



Planning and Development Department  
Land Use Planning Division

## MEMORANDUM

DATE: April 14, 2016

TO: Zoning Adjustments Board

FROM: Carol Johnson, AICP  
Acting Planning Director

SUBJECT: Use Permits for Additional Height/Floor Area in Density Bonus Projects

### ISSUE

The standard practice by staff in the Land Use Planning Division has been to advise applicants that if they elect to use the State Density Bonus on a project, they may not also apply for a Use Permit to add extra height to the project. Some applicants have argued that this is inconsistent with the Density Bonus law (Government Code section 65915).

### DISCUSSION

Government Code section 65915(f) defines the term “density bonus” as:

...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....

Some applicants have argued that the term “the otherwise maximum allowable density” necessarily includes any and all density that is permissible with a Use Permit. Thus, they conclude that under the City’s density bonus process, the “base project” must include any additional height for which a Use Permit could be issued. While the language of Section 65915(f) appears to support this argument, it would equally support the argument that “the otherwise maximum allowable density” *also* includes any additional height or coverage that might be “allowable” with a variance – an unknowable and potentially very significant increase. This is not a reasonable interpretation of the language, and we believe it was not likely Legislature’s intent in adopting Section 65915(f).

A local density bonus ordinance (as required by state law) would give the City the opportunity to clarify some of this and other ambiguities in the law. However the City of Berkeley has not yet adopted a local ordinance for implementing the State Density Bonus law in its modern form.<sup>1</sup>

The Density Bonus law is referenced in only two sections of the Zoning Ordinance: Section 23B.34.050.B (Requirements Applicable to All Green Pathway Projects), which requires that all rights under the State Density Bonus law be waived in order to participate in the Green Pathway program; and Section 23C.12.050 (State of California Density Bonus Requirements), which was first adopted in 1986 and has not been amended to conform to state law. Staff believes that a reasonable interpretation of Section 65915(f) is to allow applicants to apply for discretionary approvals otherwise provided for in the Zoning Ordinance in addition to a density bonus, but not to count such discretionary approvals as part of the base project for purposes of calculating the size of the density bonus. This interpretation gives effect to the language of Section 65915(f) by not trading off density bonuses against “other allowable density”, while at the same time at least partially satisfying the goals of the Zoning Ordinance. Use Permits for such discretionary height would still be evaluated on their own merits independent of the changes to the project that may result from the density bonus.

In order to demonstrate how projects should be evaluated when the application includes both the State Density Bonus and a Use Permit for extra height, the attached procedure was developed showing the potential outcomes in terms of number of units and height of the project. The example project is simplified and conceptual in nature; however, it helps to underscore the requirement that the Use Permit for extra height be evaluated independently from any changes to development standards that come out of the State Density Bonus process.

### CONCLUSION

The City has no authority to arbitrarily refuse a Use Permit application for extra height in conjunction with a State Density Bonus project. Such Use Permits must be reviewed in accordance with the required findings as set forth in the subject zoning district. If the Use Permit for extra height is approved, the resulting floor area is added to the State Density Bonus project; however, it does not increase the base project for purpose of calculating the number of bonus units.

---

<sup>1</sup> Section 65915 has been amended numerous times in the last 15 years. Many of these amendments were quite significant. BMC Section 23C.12.050 bears little resemblance to the law in its current state, and is flatly inconsistent with it in some significant respects.