

**Responses to Council Member Frye’s Questions  
Regarding Affordable Housing Density Bonus  
Prepared by  
City Planning & Community Investment and Development Services**

**Overall Response**

The purpose of the Affordable Housing Density Bonus is to increase the supply of affordable housing throughout the State of California. These amendments to the existing State law were crafted by the State in part to address obstacles, developed by jurisdictions, to limit the production of affordable housing.

The State also put in place a “safety valve” (findings to deny an incentive) to address incentives that are not related to the provision of affordable housing or have an adverse impact. Applicants may request, as an incentive, “relief” from a development regulation. However, if the following findings in Section 142.0740(a)(4) , as summarized below, can be made then the incentive is to be denied.

- (A) The incentive is not required in order to provide for affordable housing costs.
- (B) The incentive would have a specific adverse impact upon health and safety, or the physical environment, or on property listed in 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.

**Reponses to Questions**

1. Based on our understanding as provided by the City Attorney’s Office, the only changes that could be made to the density bonus regulations that would have a lesser potential for impacts would be to remove the two City initiated amendments. However, the decision makers would still be required to adopt the Findings and Statement of Overriding Considerations identified in the Supplemental EIR. Regarding public participation, as the question relates to project reviews, the public will continue to have input into those projects using the Affordable Housing Density Bonus that continue to require a discretionary permit.
2. State law does not require nor prohibit the granting of a waiver of Developer Impact fees as an incentive. The City is specifically not offering a waiver of fees as an incentive. Section 143.0740(a)(3) states.  
“Nothing in this division shall be construed to require the City or any of its related legal entities, including the San Diego Housing Commission, to provide a direct financial incentive, including the provision of land, or the waiver of fees or dedication requirements.”
3. State law does not require nor prohibit the granting of a waiver of a building fee or any other fees normally collected. The City is specifically not offering a waiver of any fees as an incentive. See response 2 above.

4. Building code requirements cannot be waived as an incentive, only development regulations that exceed building code requirements may be requested as an incentive.

Landscape regulations can be requested as an incentive. However, the State provides findings for denying a request. It is not likely that a landscape regulation would be so costly as to make the project unaffordable. See the findings for denial at the beginning of this response in “Overall Response”.

5. Agriculturally zoned land within the AG zone is not available for development using Affordable Housing Density Bonus. Residential development is restricted to only a residence as an accessory to the agricultural use.

Agriculturally zoned land within the AR zone would only be affected if an applicant applied to develop a new single family subdivision, of five or more units, using rural cluster development subject to a Planned Development Permit Process Four or within the NCFUA as a Process Five.

Industrially zoned land is not available for development using Affordable Housing Density Bonus.

Residentially zoned land for single family is not affected by the Affordable Housing Density Bonus. Only proposals of five or more units, in a proposed a subdivision, would be affected subject to a Planned Development Permit Process Four.

Open space zoned land is not available for development using Affordable Housing Density Bonus.

6. An applicant can request a deviation from a setback established to provide visibility at an intersection or driveway. Such a request would be reviewed and, unless some unusual mitigating circumstances were present, would be denied based on the State finding regarding an adverse affect on health and safety.
7. Hours of operation and noise do not fit into the definition of an incentive, they are operational issues. However, if it were somehow argued that these items did fall into the definition then there would need to be evidence that (1) not granting the incentive would render the housing unaffordable and (2) that in the case of noise especially, that the incentive was not an impact on health and safety.
8. Yes there is a limit to the extent of the incentive requested. The State findings for denial of an incentive require that there be a nexus between the requested incentive and the provision of affordable housing. There must be a direct proportionality between the financial value of the incentive as it relates to the ability to make the units affordable.
9. The affect of a zero side yard setback on light and air for an adjoining property would depend on the project specifics including project location, the built characteristics of the adjacent development, and the zoning of the adjacent properties (single-family, multi-family, commercial, mixed use commercial). At the very least the required setback for the adjacent property would remain and that setback would be as required in the zone.

Every request for an incentive will be reviewed on a case-by-case basis in light of the findings for denial. In a situation where a previously conforming structure on an adjacent property was built to the property line, when that is no longer allowed, and units in that adjacent property relied on windows along that property line for light and air, then the findings for denial could be made for an impact to health because building the new structure to the property line would remove access to light and air for the adjacent units.

10. According to the State Senate Bill No. 435, “It is the intent of the Legislature that local governments encourage, to the maximum extent practicable, the location of housing developed pursuant to Section 65915 of the government Code **in urban areas with adequate infrastructure to serve the housing.**” An incentive would not be granted if the requisite findings for denial regarding health and safety and specific adverse effects are made. The Supplemental EIR correctly addressed the impacts that could potentially occur if the Density Bonus incentives were utilized at a larger scale than what has historically occurred.
11. The Supplemental EIR did not differentiate between ministerial and discretionary projects but analyzed them together within the cumulative analysis. Note that the Land Development Code EIR No. 96-0333 identified cumulative impacts to Soils/Erosion Hazard, Air Quality, Hydrology/Water Quality, Biological Resources, Land Use, Transportation/Circulation, Landform Alteration, Historical Resources, and Paleontological Resources. The Supplemental EIR identified cumulative impacts to visual quality and parking.
12. Staff acknowledges the inconsistency between these two definitions. However, the Density Bonus Ordinance reflects state law (SB 435, enacted 2005), so the inconsistency is actually between SB 435 and CEQA. It is beyond staff’s authority to resolve the inconsistency. The City is obliged to implement the state requirements, so staff has dealt with this situation by interpreting SB 435 to mean that an incentive that meets the definition cited within the ordinance (and state law), and for which findings of denial could not be made, would be considered ministerial even though the project might require a discretionary process. That is, within a discretionary process, the decision maker would not have the discretion to deny or modify a “qualifying” incentive, although the decision maker could deny the project for other reasons based on required permit findings.
13. Section 65915(k) of the State Affordable Housing Density Bonus states that the granting of the incentive cannot require a discretionary approval as stated below.

“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.”
14. The phrase “In and of itself” is taken directly from the state law. It means a project using density bonus that requests an incentive cannot be required to get a discretionary permit to receive the incentive **if no other permit is already required.** However, if a project requires a discretionary permit, regardless of the requested incentive, then that discretionary permit and CEQA review are still required.

Examples of discretionary permit requirements:

- In the Coastal Overlay Zone all new development requires a Coastal Development Permit (CDP) Process Two or Three. A project using Affordable Housing Density Bonus must process a CDP.
- A project site containing environmentally sensitive lands requires a Site Development Permit (SDP) Process Three. A project using Affordable Housing Density Bonus must process a SDP.
- A project that complies with all of the underlying regulations does not need to process a Planned Development Permit (PDP). However, a PDP Process Four is required for projects that request a deviation from development regulations. If a project using Affordable Housing Density Bonus is entitled to one incentive, and the incentive requested is a deviation to a setback (as an example), and no other deviation is requested, then that project is not required to process a PDP (the incentive in and of itself cannot require a discretionary approval). However, if the same project were to request a second deviation, a PDP must be processed.

15. A development regulation as stated in SB435 is

- 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.
- 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.
- 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. This subdivision 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.

The City's implementing policies, development standards, design guidelines, and design manuals are included within the umbrella of development regulations for which deviations in the form of incentives may be requested and approved provided the findings for denial are not made.

16. Within CIPOZ Type "A", in all communities, no permit is required when a project complies with the requirements of the CPIOZ, and a Site Development Permit is required when a project does not comply with all of the requirements of the CPIOZ. A project using the Affordable Housing Density Bonus could request as an incentive one of the requirements of the CPIOZ. Similar to the example for the PDP in response #14, a Site Development Permit would not be required unless the number of deviations requested exceeded the number of incentives allowed. Again it is important to keep in mind that most CPIOZ requirements are related to design. The State findings to deny a requested

incentive include the finding that the incentive is not necessary to make the housing affordable. The finding creates a nexus between the incentive and making the project affordable. Design requirements are rarely so costly as to cause a project to become unaffordable.

Within CPIOZ Type "B", in all communities, a Site Development Permit is required for all projects, similar to the example of the Coastal Development Permit in response #14. A project using Affordable Housing Density Bonus within CPIOZ must process a Site Development Permit Process Three.

17. No permit is required for projects within the Clairemont Mesa Height Limit Overlay Zone if they comply with the regulations (30- or 40-foot height limit). A project using Affordable Housing Density Bonus can request, as an incentive, the ability to exceed the height limit without having to process a Site Development Permit **if no other permit is required**. Again, the project would be reviewed against the State findings to demonstrate that the excess height is indeed required to make the housing affordable.
18. The State Affordable Housing Density Bonus Law does not limit which regulations may be requested as incentives. However, the State provides the finding for denial of an incentive, as discussed in the Overall Response section at the beginning of this response. An applicant could conceivably request a height or other deviation (as defined in the state law) to the Airport Approach Overlay Zone for Lindbergh Field. However, the purpose of this overlay zone is protection of health and safety (to find that the request would have an adverse affect on heath and safety is a basis for denial of an incentive). In addition to the finings for denial, are procedural requirements for development in this overlay zone. These include, but are not limited to, providing to the City a letter from the FAA stating that:
  - The proposed development does not require notice to the FAA, or a determination of No Hazard from the Air Traffic Division of the Western Pacific Regional Office of the FAA (stating that the proposed development has been determined not to be a hazard to air navigation).
  - The Airport Authority has concurred with FAA determination in one of the following ways
    - The City has provided the Airport Authority with a copy of the FAA determination and has received a response stating that the Airport Authority is aware of the proposed development and that it concurs with the determination made by the Regional Office of the FAA; or
    - The Airport Authority has not responded with 40 calendar days from the date that the FAA determination was forwarded to the Airport Authority.

Again each request for an incentive will be reviewed on a case by case basis. However, it is most likely that any incentive which involves a request to deviate from the regulations of the Airport Approach Overlay Zone for Lindbergh Field would rise to the level of the findings for denial of an incentive based on health and safety.

19. The State Affordable Housing Density Bonus Law does not limit which regulations may be requested as incentives. However, the State provides the finding for denial of an incentive, as discussed in the Overall Response section at the beginning of this paper. An applicant could conceivably request a height or other deviation (as defined in the state

law) to the Airport Environs Overlay Zone. However, the purpose of this overlay zone, as with the Airport Approach Overlay Zone, is protection of health and safety (to find that the request would have an adverse affect on heath and safety is a basis for denial of an incentive). Again each request for an incentive will be reviewed on a case by case basis. However, unless the incentive qualified for the exception to the requirements (Section 132.0303) it is most likely that any incentive which involves a request to deviate from the regulations of the Airport Environs Overlay Zone would rise to the level of the findings for denial of incentive based on health and safety.

20. The statement is accurate. The City is not requesting any changes to the Coastal Height Limit Overlay Zone which implements Proposition D. How the City is able to request an amendment to the overlay zone is procedural. A vote to change the Coastal Height Limit Overlay Zone is the process that would allow the City to request an amendment of the Local Coastal Program.