

Procedures for Implementing State Density Bonus Law In Zoning Districts Without Numeric Density Standards

Introduction

This is a description of the procedures followed by the City of Berkeley for the analysis of a project that qualifies as an affordable housing project pursuant to Government Code Section 65915, the State Density Bonus Law. Specifically, this document describes how to determine the base project in zoning districts that do not have numeric density standards (R-3, R-4, R-5, Commercial Districts, and Mixed-Use Districts).

The State Density Bonus Law was enacted in 1979 to encourage the creation of more housing and to address the severe shortage of affordable housing in California by allowing an applicant to exceed the otherwise maximum residential density for a parcel by including a specific percentage of deed-restricted affordable housing. This document outlines how the City of Berkeley evaluates proposed density bonus projects.

While this document establishes a general set of procedures, every density bonus project is unique and should be treated as such. Thus staff's analysis of each proposed project will require careful review and continued discussion with applicants, colleagues, and the City Attorney.

Affordability Requirements

Pursuant to § 65915, Below Market Rate definitions:

Very Low Income	≥ 30% to 50% Area Median Income (AMI) ¹
Low Income	≥ 50% to 80% AMI
Moderate Income	≥ 80% to 100% AMI

Overview

Requirement	Duration	Reference	Applies to:
Qualifying Units	55 years	65915(c)(1)	All projects
Replacement Units	55 years	65915(c)(3)	Projects with existing units onsite ²
Demolition Ordinance	For the life of the building	23C.08.020	Projects with existing units onsite
Affordable Housing Mitigation Fee		22.20.065	Projects with units that are for rent
Inclusionary Housing Ordinance		23C.12	Projects with units that are for sale

¹ AMI is median index of household earning as it is calculated for Alameda County. For a more detailed discussion of AMI please refer to the Housing Element of the General Plan.

² Per § 65915(c)(3), replacement units are required when the project is proposed on a “parcel or parcels on which rental dwelling units are or, if the dwelling units have been vacated or demolished in the five-year period preceding the application, have been subject to a recorded covenant, ordinance, or law that restricts rents to levels affordable to persons and families of lower or very low income; subject to any other form of rent or price control through a public entity’s valid exercise of its police power; or occupied by lower or very low income households.”

Affordable Housing Projects that Qualify for a Density Bonus

If a project proposes to include dwelling units with affordability consistent with any one of the following levels (§ 65915(b)), it is considered a density bonus project:

- At least 10% of the total dwelling units are affordable to Lower Income households;
- At least 5% of the total dwelling units are affordable to Very Low Income households;
- A senior citizen housing development (requires at least 35 units) (see Civil Code Section 51.3 and 51.12 for definitions of qualified residents);
- At least 10% of the total dwelling units are affordable to Moderate Income households, when they are for sale (a “common interest development”); or
- At least 10% of the total dwelling units are for transitional foster youth or disabled veterans (Education Code Section 18541) that are affordable to Very Low Income households.

Overview (Described in more detail below)

Step 1: Calculate the “Base Project,” i.e. the project that meets the “maximum allowable density” for the project site, without any discretionary permits.

Step 2: Analyze the Fidelity between the Base Project and the Proposed Project.

Step 3: Calculate the Density Bonus, i.e. the allowed density increase.

Step 4: Accommodate the Density Bonus units (Waivers/Reductions and Concessions/Incentives)

Step 1. Calculate the Base Project

State Density Bonus Law requires a City to grant a density increase over “the otherwise maximum allowable gross residential density” for the specific zoning range and land use element of the general plan. Berkeley, however, does not have parcel-based density standards for higher density residential (R-3 and above) or commercial/mixed-use zoning districts. While the General Plan provides policy guidance for residential density, it cannot be applied on a per-parcel basis to set the maximum allowable residential density.

Because Berkeley does not have density standards in most zoning districts, we instead rely on zoning development standards and basic Building Code considerations to define a building envelope for a particular project site. The defining standards include setbacks, parking, height, lot coverage, open space, and floor area ratio. Allowable maximum residential density is therefore the residential floor area that these standards can accommodate on a given parcel. This envelope becomes the “base project” for the purpose of calculating density. In other words, per BMC Section 23C.14.040, the otherwise allowable maximum residential density is the floor area that can be achieved under the single use permit, which requires solely a finding of non-detriment under Chapter 23B.32.

Overview of Procedures to Identify the Base Project:

- a. Using the floor area and unit count of the proposed final project, calculate average unit size of the project based on the units within the proposed project.³
- b. Determine the maximum floor area of a hypothetical base project that would fit on the site without needing a development code waiver or reduction, while fully complying with the building code.
- c. Divide this area by the average unit size of the proposed units. Any fractional unit must be rounded up.⁴

Concepts for the Base Project:

- Must comply with all applicable development standards, without any discretionary permits to waive or modify a standard (such as additional height, reduced parking, setbacks or usable open space).⁵
- Must comply with applicable building and fire codes.
- Must be substantially consistent with the proposed project (not including waivers/reductions to allow the density bonus and any concessions).⁶ See below, “Fidelity between Base and Proposed Project,” for further discussion.
- Must exclude any commercial space.
- Must include any non-residential uses, including non-dwelling residential amenities (such as common laundry rooms, lounges, etc.) in proposed project, unless these uses are requested as a concession.⁷

³ This size will be larger than that typically placed on project plans, since it includes circulation space and other residential amenities that are above the ground floor.

⁴ Per § 65915(q), “Each component of any density calculation, including base density and bonus density, resulting in any fractional units shall be separately rounded up to the next whole number.”

⁵ All mechanical equipment and elevator penthouses must fit within the Base Project without the necessity of additional permits. Floor area that encroaches into the public right-of-way must be excluded, because it would require a permit from the Public Works Department.

⁶ The base project must include all required parking, even if the proposed project reduces the parking and the applicant proposes to pay an in-lieu fee.

⁷ This requirement is intended to prevent an applicant from counting non-residential space in the base project that is not actually intended for residential use, which would lead to a calculation of a larger bonus. Residential amenities (laundry rooms, bike parking, meeting rooms etc.) will not count towards the base project when located in areas of the project where residential uses are not allowed according to the Zoning Ordinance (i.e. residential uses on the ground floor in the C-1 District).

Step 2. Fidelity between Base Project and Proposed Project

The base project must be substantially consistent with the footprint, configuration of parking and usable open space, and ceiling heights of the proposed project. In other words, the base project and proposed project must have fidelity. This requirement reflects the City's desire to ensure that the project that the applicant wishes to build is reflected in the base project, and is also intended to prevent applicants from creating a base project that would be far denser and/or poorer in design quality than the applicant actually desires to build, for the purpose of obtaining a larger density bonus.

In general, the following design choices should be consistent in order for the base project and proposed project to have fidelity:

- Average unit size must be substantially the same in the base and proposed project;
- If parking is proposed in the basement of a base project, it must also be in the basement of the proposed project; if lifts are proposed in the base, they must also be in the proposed project;
- If useable open space is proposed on the roof of the base project, it must also be on the roof of the proposed project.

However, determining whether there is fidelity between the base and proposed projects is not always straightforward. Applicants should review each case with the Planning Manager as well as the City Attorney to ensure that this principle is applied consistently.

Step 3. Apply the Density Bonus

Once a base project has been established for a parcel given the characteristics of the proposed project, this base density is multiplied by the required density increase per § 65915(f). The result is the density bonus a qualifying affordable housing project is entitled to develop pursuant to State law. Below is a summary of the required procedures:

1. Determine percentage and income level of below market rate units based on § 65915(b), the 'qualifying units'
2. Calculate the allowable bonus (%) based on § 65915(f)⁸
3. Apply the number of bonus units to the base project. Round any fraction up to the next whole number.

Step 4. Accommodate the Density Bonus Units

- A. Waivers/Reductions: In order to accommodate the proposed density bonus, the City must relax development standards that would otherwise have the effect of physically precluding the bonus floor area or units. § 65915(e) provides further direction on granting waivers/reductions.

An applicant is entitled to the prescribed density increase based on the number / affordability of qualifying units the project provides; the City does not have discretion over the density increase. However, staff can work with the applicant to determine which

⁸ Per § 65915(n), a City may grant a density bonus that is greater than what is described in subdivision (f) only if permitted by local ordinance. Berkeley's ordinance only permits a greater bonus in the C-T District

waivers/reductions and concessions/incentives would result in the least detriment to the neighborhood and adjoining properties. A number of factors are considered in determining which standards to modify. These include neighborhood context, existing public policy or plan recommendations including the General Plan, Area Plans, Zoning Ordinance requirements, and environmental issues. In other words, staff will work to determine the options that would result in the least detriment to the neighborhood and adjoining properties. These determinations are subject to further review by the Zoning Adjustments Board and Design Review Committee.

In general, any combination of zoning development standards may be modified to accommodate the placement of bonus units. These include but are not limited to:

- Increased lot coverage
- Reduced setbacks
- Increased floor area ratio
- Increased building height or number of stories

- B. Concessions/Incentives: After requested waivers/reductions have been granted to accommodate the density bonus units, the applicant may request concessions/incentives, or modified development standards consistent with § 65915(k).

Per § 65915(d)(1), the City shall grant a concession or incentive unless it is able to make the finding that “the concession or incentive does not result in identifiable and actual cost reductions” or “would have a specific, adverse impact... upon public health and safety or the physical environment.” Projects are entitled to 1, 2, or 3 concessions/incentives, according to the criteria outlined in § 65915(d)(2).

Typical concessions include reduced parking or open space requirements.