

DENSITY BONUS LAW

What Are Incentives/ Concessions and Waivers?



Background on Density Bonus Law (DBL)

Originally enacted in 1979, California's Density Bonus Law (Gov. Code §§65915 - 65918) allows a developer to increase density on a property above the maximum set under a jurisdiction's General Plan land use plan. In exchange for the increased density, a certain number of the new affordable dwelling units must be reserved at below market rate (BMR) rents. Qualifying applicants can also receive reductions in required development standards. Greater benefits are available for projects that reach higher percentages of affordability (with unlimited density available for certain transit-adjacent, 100-percent BMR projects).

Besides granting rights to housing and mixed-used developments to increase density, the law provides three provisions that require local governments to grant qualifying projects: 1) incentives (or concessions)¹ that provide cost reductions; 2) waivers of development standards that would physically preclude the development of a project at the density permitted and with the incentives granted, and; 3) reductions in parking requirements.

Project Eligibility and Location

Any housing development that proposes five or more units and incorporates at least one of the requirements below is eligible for a density bonus:

- ▶ 5% units restricted to "Very Low Income"
- ▶ 10% units restricted to "Low Income" rental units or 10% "Moderate Income" for sale units
- ▶ 100% affordable units (excluding manager's units) with a maximum of 20% moderate units
- ▶ 10% "Very Low Income" units restricted for transitional foster youth, disabled veterans, or homeless
- ▶ 20% "Low Income" units for student housing at accredited colleges
- ▶ A senior housing development (no affordable units are required)²
- ▶ An age-restricted mobile home park (no affordable units required)³
- ▶ The project donates at least one acre of land to the jurisdiction for very low-income units, the land has the appropriate permits and approvals, and has access to needed public facilities
- ▶ Projects which include a child care facility

Units must be restricted to their level of affordability for at least 55 years by a recorded document. Eligibility is established by state law. A jurisdiction may not enact or impose local laws that conflict with State law or prohibit what the legislature intends to authorize. In addition, the project can be located anywhere in the jurisdiction. [Gov. Code §65915(b)(1) and §65915(i)]

¹The law uses both "concession" and "incentive" as coterminous terms.

²As defined in Sections 51.3 and 51.12 of the Civil Code

³As defined in Section 798.76 or 799.5 of the Civil Code

What Is the Density Bonus Amount?

The amount of additional units allowed under State law is set on a sliding scale, based upon two factors:

- ▶ The percentage of units in the project that will be set aside as affordable; and
- ▶ The household income category of those affordable units (very low, low, or moderate household income).

What Is an Incentive/Concession?

Usually, a development project must be modified and/or reduced to comply with established objective design standards and other development regulations such as limits on building height, setback, parking, and on-site open space requirements, etc. Concessions and incentives, as defined under State law, allow a developer to deviate from those design standards and/or development regulations when such regulations potentially make the project economically infeasible for the developer to build. Incentives/concessions include “[a] reduction in site development standards or a modification of zoning code requirements or architectural design requirements ... that result in identifiable and actual cost reductions, to provide for affordable housing costs.”

[Gov. Code §65915(d)(1) and §65915(k)]

How Many Incentives/Concessions Can Be Requested?

An applicant may apply for one or more “incentives” for density bonus projects, between one and four, depending upon the number of affordable units in the project – to reduce affordable housing costs. Included here is a table of incentives that can be requested.

In addition to this table of incentives, the DBL allows the granting of one incentive/concession for projects that include at least 20% of the units for lower income students in a student housing development.

[Government Code §65915(d)(2)(E)]

Income Category	% of Reserved Units			
Very Low	5%	10%	15%	Up to 80%
Low	10%	17%	24%	Up to 80%
Moderate	10%	20%	30%	Up to 80%
Senior	N/A	N/A	100%	N/A
Maximum # of Incentives/Concessions	1	2	3	4*

* To qualify for 4 incentives/concessions, a project must reserve at least 80% of the units to lower income households (very low, low, or combination thereof). The remaining 20% may be reserved for moderate income households. Government Code §65915(d)(2)(D).



How Do You Determine Economic Infeasibility?

An appellate court ruled in 2021 (*Schreiber v. City of Los Angeles*) that local agencies cannot require density bonus applicants to submit pro formas or other documentation to prove that requested incentives/concessions are necessary to make the housing development financially feasible. As the court explained, “[b]y requiring the city to grant incentives unless it makes particular findings, the statute places the burden of proof on the city to overcome the presumption that incentives will result in cost reductions.”^{3,4} Thus, incentives are presumed to result in cost reductions, and local governments may either accept this presumption and grant the incentives or overcome this presumption with a showing of substantial evidence to the contrary. A developer is not required to demonstrate on the front end that any requested incentive will result in actual cost reductions. However, is it still a good practice for applicants to reasonably document why the requested incentives will reduce affordable housing development costs. A local government’s other options to deny an incentive are to find on the basis of substantial evidence that the incentive would be contrary to state or federal law, or would have a specific, adverse and unavoidable impact on public health, safety or on a listed historic property.

[Gov. Code § 65589.5(d)(1)]

What Are Waivers?

Waivers are yet another form of assistance under State law, separate from incentives/concessions. A waiver is a reduction or modification of any **“development standards”** and other regulations when those requirements potentially make the construction of the project **physically infeasible**, if not approved. The developer must provide written documentation to justify why the waiver(s) is needed to construct the project. Unlike concessions and incentives, there is no limit in the number of waivers an applicant can request and applicants are entitled to a waiver of any and all development standards that would physically preclude the development at the density permitted and with the incentive(s) granted. [Gov. Code §65915(e)(1) and §65915(e)(2)]

“Development standards” includes a site or construction condition, including, but not limited to, a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a residential development pursuant to any ordinance, general plan element, specific plan, charter, or other local condition, law, policy, resolution, or regulation. [Gov. Code §65915(o)(1)]

³*Schreiber*, 69 Cal. App. 5th at 556.

⁴Gov. Code § 65915, subd. (d)(4) ([t]he city ... shall bear the burden of proof for the denial of a requested concession or incentive.”).

How Do You Determine Physical Infeasibility?

Waiver requests must be accompanied by sufficient documentation to demonstrate that the usual development standards would physically preclude development of the project with a density bonus. Furthermore, while the developer must justify the need for a waiver, a pro-forma (or other similar analysis) is not required. An example of sufficient documentation is a written explanation of the requested waiver(s) and a waiver exhibit showing the developable envelope remaining once all development standards are met.

[Gov. Code §65915(a)(2)]

Can the Agency Deny a Concession/Incentive or Waiver?

Yes. Nothing in the DBL requires a local government to grant an incentive or waiver that will potentially result in a specific, adverse impact upon public health, safety, the environment or on any property listed in the California Register of Historic Resources.

[Gov. Code §65915(d)(1) and §65915(e)(1)]



Projects in the Coastal Zone

When a density bonus project is proposed in the coastal zone, legislation that went into effect in 2019 struck a balance between the state goals of promoting housing and protecting the coast. Density bonuses, incentives, waivers, and parking reductions are to be permitted so that they are consistent with both density bonus law and the California Coastal Act. Granting of a density bonus or an incentive does not require a general plan, zoning, or local coastal plan amendment.

The purpose of this material is to provide guidance, which agencies and other entities may use at their discretion. This guidance does not alter lead agency discretion in decision-making, independent judgment and analysis, and preparing environmental documents for project or governmental action subject to CEQA requirements. This material is for general information only and should not be construed as legal advice or legal opinion.