-(D).
- 21 See discussion *infra* Part III.B.3.
- 22 See CAL. GOV'T CODE § 65915(d)(1).
- 23 Stats. 2005, ch. 496, sec. 3.
- 24 *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 824 (2007).
- 25 *Id.* at 830.
- 26 See discussion *supra* Part III.A.1.
- 27 *Wollmer II*, 193 Cal. App. 4th at 1340.
- 28 *Id.* at 1343.
- 29 CAL. GOV'T CODE § 65915(f)(4).
- 30 *Id.* § 65915(f)(1).
- 31 *Id.* § 65915(f)(2).
- 32 *Id.* § 65915(f)(3).
- 33 *Id.* § 65915(b)(3).
- 34 *Id.* § 65915(n). The “[i]f permitted by local ordinance” limitation was added by AB 2280 in 2008. Both *Friends of Lagoon Valley*, 154 Cal. App. 4th at 826, and *Wollmer I*, 179 Cal. App. 4th at 944, analyzed the pre-AB 2280 version of section 65915(n) to hold that no implementing ordinance was required for a city to allow a greater number of density bonus units.
- 35 CAL. GOV'T CODE § 65915(d)(1).
- 36 *Wollmer I*, 179 Cal. App. 4th at 944.
- 37 CAL. GOV'T CODE § 65915(k).
- 38 The legislative analyses of SB 1818 indicate that the purpose of this provision was to “ensure that the incentives have some value. The intent of adding ‘financially sufficient’ is [to] ensure that value is more than nominal and actually of benefit to the developer.” A.B. 1818 Bill Analysis, at 5 (Cal. Apr. 16, 2004).
- 39 CAL. GOV'T CODE § 65917.
- 40 *Id.* § 65915(l). The receipt of direct financial incentives provided under the Density Bonus Law, however, removes a rental housing project from the preemption provisions of the Costa Hawkins Act, as explained in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396, 1402 (2009).
- 41 Mitchell B. Menzer & Svetlana G. Attestatova, *A Guide to California Government Code Section 65915: Density Bonuses and Incentives for Affordable Housing*, 23 CAL. REAL PROP. J., Spring 2005, at 6-7.
- 42 Moderate income units must be in a common interest development. CAL. GOV'T CODE § 65915(b)(1)(D).
- 43 *Id.* § 65915(d)(2).
- 44 *Id.* § 65915(p)(1).
- 45 *Id.*
- 46 *Id.* § 65915(d)(3).
- 47 Although not defined in section 65915, “substantial evidence” is generally defined as evidence of “ponderable legal significance . . . reasonable in nature, credible, and of solid value, and relevant evidence that a reasonable mind might accept as adequate to support a conclusion.” *Young v. Gannon*, 97 Cal. App. 4th 209, 225 (2002) (internal citations omitted).
- 48 CAL. GOV'T CODE § 65915(d)(1).
- 49 A.B. 1866 Bill Analysis, at 5 (Cal. May 7, 2002); A.B. 1866 Bill Analysis, at 6 (Cal. Apr. 22, 2002); A.B. Bill Analysis, at 1 (Cal. Apr. 8, 2002).
- 50 See *Wollmer II*, 193 Cal. App. 4th at 1344.
- 51 See discussion *infra* Part V.
- 52 CAL. GOV'T CODE § 65589.5(j)(1).
- 53 *Wollmer II*, 193 Cal. App. 4th at 1349-50 (quoting CAL. GOV'T CODE § 65589.5(d)(2)).
- 54 See discussion *infra* Part VI.
- 55 CAL. GOV'T CODE § 65915(d)(3).
- 56 *Id.* § 65915(e)(1). The 2008 amendments added the references to “physically precluding” the construction of a density bonus project, and deleted subdivision (f), which read: “The applicant shall show that the waiver or modification is necessary to make the housing units economically feasible.” See *Wollmer II*, 193 Cal. App. 4th at 1346.
- 57 CAL. GOV'T CODE § 65915(o)(1).
- 58 *Id.* § 65915(e)(2).
- 59 *Id.* § 65915(e)(1). The statute does not identify any findings that may be applied to deny a density bonus request.
- 60 *Id.*
- 61 *Id.*
- 62 *Id.* § 65589.5.
- 63 *Id.* § 65589.5(b).
- 64 *N. Pacifica, LLC v. City of Pacifica*, 234 F. Supp. 2d 1053, 1057-58 (N.D. Cal. 2002).
- 65 The Housing Accountability Act defines “feasible” as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” CAL. GOV'T CODE § 65589.5(h)(1).
- 66 *Id.* § 65589.5(d)(2); see also *id.* § 65915(d)(1).
- 67 *Id.* § 65589.5(h)(3).
- 68 *Id.* § 65915(b)(1)(A).
- 69 Similar to the definitions in subdivision (d)(2) and (d)(1)(B) of section 65915, a “specific, adverse impact” is defined 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.” *Id.* § 65589.5(j)(1).

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- 70 *Id.* § 65589.5(j).
- 71 *N. Pacifica, LLC v. City of Pacifica*, 234 F. Supp. 2d 1053, 1060 (N.D. Cal. 2002).
- 72 *Id.* at 1059.
- 73 *Wollmer I*, 179 Cal. App. 4th 933 (2009); *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807 (2007).
- 74 *Wollmer II*, 193 Cal. App. 4th at 1338.
- 75 *Id.* at 1342.
- 76 *Id.* at 1342-43.
- 77 *Id.* at 1344.
- 78 *Id.* at 1346.
- 79 *Id.* at 1347 (quoting *Wollmer I*, 179 Cal. App. 4th 933, 947 (2009)).
- 80 *Id.* at 1344-45.
- 81 See discussion *supra* Part IV.
- 82 CAL. GOV'T CODE § 65915(f)(5), (j).
- 83 CAL. CONST. art. XI, § 7.
- 84 *Cotta v. City & County of San Francisco*, 157 Cal. App. 4th 1550, 1557 (2007) (citing 8 WITKIN, SUMMARY OF CAL. LAW *Constitutional Law* § 784 (9th ed. 1988)).
- 85 *Richeson v. Helal*, 158 Cal. App. 4th 268, 277 (2007).
- 86 See, e.g., *Novi v. City of Pacifica*, 169 Cal. App. 3d 678, 682 (1985).
- 87 CAL. CONST. art. XI, § 7.
- 88 *Viacom Outdoor, Inc. v. City of Arcata*, 140 Cal. App. 4th 230, 236 (2006).
- 89 See, e.g., *Bldg. Indus. Ass'n v. City of Oceanside*, 27 Cal. App. 4th 744, 770 (1994); *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 823-24 (2007); *Shea Homes Ltd. P'ship v. County of Alameda*, 110 Cal. App. 4th 1246, 1263 (2003); *Wollmer I*, 179 Cal. App. 4th at 940-41; *Wollmer II*, 193 Cal. App. 4th at 1339 .
- 90 See discussion *supra* Part III.B.3.
- 91 *Bldg. Indus. Ass'n*, 27 Cal. App. 4th at 770, 772.
- 92 *Friends of Lagoon Valley*, 154 Cal. App. 4th at 830.
- 93 CAL. GOV'T CODE § 65915(e)(1).
- 94 *Wollmer I*, 179 Cal. App. 4th at 936.
- 95 *Id.* at 937.
- 96 "If the project were not built, it goes without saying that housing units for lower-income households would not be built and the purpose of the density bonus law to encourage such development would not be achieved." *Wollmer II*, 193 Cal. App. 4th at 1347.
- 97 At least one trial court has ruled that the Density Bonus Law requires a city to approve a density bonus project where housing was otherwise entirely *prohibited*. See Lewis J. Soffer, *Does the Density Bonus Law (Gov. Code § 65915) Require Local Government to Approve Mixed Use and Housing Projects Where Local Zoning Does Not Allow Housing at All?*, 18 MILLER & STARR REAL ESTATE NEWSALERT, July 2008, at 2.
- 98 See, e.g., *Topanga Assoc. for a Scenic Cmty. v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974).
- 99 *Wollmer II*, 193 Cal. App. 4th at 1347.
- 100 See CAL. GOV'T CODE §§ 65584-65584.7.
- 101 A.B. 2280 Bill Analysis, Staff Comments, at 11 (Cal. Apr. 21, 2008).

# Maximizing Density Through Affordability

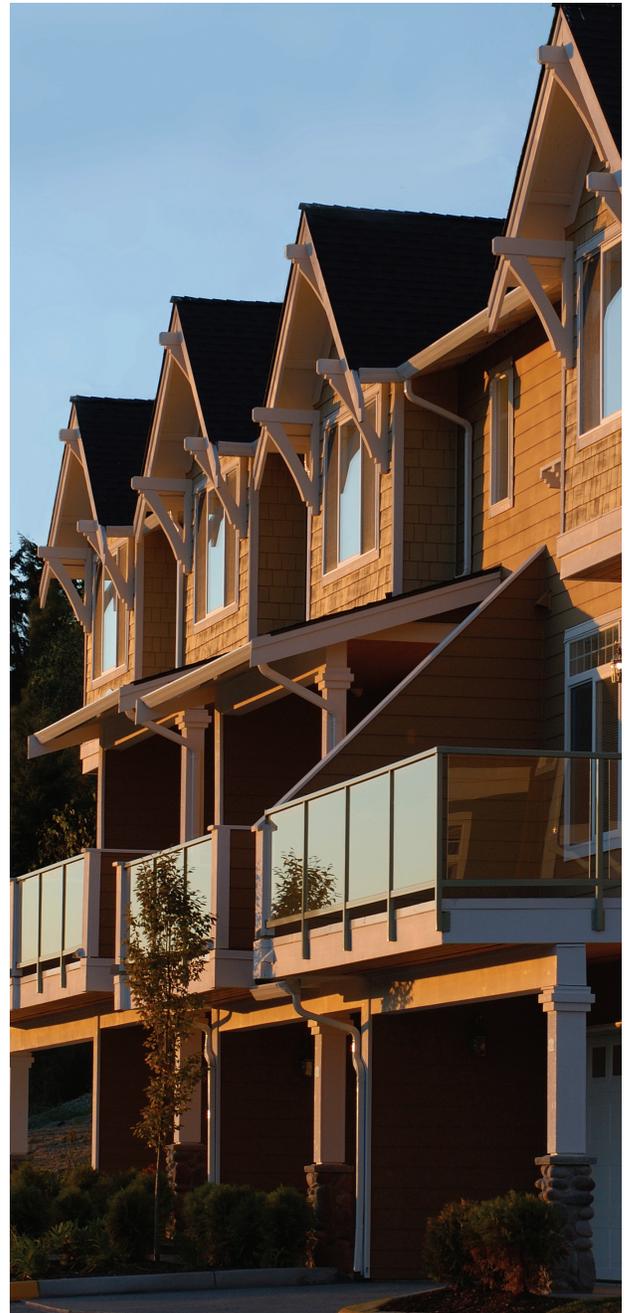
## A Developer's Guide to the California Density Bonus Law

*By Jon E. Goetz and Tom Sakai*

Savvy housing developers are taking advantage of California's Density Bonus Law, a mechanism which allows them to obtain more favorable local development requirements in exchange for offering to build affordable or senior units. The Density Bonus Law (found in California Government Code Sections 65915 – 65918) provides developers with powerful tools to encourage the development of affordable and senior housing, including up to a 35% increase in project densities, depending on the amount of affordable housing provided. The Density Bonus Law is about more than the density bonus itself, however. It is actually a larger package of incentives intended to help make the development of affordable and senior housing economically feasible. Other tools include reduced parking requirements, other incentives and concessions such as reduced setback and minimum square footage requirements, and the ability to donate land for the development of affordable housing to earn a density bonus. Often these other tools are even more helpful to project economics than the density bonus itself, particularly the special parking benefits. Sometimes these incentives are sufficient to make the project pencil out, but for other projects financial assistance is necessary to make the project feasible.

In determining whether a development project would benefit from becoming a density bonus project, developers also need to be aware that:

- The Density Bonus is a state mandate. A developer who meets the requirements of the state law is entitled to receive the density



bonus and other benefits. As with any state mandate, some local governments will resent the state requirement and will attempt to resist. But many local governments like the density bonus as a helpful tool to cut through their own land use requirements and local political issues.

- Use of a density bonus may be particularly helpful in those jurisdictions that impose inclusionary housing requirements for new developments.

## How the Density Bonus Works

### Projects Entitled to a Density Bonus

Cities and counties are required to grant a density bonus and other incentives or concessions to housing projects which contain one of the following:

- At least 5% of the housing units are restricted to very low income residents.
- At least 10% of the housing units are restricted to lower income residents.
- At least 10% of the housing units in a for-sale common interest development are restricted to moderate income residents.
- The project donates at least one acre of land to the city or county for very low income units, and the land has the appropriate general plan designation, zoning, permits and approvals, and access to public facilities needed for such housing.
- The project is a senior citizen housing development (no affordable units required).
- The project is a mobilehome park age-restricted to senior citizens (no affordable units required).

### Density Bonus Amount

The amount of the density bonus is set on a sliding scale, based upon the percentage of affordable units at each income level, as shown in the chart on the following page.



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**Density Bonus Chart\***

Affordable Unit Percentage**	Very Low Income Density Bonus	Low Income Density Bonus	Moderate Income Density Bonus	Land Donation Density Bonus	Senior Density Bonus ***
5%	20%	-	-	-	20%
6%	22.5%	-	-	-	20%
7%	25%	-	-	-	20%
8%	27.5%	-	-	-	20%
9%	30%	-	-	-	20%
10%	32.5%	20%	5%	15%	20%
11%	35%	21.5%	6%	16%	20%
12%	35%	23%	7%	17%	20%
13%	35%	24.5%	8%	18%	20%
14%	35%	26%	9%	19%	20%
15%	35%	27.5%	10%	20%	20%
16%	35%	29%	11%	21%	20%
17%	35%	30.5%	12%	22%	20%
18%	35%	32%	13%	23%	20%
19%	35%	33.5%	14%	24%	20%
20%	35%	35%	15%	25%	20%
21%	35%	35%	16%	26%	20%
22%	35%	35%	17%	27%	20%
23%	35%	35%	18%	28%	20%
24%	35%	35%	19%	29%	20%
25%	35%	35%	20%	30%	20%
26%	35%	35%	21%	31%	20%
27%	35%	35%	22%	32%	20%
28%	35%	35%	23%	33%	20%
29%	35%	35%	24%	34%	20%
30%	35%	35%	25%	35%	20%
31%	35%	35%	26%	35%	20%
32%	35%	35%	27%	35%	20%
33%	35%	35%	28%	35%	20%
34%	35%	35%	29%	35%	20%
35%	35%	35%	30%	35%	20%
36%	35%	35%	31%	35%	20%
37%	35%	35%	32%	35%	20%
38%	35%	35%	33%	35%	20%
39%	35%	35%	34%	35%	20%
40%	35%	35%	35%	35%	20%

\* All density bonus calculations resulting in fractions are rounded up to the next whole number.

\*\* Affordable unit percentage is calculated excluding units added by a density bonus.

\*\*\* No affordable units are required for senior housing units to receive a density bonus.

### **Required Incentives and Concessions**

In addition to the density bonus, the city or county is also required to provide one or more “incentives” or “concessions” to each project which qualifies for a density bonus (except that market rate senior citizen projects with no affordable units, and land donated for very low income housing, do not appear to be entitled to incentives or concessions). A concession or incentive is defined as:

- A reduction in site development standards or a modification of zoning code or architectural design requirements, such as a reduction in setback or minimum square footage requirements; or
- Approval of mixed use zoning; or
- Other regulatory incentives or concessions which actually result in identifiable and financially sufficient cost reductions.

The number of required incentives or concessions is based on the percentage of affordable units in the project:

- For projects with at least 5% very low income, 10% lower income or 10% moderate income units, one incentive or concession is required.
- For projects with at least 10% very low income, 20% lower income or 20% moderate income units, two incentives or concessions are required.
- For projects with at least 15% very low income, 30% lower income or 30% moderate income units, three incentives or concessions are required.

The city or county is required to grant the concession or incentive proposed by the developer unless it finds that the proposed concession or incentive is not required in order to achieve the required affordable housing costs or rents, or would cause a public health or safety problem, cause an environmental problem, harm historical property, or would be contrary to law. Financial incentives, fee waivers and reductions in dedication requirements

may be, but are not required to be, provided by the city or county.

### **Other Forms of Assistance**

A development qualifying for a density bonus also receives two additional forms of assistance which have important benefits for a housing project:

- **Waiver or Reduction of Development Standards.** If any other city or county development standard would physically prevent the project from being built at the permitted density and with the granted concessions/incentives, the developer may propose to have those standards waived or reduced. The city or county is not permitted to apply any development standard which physically precludes the construction of the project at its permitted density and with the granted concessions/incentives. The city or county is not required to waive or reduce development standards that that would cause

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*“This ability to force the locality to modify its normal development standards is sometimes the most compelling reason for the developer to structure a project to qualify for the density bonus.”*

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a public health or safety problem, cause an environmental problem, harm historical property, or would be contrary to law. The waiver or reduction of a development standard does not count as an incentive or concession. Development standards which have been waived or reduced utilizing this section include setback requirements and lot coverage requirements. This ability to force the locality to modify its normal development standards is sometimes the most compelling reason for the developer to structure a project to qualify for the density bonus.

# KMTG REFERENCE GUIDE

- **Maximum Parking Requirements.** Upon the developer's request, the city or county may not require more than one onsite parking space for studio and one bedroom units, two onsite parking spaces for two and three bedroom units, and two and one-half onsite parking spaces for units with four or more bedrooms. Onsite spaces may be provided through tandem or uncovered parking, but not onstreet parking. Requesting these parking standards does not count as an incentive or concession, but the developer may request further parking standard reductions as an incentive or

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*“In many cases, achieving a reduction in parking requirements may be more valuable than the additional permitted units.”*

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concession. This is one of the most important benefits of the density bonus statute. In many cases, achieving a reduction in parking requirements may be more valuable than the additional permitted units. In higher density developments requiring the use of structured parking, the construction cost of structured parking is very expensive, costing upwards of \$20,000 per parking space. While this provision of the density bonus statute can be used to reduce excessive parking requirements, care must be taken not to impact the project's marketability by reducing parking to minimum requirements which lead to parking shortages.

## **Affordable Housing Restrictions**

- **Rental Units.** Affordable rental units must be restricted by an agreement which sets maximum incomes and rents for those units. The income and rent restrictions must remain in place for a 30 year term, or a longer period if required by the terms of other subsidies received by the project. Rents must be restricted as follows:



- For very low income units, rents may not exceed 30% x 50% of the area median income for a household size suitable for the unit.
- For lower income units, rents may not exceed 30% x 60% of the area median income for a household size suitable for the unit.
- Area median income is determined annually by regulation of the California Department of Housing and Community Development, based upon median income regulations adopted by the U.S. Department of Housing and Urban Development.
- Rents must include a reasonable utility allowance.
- Household size appropriate to the unit means 1 for a studio unit, 2 for a one

bedroom unit, 3 for a two bedroom unit, 4 for a three bedroom unit, etc.

- A list of current affordable rent calculations and income limits for many California counties is available on the Kronick, Moskovitz, Tiedemann & Girard website at [www.kmtg.com/publications](http://www.kmtg.com/publications).
- **For Sale Units.** Affordable for sale units must be sold to the initial buyer at an affordable housing cost. All housing related costs generally may not exceed 35% x 110% of the area median income for a household size suitable for the unit. Housing related costs include mortgage loan payments, mortgage insurance payments, property taxes and assessments, homeowner association fees, reasonable utilities allowance, insurance premiums, maintenance costs, and space rent.
  - Buyers must enter into an equity sharing agreement with the city or county, unless the equity sharing requirements conflict with the requirements of another public funding source or law. The equity sharing agreement does not restrict the resale price, but requires the original owner to pay the city or county a portion of any appreciation received on resale.
  - The city/county percentage of appreciation is the purchase price discount received by the original buyer, plus any down payment assistance provided by the city/county. (For example, if the original sales price is \$200,000, and the original fair market value is \$250,000, and there is no city/county down payment assistance, the city/county subsidy is \$50,000, and the city/county's share of appreciation is 20%).
  - The seller is permitted to retain its original down payment, the value of any improvements made to the home, and the remaining share of the appreciation.
  - The income and affordability requirements are not binding on resale purchasers (but if other public funding sources or

programs are used, the requirements may apply to resales for a fixed number of years).

- A list of current affordable housing cost calculations and income limits for many California counties is available at the Kronick, Moskovitz, Tiedemann & Girard website at [www.kmtg.com/publications](http://www.kmtg.com/publications).

#### **How the Density Bonus Works for Senior Projects**

As shown in the Density Bonus Chart above, a senior citizen housing development meeting the requirements of Section 51.3 or 51.12 of the Civil Code qualifies for a 20% density bonus. This is a very desirable option for senior housing developments. In jurisdictions where the local ordinances do not reduce the parking requirements for senior housing developments, the reduced parking requirements alone may justify applying for a density bonus.

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*“In jurisdictions where the local ordinances do not reduce the parking requirements for senior housing developments, the reduced parking requirements alone may justify applying for a density bonus.”*

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#### **How the Density Bonus Works for Condominium Conversion Projects**

The density bonus statute provides for a density bonus of up to 25% for condominium conversion projects providing at least 33% for the total units to low or moderate income households or 15% of the units to lower income households. Many condominium conversion projects are not designed in a manner that allows them to take advantage of the opportunity to construct additional units, but some projects may find this helpful. While condominium conversions are not presently a viable development alternative, this provision may be of some value in limited situations in the future.



### **How the Density Bonus Works for Child Care**

Housing projects that provide child care are eligible for a separate density bonus equal to the size of the child care facility. The child care facility must remain in operation for at least the length of the affordability covenants. A percentage of the child care spaces must also be made available to low and moderate income families. A separate statute permits cities and counties to grant density bonuses to commercial and industrial projects of at least 50,000 square feet, when the developer sets aside at least 2,000 square feet in the building and 3,000 square feet of outside space for a child care facility. See Government Code Section 65917.5 for additional details.

### **How to Obtain a Density Bonus Through Land Donation**

Many market rate housing developers are uncomfortable with building and marketing affordable units themselves, whether due to their lack of experience with the affordable housing process or because of their desire to concentrate on their core market rate homes. Other developers may have sites that are underutilized in terms of

project density. The density bonus law contains a special sliding scale bonus for land donation which allows those developers to turn over the actual development of the affordable units to local agencies or experienced low income developers. The density bonus is available for the donation of at least an acre of fully entitled land, with all needed public facilities and infrastructure, and large enough for the construction of a high density very low income project containing 10% of the total homes in the development. The parcel must be located within the boundary of the proposed development or, subject to the approval of the jurisdiction, and within one-fourth mile of the boundary of the proposed development. The more units that can be built on the donated land, the larger the density bonus. Because of the parcel size requirements, this option is only practical for larger developments. The land donation density bonus can be combined with the regular density bonus provided for the development of affordable units, up to a maximum 35% density bonus. A master planned community developer needs to carefully evaluate the land donation option as opposed to engaging an affordable housing developer to fulfill the project's affordable housing obligations. In many cases the master developer

will prefer to control the affordable component of the project through a direct agreement with the affordable housing developer, rather than allowing the local government to control the project.

### **How the Density Bonus Can Help in a Friendly Jurisdiction**

While the density bonus law is often used by developers to obtain more housing than the local jurisdiction would ordinarily permit, it can also be a helpful land use tool in jurisdictions which favor the proposed project and want to provide support. Planners in many cities and counties may be disposed by personal ideology or local policy to encourage the construction of higher density housing and mixed use developments near transit stops and downtown areas, but are hampered by existing general plan standards and zoning from approving these sorts of projects. Elected officials often support these projects too, but may find it politically difficult to oppose neighborhood and

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*“The density bonus can provide a useful mechanism for increasing allowable density without requiring local officials to approve general plan amendments and zoning changes.”*

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environmental groups over the necessary general plan amendments, zoning changes and CEQA approvals.

The density bonus can provide a useful mechanism for increasing allowable density without requiring local officials to approve general plan amendments and zoning changes. A project that satisfies the requirements of the density bonus law often can obtain the necessary land use approvals through the award of the density bonus units and requested concessions and incentives, without having to amend the underlying land use requirements. Friendly local officials may encourage the use of the

density bonus to “force” the jurisdiction to approve a desired project.

### **How the Density Bonus Law Can Help in a Hostile Jurisdiction**

It is important to know that the density bonus is a state law requirement which is mandatory on cities and counties, even charter cities which are free from many other state requirements. A developer who meets the law’s requirements for affordable or senior units is entitled to the density bonus and other assistance as of right, regardless of what the locality wants (subject to limited health and safety exceptions). The density bonus statute can be used to achieve reductions in development standards or the granting of concessions or incentives from jurisdictions that otherwise would not be inclined to grant those items. Examples might include a reduction in parking standards if those standards are deemed excessive by the developer, or other reductions in development standards if needed to achieve the total density permitted by the density bonus.

Developers who nonetheless encounter hostility from local jurisdictions are provided several tools to ensure that a required density bonus is actually granted. Developers are entitled to an informal meeting with a local jurisdiction which fails to modify a requested development standard. If a developer successfully sues the locality to enforce the density bonus requirements, it is entitled to an award of its attorneys’ fees. The obligation to pay a developer’s

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*“A developer who meets the law’s requirements for affordable or senior units is entitled to the density bonus and other assistance as of right, regardless of what the locality wants.”*

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attorneys’ fees is a powerful incentive for local jurisdictions to voluntarily comply with the state

law density bonus requirements, even when the jurisdiction is not in favor of its effects on the project.

### **CEQA Issues in Density Bonus Projects**

Although there is no specific density bonus exemption from the California Environmental Quality Act, many density bonus projects are likely candidates for urban infill and affordable housing exemptions from CEQA. One commonly invoked exemption is the Class 32 urban infill exemption found in CEQA Guidelines Section 15332. That exemption is available if the project is consistent



with applicable general plan designation and zoning, the site is five acres or less and surrounded by urban uses, is not habitat for endangered, rare or threatened species, does not have any significant effects relating to traffic, noise, air quality or water quality, and is adequately served by utilities and public services. Other exemptions are available for high density housing projects near major transit stops (CEQA Guidelines Section 15195) and affordable housing projects of up to 100 units (CEQA Guidelines Section 15194).

A recent case, *Wollmer v. City of Berkeley*, clarified the use of the CEQA infill exemption for density bonus projects. In that case, an opponent of a Berkeley density bonus project challenged the City's use of the urban infill exemption on the grounds that

the City's modifications and waivers of development standards, as required under the density bonus law, meant that the project was not consistent with existing zoning. The court rejected that argument, finding that the modifications required by the density bonus law did not disqualify the project from claiming the exemption.

Not all density bonus projects will qualify for one of these CEQA exemptions, however. Sometimes the additional density provided to non-exempt projects may bring the project out of the coverage of an existing CEQA approval for a general plan, specific plan or other larger project. For instance, if a previously approved environmental impact report analyzed a 100 unit project as the largest allowed under existing zoning, but the developer is able to qualify for 120 units with a density bonus, the existing EIR may not cover the larger project. The larger density bonus project may require additional CEQA analysis for approval.

### **Using the Density Bonus to Satisfy Inclusionary Housing Requirements**

Many of California's cities and counties have adopted inclusionary housing ordinances, which typically require that a specified percentage of units in a new housing development be restricted as affordable units. The inclusionary requirements significantly reduce income from rental units and sales prices of for-sale homes. In today's tight housing market, compliance with local inclusionary requirements may make many projects economically infeasible. The density bonus provides one method for developers to improve the economics of their project while still complying with the inclusionary



housing requirements. While there are some local agencies which believe that inclusionary units do not qualify for density bonuses, it is generally understood that the density bonus is intended by state law to be a powerful financial tool to help developers achieve the inclusionary housing requirements.

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*“In today’s tight housing market, compliance with local inclusionary requirements may make many projects economically infeasible. The density bonus provides one method for developers to improve the economics of their project while still complying with the inclusionary housing requirements.”*

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Local inclusionary housing ordinances are currently in a state of uncertainty due to recent case law. One recent case, *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009), held that inclusionary housing requirements violate the Costa-Hawkins Act, which allows owners of residential rental housing to establish the initial rental rates for housing units without being subject to government rent limits. However, there are exceptions to the Costa-Hawkins rent control prohibition for developers who receive assistance under the density bonus law or who receive direct financial assistance from a public agency. Localities with inclusionary housing ordinances may welcome a developer’s use of the density bonus law because this will effectively prevent the developer from challenging the applicability of the inclusionary housing ordinance.

### **Density Bonus – A Flexible Tool**

The Density Bonus Law can be a powerful tool for a variety of different types of development projects, whether they are traditional affordable housing projects, predominantly market rate housing

developments, or senior projects. Obtaining greater density can help the developer of any type of project bring costs and financing sources into line by putting more homes on the land, reducing the per unit land costs. Use of the favorable parking requirements can reduce the amount of costly land needed for parking. The incentives and concessions to be provided by the local government can provide a helpful way to modify development requirements which may stand in the way of a successful project. Of course there is a price to pay for these benefits - the affordable units needed to earn the density bonus. Each developer will need to make a cost-benefit determination whether the cost of compliance is worth the benefits. But the Density Bonus Law is unquestionably a useful option for housing developers trying to make financial sense of their projects in today’s economy.

### **Density Bonus Statutes**

Please refer to pages 11 through 16.

## Density Bonus Statutes

**Government Code Sections 65915 – 65918. Effective as of January 1, 2012**

**65915.** (a) When an applicant seeks a density bonus for a housing development within, or for the donation of land for housing within, the jurisdiction of a city, county, or city and county, that local government shall provide the applicant with incentives or concessions for the production of housing units and child care facilities as prescribed in this section. All cities, counties, or cities and counties shall adopt an ordinance that specifies how compliance with this section will be implemented. Failure to adopt an ordinance shall not relieve a city, county, or city and county from complying with this section.

(b) (1) A city, county, or city and county shall grant one density bonus, the amount of which shall be as specified in subdivision (f), and incentives or concessions, as described in subdivision (d), when an applicant for a housing development seeks and agrees to construct a housing development, excluding any units permitted by the density bonus awarded pursuant to this section, that will contain at least any one of the following:

(A) Ten percent of the total units of a housing development for lower income households, as defined in Section 50079.5 of the Health and Safety Code.

(B) Five percent of the total units of a housing development for very low income households, as defined in Section 50105 of the Health and Safety Code.

(C) A senior citizen housing development, as defined in Sections 51.3 and 51.12 of the Civil Code, or mobilehome park that limits residency based on age requirements for housing for older persons pursuant to Section 798.76 or 799.5 of the Civil Code.

(D) Ten percent of the total dwelling units in a common interest development as defined in Section 1351 of the Civil Code for persons and families of moderate income, as defined in Section 50093 of the Health and Safety Code, provided that all units in the

development are offered to the public for purchase.

(2) For purposes of calculating the amount of the density bonus pursuant to subdivision (f), the applicant who requests a density bonus pursuant to this subdivision shall elect whether the bonus shall be awarded on the basis of subparagraph (A), (B), (C), or (D) of paragraph (1).

(3) For the purposes of this section, “total units” or “total dwelling units” does not include units added by a density bonus awarded pursuant to this section or any local law granting a greater density bonus.

(c) (1) An applicant shall agree to, and the city, county, or city and county shall ensure, continued affordability of all low- and very low income units that qualified the applicant for the award of the density bonus for 30 years or a longer period of time if required by the construction or mortgage financing assistance program, mortgage insurance program, or rental subsidy program. Rents for the lower income density bonus units shall be set at an affordable rent as defined in Section 50053 of the Health and Safety Code. Owner-occupied units shall be available at an affordable housing cost as defined in Section 50052.5 of the Health and Safety Code.

(2) An applicant shall agree to, and the city, county, or city and county shall ensure that, the initial occupant of the moderate-income units that are directly related to the receipt of the density bonus in the common interest development, as defined in Section 1351 of the Civil Code, are persons and families of moderate income, as defined in Section 50093 of the Health and Safety Code, and that the units are offered at an affordable housing cost, as that cost is defined in Section 50052.5 of the Health and Safety Code. The local government shall enforce an equity sharing agreement, unless it is in conflict with the requirements of another public funding source or law. The following apply to the equity sharing agreement:

(A) Upon resale, the seller of the unit shall retain the value of any improvements, the down payment, and the seller’s proportionate share of appreciation. The local government shall recapture any initial subsidy, as

defined in subparagraph (B), and its proportionate share of appreciation, as defined in subparagraph (C), which amount shall be used within five years for any of the purposes described in subdivision (e) of Section 33334.2 of the Health and Safety Code that promote home ownership.

(B) For purposes of this subdivision, the local government’s initial subsidy shall be equal to the fair market value of the home at the time of initial sale minus the initial sale price to the moderate-income household, plus the amount of any down payment assistance or mortgage assistance. If upon resale the market value is lower than the initial market value, then the value at the time of the resale shall be used as the initial market value.

(C) For purposes of this subdivision, the local government’s proportionate share of appreciation shall be equal to the ratio of the local government’s initial subsidy to the fair market value of the home at the time of initial sale.

(d) (1) An applicant for a density bonus pursuant to subdivision (b) may submit to a city, county, or city and county a proposal for the specific incentives or concessions that the applicant requests pursuant to this section, and may request a meeting with the city, county, or city and county. The city, county, or city and county shall grant the concession or incentive requested by the applicant unless the city, county, or city and county makes a written finding, based upon substantial evidence, of any of the following:

(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

# KMTG REFERENCE GUIDE

development unaffordable to low- and moderate-income households.

(C) The concession or incentive would be contrary to state or federal law.

(2) The applicant shall receive the following number of incentives or concessions:

(A) One incentive or concession for projects that include at least 10 percent of the total units for lower income households, at least 5 percent for very low income households, or at least 10 percent for persons and families of moderate income in a common interest development.

(B) Two incentives or concessions for projects that include at least 20 percent of the total units for lower income households, at least 10 percent for very low income households, or at least 20 percent for persons and families of moderate income in a common interest development.

(C) Three incentives or concessions for projects that include at least 30 percent of the total units for lower income households, at least 15 percent for very low income households, or at least 30 percent for persons and families of moderate income in a common interest development.

(3) The applicant may initiate judicial proceedings if the city, county, or city and county refuses to grant a requested density bonus, incentive, or concession. If a court finds that the refusal to grant a requested density bonus, incentive, or concession is in violation of this section, the court shall award the plaintiff reasonable attorney's fees and costs of suit. 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. 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. The city,

county, or city and county shall establish procedures for carrying out this section, that shall include legislative body approval of the means of compliance with this section.

(e) (1) In no case may a city, county, or city and county apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted by this section. An applicant may submit to a city, county, or city and county a proposal for the waiver or reduction of development standards that will have the effect of physically precluding the construction of a development meeting the criteria of subdivision (b) at the densities or with the concessions or incentives permitted under this section, and may request a meeting with the city, county, or city and county. If a court finds that the refusal to grant a waiver or reduction of development standards is in violation of this section, the court shall award the plaintiff reasonable attorney's fees and costs of suit. 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. 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.

(2) A proposal for the waiver or reduction of development standards pursuant to this subdivision shall neither reduce nor increase the number of incentives or concessions to which the applicant is entitled pursuant to subdivision (d).

(f) For the purposes of this chapter, "density bonus" means a density increase over the otherwise maximum allowable residential density as of the

date of application by the applicant to the city, county, or city and county. The applicant may elect to accept a lesser percentage of density bonus. The amount of density bonus to which the applicant is entitled shall vary according to the amount by which the percentage of affordable housing units exceeds the percentage established in subdivision (b).

(1) For housing developments meeting the criteria of subparagraph (A) of paragraph (1) of subdivision (b), the density bonus shall be calculated as follows:

Percentage Low-Income Units	Percentage Density Bonus
10	20
11	21.5
12	23
13	24.5
14	26
15	27.5
17	30.5
18	32
19	33.5
20	35

(2) For housing developments meeting the criteria of subparagraph (B) of paragraph (1) of subdivision (b), the density bonus shall be calculated as follows:

Percentage Very Low Income Units	Percentage Density Bonus
5	20
6	22.5
7	25
8	27.5
9	30
10	32.5
11	35

(3) For housing developments meeting the criteria of subparagraph (C) of paragraph (1) of subdivision (b), the density bonus shall be 20 percent of the number of senior housing units.

# KMTG REFERENCE GUIDE

(4) For housing developments meeting the criteria of subparagraph (D) of paragraph (1) of subdivision (b), the density bonus shall be calculated as follows:

Percentage Moderate-Income Units	Percentage Density Bonus
10	5
11	6
12	7
13	8
14	9
15	10
16	11
17	12
18	13
19	14
20	15
21	16
22	17
23	18
24	19
25	20
26	21
27	22
28	23
29	24
30	25
31	26
32	27
33	28
34	29
35	30
36	31
37	32
38	33
39	34
40	35

(5) All density calculations resulting in fractional units shall be rounded up to the next whole number. The granting of a density bonus shall not be interpreted, in and of itself, to require a general plan amendment, local coastal plan

amendment, zoning change, or other discretionary approval.

(g) (1) When an applicant for a tentative subdivision map, parcel map, or other residential development approval donates land to a city, county, or city and county in accordance with this subdivision, the applicant shall be entitled to a 15-percent increase above the otherwise maximum allowable residential density for the entire development, as follows:

Percentage Very Low Income	Percentage Density Bonus
10	15
11	16
12	17
13	18
14	19
15	20
16	21
17	22
18	23
19	24
20	25
21	26
22	27
23	28
24	29
25	30
26	31
27	32
28	33
29	34
30	35

(2) This increase shall be in addition to any increase in density mandated by subdivision (b), up to a maximum combined mandated density increase of 35 percent if an applicant seeks an increase pursuant to both this subdivision and subdivision (b). All density calculations resulting in fractional units shall be rounded up to the next whole number. Nothing in this subdivision shall be construed to enlarge or diminish the authority of a city, county, or city and county to

require a developer to donate land as a condition of development. An applicant shall be eligible for the increased density bonus described in this subdivision if all of the following conditions are met:

(A) The applicant donates and transfers the land no later than the date of approval of the final subdivision map, parcel map, or residential development application.

(B) The developable acreage and zoning classification of the land being transferred are sufficient to permit construction of units affordable to very low income households in an amount not less than 10 percent of the number of residential units of the proposed development.

(C) The transferred land is at least one acre in size or of sufficient size to permit development of at least 40 units, has the appropriate general plan designation, is appropriately zoned with appropriate development standards for development at the density described in paragraph (3) of subdivision (c) of Section 65583.2, and is or will be served by adequate public facilities and infrastructure.

(D) The transferred land shall have all of the permits and approvals, other than building permits, necessary for the development of the very low income housing units on the transferred land, not later than the date of approval of the final subdivision map, parcel map, or residential development application, except that the local government may subject the proposed development to subsequent design review to the extent authorized by subdivision (i) of Section 65583.2 if the design is not reviewed by the local government prior to the time of transfer.

(E) The transferred land and the affordable units shall be subject to a deed restriction ensuring continued affordability of the units consistent with paragraphs (1) and (2) of subdivision (c), which shall be recorded on the property at the time of the transfer.

(F) The land is transferred to the local agency or to a housing developer approved by the local agency. The local agency may require the applicant to identify and transfer the land to the developer.

# KMTG REFERENCE GUIDE

(G) The transferred land shall be within the boundary of the proposed development or, if the local agency agrees, within one-quarter mile of the boundary of the proposed development.

(H) A proposed source of funding for the very low income units shall be identified not later than the date of approval of the final subdivision map, parcel map, or residential development application.

(h) (1) When an applicant proposes to construct a housing development that conforms to the requirements of subdivision (b) and includes a child care facility that will be located on the premises of, as part of, or adjacent to, the project, the city, county, or city and county shall grant either of the following:

(A) An additional density bonus that is an amount of square feet of residential space that is equal to or greater than the amount of square feet in the child care facility.

(B) An additional concession or incentive that contributes significantly to the economic feasibility of the construction of the child care facility.

(2) The city, county, or city and county shall require, as a condition of approving the housing development, that the following occur:

(A) The child care facility shall remain in operation for a period of time that is as long as or longer than the period of time during which the density bonus units are required to remain affordable pursuant to subdivision (c).

(B) Of the children who attend the child care facility, the children of very low income households, lower income households, or families of moderate income shall equal a percentage that is equal to or greater than the percentage of dwelling units that are required for very low income households, lower income households, or families of moderate income pursuant to subdivision (b).

(3) Notwithstanding any requirement of this subdivision, a city, county, or a city and county shall not be required to provide a density bonus or concession for a child care facility if it finds, based upon substantial evidence, that the

community has adequate child care facilities.

(4) "Child care facility," as used in this section, means a child day care facility other than a family day care home, including, but not limited to, infant centers, preschools, extended day care facilities, and schoolage child care centers.

(i) "Housing development," as used in this section, means a development project for five or more residential units. For the purposes of this section, "housing development" also includes a subdivision or common interest development, as defined in Section 1351 of the Civil Code, approved by a city, county, or city and county and consists of residential units or unimproved residential lots and either a project to substantially rehabilitate and convert an existing commercial building to residential use or the substantial rehabilitation of an existing multifamily dwelling, as defined in subdivision (d) of Section 65863.4, where the result of the rehabilitation would be a net increase in available residential units. For the purpose of calculating a density bonus, the residential units shall be on contiguous sites that are the subject of one development application, but do not have to be based upon individual subdivision maps or parcels. The density bonus shall be permitted in geographic areas of the housing development other than the areas where the units for the lower income households are located.

(j) The granting of a concession or incentive shall not be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, or other discretionary approval. This provision is declaratory of existing law.

(k) For the purposes of this chapter, concession or incentive means any of the following:

(1) A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission as provided in Part 2.5 (commencing with Section 18901) of

Division 13 of the Health and Safety Code, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable, financially sufficient, and actual cost reductions.

(2) Approval of mixed use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and if the commercial, office, industrial, or other land uses are compatible with the housing project and the existing or planned development in the area where the proposed housing project will be located.

(3) Other regulatory incentives or concessions proposed by the developer or the city, county, or city and county that result in identifiable, financially sufficient, and actual cost reductions.

(l) Subdivision (k) does not limit or require the provision of direct financial incentives for the housing development, including the provision of publicly owned land, by the city, county, or city and county, or the waiver of fees or dedication requirements.

(m) Nothing in this section shall be construed to supersede or in any way alter or lessen the effect or application of the California Coastal Act (Division 20 (commencing with Section 30000) of the Public Resources Code).

(n) If permitted by local ordinance, nothing in this section shall be construed to prohibit a city, county, or city and county from granting a density bonus greater than what is described in this section for a development that meets the requirements of this section or from granting a proportionately lower density bonus than what is required by this section for developments that do not meet the requirements of this section.

(o) For purposes of this section, the following definitions shall apply:

(1) "Development standard" includes a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio,

# KMTG REFERENCE GUIDE

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.

(2) "Maximum allowable residential density" 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. Where 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 shall prevail.

(p) (1) Upon the request of the developer, no city, county, or city and county shall require a vehicular parking ratio, inclusive of handicapped and guest parking, of a development meeting the criteria of subdivision (b), that exceeds the following ratios:

(A) Zero to one bedroom: one onsite parking space.

(B) Two to three bedrooms: two onsite parking spaces.

(C) Four and more bedrooms: two and one-half parking spaces.

(2) If the total number of parking spaces required for a development is other than a whole number, the number shall be rounded up to the next whole number. For purposes of this subdivision, a development may provide "onsite parking" through tandem parking or uncovered parking, but not through onstreet parking.

(3) This subdivision shall apply to a development that meets the requirements of subdivision (b) but only at the request of the applicant. An applicant may request parking incentives or concessions beyond those provided in this subdivision pursuant to subdivision (d).

**65915.5.** (a) When an applicant for approval to convert apartments to a condominium project agrees to provide at least 33 percent of the total units

of the proposed condominium project to persons and families of low or moderate income as defined in Section 50093 of the Health and Safety Code, or 15 percent of the total units of the proposed condominium project to lower income households as defined in Section 50079.5 of the Health and Safety Code, and agrees to pay for the reasonably necessary administrative costs incurred by a city, county, or city and county pursuant to this section, the city, county, or city and county shall either (1) grant a density bonus or (2) provide other incentives of equivalent financial value. A city, county, or city and county may place such reasonable conditions on the granting of a density bonus or other incentives of equivalent financial value as it finds appropriate, including, but not limited to, conditions which assure continued affordability of units to subsequent purchasers who are persons and families of low and moderate income or lower income households.

(b) For purposes of this section, "density bonus" means an increase in units of 25 percent over the number of apartments, to be provided within the existing structure or structures proposed for conversion.

(c) For purposes of this section, "other incentives of equivalent financial value" shall not be construed to require a city, county, or city and county to provide cash transfer payments or other monetary compensation but may include the reduction or waiver of requirements which the city, county, or city and county might otherwise apply as conditions of conversion approval.

(d) An applicant for approval to convert apartments to a condominium project may submit to a city, county, or city and county a preliminary proposal pursuant to this section prior to the submittal of any formal requests for subdivision map approvals. The city, county, or city and county shall, within 90 days of receipt of a written proposal, notify the applicant in writing of the manner in which it will comply with this section. The city, county, or city and county shall establish procedures for carrying out this section, which shall include legislative body approval of the means of compliance with this section.

(e) Nothing in this section shall be construed to require a city, county, or city and county to approve a proposal to convert apartments to condominiums.

(f) An applicant shall be ineligible for a density bonus or other incentives under this section if the apartments proposed for conversion constitute a housing development for which a density bonus or other incentives were provided under Section 65915.

**65916.** Where there is a direct financial contribution to a housing development pursuant to Section 65915 through participation in cost of infrastructure, write-down of land costs, or subsidizing the cost of construction, the city, county, or city and county shall assure continued availability for low- and moderate-income units for 30 years. When appropriate, the agreement provided for in Section 65915 shall specify the mechanisms and procedures necessary to carry out this section.

**65917.** In enacting this chapter it is the intent of the Legislature that the density bonus or other incentives offered by the city, county, or city and county pursuant to this chapter shall contribute significantly to the economic feasibility of lower income housing in proposed housing developments. In the absence of an agreement with a developer in accordance with Section 65915, a locality shall not offer a density bonus or any other incentive that would undermine the intent of this chapter.

**65917.5** (a) As used in this section, the following terms shall have the following meanings:

(1) "Child care facility" means a facility installed, operated, and maintained under this section for the nonresidential care of children as defined under applicable state licensing requirements for the facility.

(2) "Density bonus" means a floor area ratio bonus over the otherwise maximum allowable density permitted under the applicable zoning ordinance and land use elements of the general plan of a city, including a charter city, city and county, or county of:

(A) A maximum of five square feet of floor area for each one square foot of

# KMTG REFERENCE GUIDE

floor area contained in the child care facility for existing structures.

(B) A maximum of 10 square feet of floor area for each one square foot of floor area contained in the child care facility for new structures. For purposes of calculating the density bonus under this section, both indoor and outdoor square footage requirements for the child care facility as set forth in applicable state child care licensing requirements shall be included in the floor area of the child care facility.

(3) "Developer" means the owner or other person, including a lessee, having the right under the applicable zoning ordinance of a city council, including a charter city council, city and county board of supervisors, or county board of supervisors to make an application for development approvals for the development or redevelopment of a commercial or industrial project.

(4) "Floor area" means as to a commercial or industrial project, the floor area as calculated under the applicable zoning ordinance of a city council, including a charter city council, city and county board of supervisors, or county board of supervisors and as to a child care facility, the total area contained within the exterior walls of the facility and all outdoor areas devoted to the use of the facility in accordance with applicable state child care licensing requirements.

(b) A city council, including a charter city council, city and county board of supervisors, or county board of supervisors may establish a procedure by ordinance to grant a developer of a commercial or industrial project, containing at least 50,000 square feet of floor area, a density bonus when that developer has set aside at least 2,000 square feet of floor area and 3,000 outdoor square feet to be used for a child care facility. The granting of a bonus shall not preclude a city council, including a charter city council, city and county board of supervisors, or county board of supervisors from imposing necessary conditions on the project or on the additional square footage. Projects constructed under this section shall conform to height, setback, lot coverage, architectural review, site plan review, fees, charges, and other

health, safety, and zoning requirements generally applicable to construction in the zone in which the property is located. A consortium with more than one developer may be permitted to achieve the threshold amount for the available density bonus with each developer's density bonus equal to the percentage participation of the developer. This facility may be located on the project site or may be located offsite as agreed upon by the developer and local agency. If the child care facility is not located on the site of the project, the local agency shall determine whether the location of the child care facility is appropriate and whether it conforms with the intent of this section. The child care facility shall be of a size to comply with all state licensing requirements in order to accommodate at least 40 children.

(c) The developer may operate the child care facility itself or may contract with a licensed child care provider to operate the facility. In all cases, the developer shall show ongoing coordination with a local child care resource and referral network or local governmental child care coordinator in order to qualify for the density bonus.

(d) If the developer uses space allocated for child care facility purposes, in accordance with subdivision (b), for purposes other than for a child care facility, an assessment based on the square footage of the project may be levied and collected by the city council, including a charter city council, city and county board of supervisors, or county board of supervisors. The assessment shall be consistent with the market value of the space. If the developer fails to have the space allocated for the child care facility within three years, from the date upon which the first temporary certificate of occupancy is granted, an assessment based on the square footage of the project may be levied and collected by the city council, including a charter city council, city and county board of supervisors, or county board of supervisors in accordance with procedures to be developed by the legislative body of the city council, including a charter city council, city and county board of supervisors, or county board of supervisors. The assessment shall be consistent with the market value of the space. A penalty levied against

a consortium of developers shall be charged to each developer in an amount equal to the developer's percentage square feet participation. Funds collected pursuant to this subdivision shall be deposited by the city council, including a charter city council, city and county board of supervisors, or county board of supervisors into a special account to be used for child care services or child care facilities.

(e) Once the child care facility has been established, prior to the closure, change in use, or reduction in the physical size of, the facility, the city, city council, including a charter city council, city and county board of supervisors, or county board of supervisors shall be required to make a finding that the need for child care is no longer present, or is not present to the same degree as it was at the time the facility was established.

(f) The requirements of Chapter 5 (commencing with Section 66000) and of the amendments made to Sections 53077, 54997, and 54998 by Chapter 1002 of the Statutes of 1987 shall not apply to actions taken in accordance with this section.

(g) This section shall not apply to a voter-approved ordinance adopted by referendum or initiative.

**65918.** The provisions of this chapter shall apply to charter cities.