APA California Chapter
American Planning Association

SB 1818 Q & A

CCAPA's Answers to Frequently Asked Questions Regarding
SB 1818 (Hollingsworth) – Changes to Density Bonus Law - 2005

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Background

The State of California enacted significant changes to the state's density bonus law, which went into effect on January 1, 2005. The legislation, SB 1818 introduced by Senator Hollingsworth (chaptered as Government Code Section 65915-65918), requires cities and counties to overhaul their ordinances to bring them into conformance with new state mandates. The previous law allowed for a 25% density bonus when housing projects provided between 10 – 20% of the units affordable (depending upon the level of affordability). In addition, cities and counties needed to provide at least one "concession" such as financial assistance or a reduction in development standards. The new law significantly reduces the amount of units that a developer must provide in order to receive a density bonus and requires cities and counties to provide between one to three concessions, depending upon the percentage of affordable units that the developer provides. It also imposes a new land donation rule, and statewide parking standards. Given the sweeping changes that the state has put in effect, CCAPA received numerous questions from its members regarding the new law and the following are answers to the most frequently asked questions.

Please note that the information provided is the opinion of experts in State housing law, but are not intended as legal advice. Please seek the guidance of your city attorney or county counsel on implementing the provisions of the new law in your jurisdiction.

Major Provisions

Density Bonus. The number of affordable units that a developer must provide in order to receive a density bonus is significantly reduced from prior law.

If at least 5% of the units are affordable to Very Low income households or 10% of the units are affordable to Low income households, then the project is eligible for a 20% density bonus.

If 10% of condominium or planned development units are affordable to Moderate income households, then the project is eligible to receive a 5% density bonus.

In addition, there is a sliding scale that requires:

- ?? an additional 2.5% density bonus for each additional increase of 1% Very Low income units above the initial 5% threshold;
- ?? a density increase of 1.5% for each additional 1% increase in Low income units above the initial 10% threshold; and
- ?? a 1% density increase for each 1% increase in Moderate income units above the initial 10% threshold.

These bonuses reach a maximum density bonus of 35% when a project provides either 11% Very Low income units, 20% Low income units, or 40% Moderate income units.

Continued Affordability. The continued affordability requirements for Very Low and Low income units have not changed. However, the requirements for Moderate income condominium units have changed significantly. The new law specifies that the city or county must insure that the initial occupants of Moderate income units meet the income qualifications. However, upon resale of the units the seller retains the down payment, the value of any improvements, and the seller's proportionate share of appreciation. The city or county recaptures its proportionate share of appreciation and those funds must be used within three years to promote Lower or Moderate income home ownership. It is unclear whether these units must be sold at market rate, or if a city or county can limit appreciation (see Question 7 below).

Concessions and Incentives. Cities and counties must grant more "concessions or incentives" reducing development standards, depending on the percentage of affordable units provided. "Concessions and incentives" include reductions in zoning standards, other development standards, design requirements, mixed use zoning, and any other incentive that would reduce costs for the developer. Any project that meets the minimum criteria for a density bonus is entitled to one concession from the local government agency, increasing up to a maximum of three concessions depending upon the amount of affordable housing provided. For example:

- ?? For projects that provide either 5% of the units affordable to Very Low income households,10% of the units affordable to Lower Income households, or 25% Moderate Income condominiums, then the developer is entitled to one concession.
- ?? When the number of affordable units is increased to 10% Very Low income units, 20% Lower income units, or 20% Moderate income units, then the developer is entitled to two concessions.
- ?? When the number of affordable units is increased to 15% Very Low income, 30% Lower income, or 30% Moderate income units, then the number of concessions is increased to three.

Waivers and Modifications of "Development Standards." A city or county may not impose a "development standard" that makes it infeasible to construct the housing development with the proposed density bonus. *In addition to* requesting "incentives and concessions," applicants may request the waiver of an unlimited number of "development standards" by showing that the waivers are needed to make the project economically feasible. The bill defines "development standards" as "site or construction conditions."

Land Donation. Additional density is available to projects that donate land for residential use. The land must satisfy all of the following requirements:

a) have the appropriate general plan designation and zoning to permit construction of units affordable to Very Low income households in an amount not less than 10% of the units in the residential development;
b) be at least one acre in size or of sufficient size to permit development of at least 40 units; and
c) be served by adequate public facilities and infrastructure.

The base density bonus is 15%, with increases in 1% increments for each percentage increase in the units that can be accommodated above the minimum 10% of the units described in (a), up to a maximum of 35%. The maximum combined density bonus is 35% under all rules. When the land is transferred, it must have all of the permits and approvals necessary for the development of the Very Low income housing units. The land and affordable units must be subject to deed restrictions ensuring continued affordability. The city or county may require that the land be transferred to a developer instead of the city.

Parking Standards. If a project qualifies for a density bonus, the developer may request (and the City and County must grant) new parking standards for the entire development project. The new standards are:

?? zero to one bedroom – one on-site parking space
?? two to three bedrooms – two onsite parking spaces
?? four or more bedrooms – two and one-half on-site parking spaces.

These numbers are inclusive of guest parking and handicapped parking and may be tandem or uncovered (but cannot be on-street). The parking standards may be requested even if no density bonus is requested.

Questions

1. Does this law apply to charter cities and charter counties?

Yes.

2. Can inclusionary requirements be imposed on the bonus units?

Most experts agree that inclusionary requirements cannot be imposed on the density bonus units themselves. The reasoning is that the Legislature intended to give developers market-rate units in exchange for affordable units. For instance, if a 100-unit project becomes a 120-unit project after receiving a density bonus, the inclusionary requirements may be imposed only on the original 100 units, not the 20 bonus units. If a city has a 20% inclusionary requirement, normally the city would require 24 inclusionary units in a 120-unit project (20% of 120 units). However, if 20 units are density bonus units, then the 20% inclusionary requirement can only be imposed on 100 units, requiring only 20 inclusionary units (20% of 100 units). The net impact is that only 16.7% (20/120) of the total units will be affordable inclusionary units, rather than 20% (24/120) as intended by the inclusionary ordinance.

3. Do inclusionary units qualify a project for a density bonus?

The density bonus law applies when an applicant "seeks a density bonus" and "agrees to construct" the required percentages of affordable units. There have been two interpretations of this section.

Many localities interpret the bill to mean that if the inclusionary units meet the requirements of the density bonus law, then the inclusionary units will qualify the development for a density bonus. For instance, in these jurisdictions, if an inclusionary ordinance requires that ten percent of the units be affordable to Low income households, a project complying with the ordinance will be eligible for a 20% density bonus.

Other localities interpret this to mean that when a local jurisdiction <u>imposes</u> its inclusionary housing requirement, the applicant is not "agreeing to construct" the units and so is not eligible for a density bonus. The legislative history of the amendments to SB 1818 confirms that the changes in the law were not intended to affect an inclusionary zoning ordinance.

You may want to discuss this issue with your city or county attorney.

Note that no density bonus need be given in any case unless an applicant actually "seeks"--applies for--the bonus, even if the project would otherwise be eligible for a density bonus.

4. Can a developer successfully argue that the inclusionary requirements make the project infeasible?

No. Developers can only request a waiver of "development standards" that make a project infeasible. "Development standards" are defined as "site or construction conditions." The proponents of the bill included this definition specifically so that an inclusionary ordinance would not be considered a development standard. An inclusionary ordinance doesn't regulate site or construction conditions; it only affects the economics of the project. Consequently, a developer cannot request a waiver by arguing that the inclusionary ordinance makes the project infeasible.

Some inclusionary ordinances do have requirements that might be considered to be site and construction conditions such as requiring dispersal of units, similarity in design to market-rate units, etc. Presumably a developer could try to show that these are site or construction conditions and request that they be waived, following the procedures discussed in Question 9.

5. Can a city or county require design review for density bonus projects, even if it renders the project infeasible?

The short answer is "no"--if, indeed, design review will make the project infeasible. As discussed in the previous question, no local agency can apply any development standard that will preclude the development of a density bonus project. How would this work in the case of design review? The process of design review is not a development standard, so no waiver could be requested. Design review conditions, however, usually involve site or construction requirements, so would probably be considered to be "development standards." The issue would most likely arise if an applicant argued that design review conditions made the project infeasible and presented evidence showing that the project would not be economically feasible with the conditions. Cities and counties should consider including in their local ordinances a process for evaluating requests for waivers including the type of economic information which must accompany the request and how the information will be evaluated.

6. Can a city or county place additional resale restrictions on a Moderate income condominium and planned developments?

If an applicant receives no public subsidy and agrees to impose the equity-sharing required by SB 1818, the city or county cannot require additional resale restrictions (see discussion in Question 7 below).

However, if a city or county has an inclusionary ordinance that requires Moderate income units to have resale restrictions or longer periods of affordability, the city is under no obligation to count as inclusionary units, those Moderate income units that meet only density bonus standards. For instance, assume that a city has a 15% Moderate income inclusionary requirement and requires a 55-year resale restriction. A developer could propose 15% Moderate income units with the equity-sharing required by SB 1818 and receive a density bonus. However, since none of the units would meet the standards in the City's inclusionary ordinance, the City would not be required to count any of the units as inclusionary units. The developer would have to provide another 15% Moderate income units meeting the City's standards for resale restrictions and 55 years of affordability. In this case, most developers would choose to apply the city's standards to their Moderate income units.

7. Is there a requirement for continued affordability for Moderate income condominium and planned developments?

No, only the initial occupant must meet the affordable income criteria. After the initial owner sells the unit, that person is entitled to receive the value of their down payment, improvements to the property, and proportional share of the appreciation of the unit. The City or County receives its proportional share of the appreciation and must use that money within three years to promote affordable, ownership housing.

The bill is not clear about how appreciation is defined. Proponents of the bill state that it was intended to work as follows: if a locality makes a unit available for

$200,000 to a moderate income purchaser but the unit has a value at the time of purchase of $300,000, then the locality gets to recapture the $100,000 subsidy upon resale. In addition, if the unit goes up in value another $30,000 between the date or purchase and the date of resale, the locality and purchaser split the appreciation per the formula in the bill. The bill does not specifically require that the units be re-sold at fair market price, which may allow localities to impose resale controls limiting the amount of appreciation.

8. If a developer is proposing a mixture of affordable housing types (i.e., 5% Very Low plus 10% Low income units) how is the density bonus calculated?

SB 1818 amended Government Code Section 65915 to delete the language in subsection (l), which previously stipulated that an applicant who "agrees to construct both 20 percent of the total units for Lower income households and 10 percent of the total units for Very Low income households is entitled to only one density bonus and at least one additional concession or incentive". Localities should assume, therefore, that if the proposed percentage of units by affordable housing type meets or exceeds the thresholds stipulated in subsection (g) they will have to grant the 20 percent density bonus to which the applicant is entitled for each type of affordable housing that exceeds the threshold specified in subsection (g) (1). Note, however, that this subsection now specifies that the <u>maximum</u> density bonus to which an applicant is entitled is 35 percent, in contrast to the previous requirement, which stated that the applicant was entitled to a <u>minimum</u> bonus of 25 percent but did not specify a maximum. If the applicant proposes a mixture of affordable housing types that meets or exceeds the threshold for more than one housing type, he or she is, therefore, not entitled to receive a bonus that exceeds 35 percent of the density that would otherwise be allowed by applicable zoning and the land use element.

Neither the former version of Sec. 65915 nor the amendments in SB 1818 provide more guidance about how agencies should calculate the density bonus for a project that includes a mixture of affordable housing types when the project does not meet the specified thresholds for each affordable housing type. For example, an applicant might propose to make 5 percent of the units affordable to Very Low income households plus 5 percent affordable to Low income households. In that case, one way to calculate the bonus would be to grant the incremental density allowed in subsection (g) for the Low income units (1.5 percent multiplied by 5 or a total of 7.5 percent for the Low income units) in addition to the 20 percent bonus to which the applicant is entitled for the 5 percent Very Low income units.

Another way to calculate a mixture of affordable housing types it to first evaluate the Very Low income units only. If a project has 5% Very Low income units then it would be entitled to a 20% bonus. Then evaluate the 5% Low income units by themselves. These don't qualify for any density bonus (10% Low income units required). Then, consider all 10% of the units as Low income units. This again permits a 20% bonus. Consequently, the project is only entitled to a 20% bonus. (This has the effect of encouraging developers to have more Very Low income units, since 8% Very Low income units would give the developer the 27.5% density bonus.) Since the law is silent on which manner to calculate a density bonus for a mixture of income levels, it is important for the city or county to choose a method and be clear and consistent in the implementation.

Also, cities and counties should amend their density bonus provisions to delete any reference to the "one density bonus" limit that Sec. 65915 previously imposed. They may want to amend their ordinances to also specify how to calculate both the minimum <u>and</u> the maximum number of additional units that might be granted pursuant to this section and to specify the 35 percent maximum stipulated as a result of SB 1818.

9. Can a city or county require the developer to choose from a specific list of concessions chosen by the local agency? What happens if they want a concession that is not on the list?

A city or county can request that a developer choose a concession or incentive from a list that the city or county has prepared as acceptable concessions; however, under certain circumstances, the developer may be entitled to other incentives not on the city or county list.

Section 65915 (l) defines "concession or incentive" as 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. Examples include a reduction in setback and square footage requirements and reduction in parking ratios. Approval of mixed use zoning is a "concession" if the non-residential use is compatible with the housing project and the existing or planned development in the area. In addition, the developer may propose other regulatory incentives or concessions that result in "identifiable, financially sufficient, <u>and</u> actual cost reductions"

Subsection (d)(1) does make clear that the city or county may refuse to grant a concession or incentive if it makes certain findings based upon substantial evidence. The type of evidence that would be required to support such findings is spelled out in subsections (d)(1) (A) and (B) and includes a determination that the concession or incentive is not required in order to provide the proposed affordable housing units or "would have a specific adverse impact … upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources" so long as there is no way to mitigate or avoid the specific impact without making the development unaffordable to Low and Moderate income households. As noted in subsection (d)(3), these are essentially the same findings that Government code Section 65589.5 requires in order to deny or impose certain conditions on an affordable housing development.

Local agencies are advised to pay close attention to these provisions because of the penalties that subsection (e) imposes on localities that refuse to waive standards and requirements in violation of the law. In addition to being ordered to grant the requested waiver, the local agency may be liable for the plaintiff's attorney's fees and litigation costs.

In addition to the required concessions and incentives, note that subsection (f) states that cities may not apply development standards that would preclude the development of the density bonus units. The applicant may request a waiver and "shall show that the waiver or modification is necessary to make the housing units economically feasible." Local agencies should, therefore, require that applicants provide financial data showing that the proposed waiver or modification is necessary to make the affordable units economically feasible. Pursuant to subsection (d) (3), agencies should also amend their ordinances to establish procedures for accommodating qualified projects by "waiving or modifying development and zoning standards that would otherwise inhibit the utilization of the density bonus on specific sites." Applicants proposing qualified projects should not be subjected to a variance procedure but, instead, should be able to apply for an exception or waiver based on specific findings, including economic considerations, that are spelled out in the ordinance.

10. Do the new reduced parking requirements apply to the affordable units only or to the entire project?

The new parking standards apply to the entire project, both affordable and market rate units but only upon request of the developer.

11. Can cities and counties require guest parking for affordable projects?

No. The new parking standards that apply upon request of the developer are inclusive of guest parking and handicapped parking. It should be noted that state law cannot preempt federal ADA requirements.

12. Does a city or county need to conduct a CEQA analysis prior to adopting changes to their local ordinances in order to comply with the new law?

Yes. A change in zoning or other land use ordinance is a project subject to CEQA (State CEQA Guidelines Section 15378(a)[1]; *Bozung v. LAFCO* [1975] 13 Cal.3d 263). Under CEQA, the baseline for determining the significance of a project is the existing environment. SB 1818 will require agencies to adopt ordinances that may result in significant indirect effects on the environment by reducing the effectiveness of existing protective standards. Adopting new, less restrictive standards may result in a significant effect.

For example, in *City of Redlands, et al. v. County of San Bernardino* (2002) 96 Cal.App.4th 398, Redlands and other cities sued San Bernardino County over a general plan amendment which modified existing County general plan provisions relating to development within City spheres of influence. Where previous County policy had been to defer to City development standards within the spheres (including more restrictive regulations and growth control measures), the general plan amendment would have provided the County more leeway to approve projects that did not conform to City standards. The County adopted a negative declaration for the general plan amendment.

The court found that the County's initial study "does not provide evidence to show how such a shift in policy would have little or no effect on the environment."

The court noted that "CEQA reaches beyond mere changes in the language in the agency's policy to the ultimate consequences of such changes to the physical environment." Although the CEQA analysis is not required to be as detailed as a project-specific analysis, it is required to analyze the expected secondary effects of the general plan amendment. The cities presented substantial evidence, in the form of specific examples of city standards that were more restrictive than County standards and that would no longer be required within unincorporated spheres if the general plan amendment were approved, that the general plan amendment may have a significant effect. The court ordered preparation of an EIR.

13. Are affordable projects exempt from CEQA or can a local government agency require negative declarations or environmental impact reports for affordable projects with inadequate parking?

SB 1818 does not establish an exemption from CEQA requirements. The regulatory concessions that must be offered to a qualifying project do not and cannot include non-compliance with CEQA. CEQA operates independently of SB 1818 and is not limited by that statute. However, a project may qualify for a categorical exemption under State CEQA Guidelines Section 15332 (Infill Development Projects) if it meets the criteria set out in that section and is not subject to any of the exceptions established under Section 15300.2.

Separately, Public Resources Section 21159.24 provides a qualified, statutory exemption for specified inclusionary infill housing projects. This exemption would not apply if there is "a reasonable possibility that the project will have a project-specific, significant effect on the environment due to unusual circumstances."

An agency must prepare an initial study for any project (including an affordable project) that is not exempt from CEQA. If there is substantial evidence (e.g., facts or expert opinion based on facts) that the project may result in a significant effect on the environment, an EIR must be prepared. If there is no substantial evidence to that effect, a negative declaration or mitigated negative declaration can be prepared.

The baseline for determining the significance of a project impact is the existing environment. The significance of a project's impacts depends upon the extent of adverse change to the environment that would result from the project. Where a project involves a density bonus, the "project" for purposes of CEQA is the proposed activity including the bonus and any related concessions.

Government Code Section 65915 comprises the density bonus law. Subdivision (d) authorizes a local agency to deny a proposed incentive/concession when there is substantial evidence that the incentive/concession would have a "specific adverse impact" on "public health and safety" (as defined in Government Code Section 65589.5(d)[2]), or the physical environment, or on a property listed on the California Register of Historical Resources and there is "no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households." This would authorize an agency to deny a proposed incentive/concession when an EIR has been prepared that identifies significant project impacts that either cannot be avoided or that could be mitigated, but the mitigation would make the project unaffordable. Because a mitigated negative declaration can only be released when the applicant has agreed to the mitigation measures, a local agency could also deny incentives/concessions on the basis of an initial study if the applicant was unwilling to agree to the mitigation measures due to cost. The EIR or the initial study would provide the "substantial evidence" necessary to support denial under Section 65915(d).

It is important to note that the clear intent of the legislation is to facilitate the construction of affordable housing through density bonuses and reductions in local development standards. Therefore, the CEQA analysis conducted by the city or county should focus on reasonable CEQA impacts, and not as a potential loophole to make the process of building affordable housing more difficult.