




## DEPARTMENT OF CITY PLANNING Executive Office

City Hall, 200 N. Spring Street, Room 525, Los Angeles, CA 90012

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DATE: January 25, 2021

TO: Interested Parties  
Department of City Planning Staff

FROM: Vincent P. Bertoni, AICP   
Director of Planning  
Department of City Planning

SUBJECT: **ON-MENU DENSITY BONUS MINISTERIAL REVIEW PROCESS**

### Summary

This memo explains a change to the interpretation and application of the City's Density Bonus Ordinance that will require requests for on-menu Density Bonus incentives be processed ministerially through the Department of City Planning (Planning), thereby rendering these requests exempt from analysis under the California Environmental Quality Act (CEQA).

Currently, Planning requires CEQA analysis for on-menu Density Bonus incentive requests. On-menu Density Bonus incentives are requests for pre-calculated modifications to specified development standards enumerated in a codified menu. The new interpretation set forth herein aligns historical practices, the City's Code, and legal authorities relative to CEQA, the State Density Bonus statute (Gov. Code §65915), and the Housing Accountability Act (Gov. Code §65589.5).

As of the date of this memo, a project that solely requests Density Bonus on-menu incentives, and is not subject to other discretionary entitlements, will not trigger analysis under CEQA. In addition, active projects seeking an on-menu Density Bonus entitlement that are currently in the project review process will be treated ministerially, unless there are other discretionary entitlements requested as part of the project. All other LAMC-required processes and procedures, including but not limited to those for notification and appeals, will not change, and projects will continue to receive a Letter of Determination describing the approved project and any applicable conditions of approval.

### Background and Existing City Practices

The City's Density Bonus Ordinance, codified in 2008 at Los Angeles Municipal Code (LAMC) §12.22 A.25 (Ord. No. 179681), implements State Density Bonus law at Government Code §65915. For housing development projects with specified percentages of affordable housing, the City shall grant upon request specified density bonuses, "concessions" or "incentives" in the form of reduced development standards (incentives), and "waivers" of development standards which physically preclude the project (waivers) (Gov. Code §65915 (b, d, e, f)). Any absence of local implementing legislation does not relieve the City from complying with the requirements of State Density Bonus law (Gov. Code §65915(a)(1)). As

discussed below, the City currently has three different project review procedures depending on the type of density bonus project request.

1. The Existing Ministerial Process. A project requesting only a density bonus up to 35%, and/or a parking ratio specified by State Density Bonus law or LAMC §12.22 A.25(d), and is not seeking additional incentives or waivers, is reviewed through a ministerial process and is not subject to appeal (LAMC §12.22 A.25 (g)(1)). No further CEQA review is conducted for projects that fall within this category.
2. The Existing On-Menu Process. A project requesting incentives enumerated in the codified “menu of incentives” is reviewed through the on-menu process. For on-menu incentive requests, Planning currently requires analysis under CEQA. The initial decision is made by the Director of Planning, no public hearing is required, and the determination is subject to an appeal and appeal hearing before the City Planning Commission (LAMC §12.22 A.25 (g)(2)).
3. The Existing Off-Menu Process. For a project requesting incentives that do not appear on the “menu of incentives” or any waivers, the request is reviewed through the off-menu process. For off-menu incentive or waiver requests, Planning also requires analysis under CEQA. The initial decision is made by the City Planning Commission after a noticed public hearing, but is not subject to appeal (LAMC §12.22 A.25 (g)(3)).

Historically, Planning has treated requests for any incentives or waivers as discretionary for purposes of CEQA. Planning has prepared a CEQA review for these requests since the Density Bonus Ordinance was adopted in 2008 (February 2, 2006 Interim Planning Director Memo, Council File 05-1345). However, due to the absence of discretion to deny incentive or waiver requests under either the City’s Ordinance or State Density Bonus law, the City has also refrained from imposing certain project-specific conditions, such as conditions that would have the effect of reducing requested density, even though these types of conditions could be imposed on other types of discretionary entitlement requests, like conditional use permits or variances.

### **The LAMC Criteria for Granting On-Menu Incentives is Objective in Nature**

The City’s Density Bonus Ordinance includes specified, objective requirements for projects requesting on-menu incentives (LAMC §12.22 A.25 (e)(2)). The City’s “menu of incentives” also articulates in objective terms the most applicable and commonly requested development standard modifications pertaining to multifamily housing, which were pre-evaluated as providing for affordable housing costs (Planning Director Memo, Implementation of Density Bonus Ordinance, October 16, 2014). The City’s intent in creating on-menu incentives was to streamline the approval of requests for a set of known, objectively calculated, and standardized incentives that were publicly reviewed and then codified in the LAMC. Determining whether a project satisfies the LAMC requirements for an on-menu incentive involves little to no personal judgment and involves a determination of whether the application conforms to applicable objective requirements. This is in contrast to off-menu incentive or waiver requests, which are unknown, non-standard, have no clear statutory limitations, and were not publicly pre-evaluated prior to the date of a project application. Due to this

difference, off-menu incentives will continue to be processed as discretionary requests subject to review under CEQA.

### **A Ministerial Process for Requesting On-Menu Incentives Aligns with State Housing Law**

The City is preempted from denying a density bonus or on-menu incentive outside of objectively defined circumstances, or requiring a discretionary approval simply due to the fact of a density bonus or on-menu incentive request. State Density Bonus law provides that the granting of a density bonus or incentive “shall not require...a discretionary approval” (Gov. Code §65915(f)(5) and (j)(1)).

State law also provides that for a project which meets specified objective affordability criteria, the City “shall” grant a density bonus, a specified number of incentives, and waivers (Gov. Code §65915 (b, d, e, f)). The City is only able to deny a requested incentive if there is evidence to make one of three objectively described findings, such as a finding of a specific adverse impact based on objective written health and safety standards that cannot be feasibly mitigated (Id.). Consistent with a prior 2014 memo that addressed this issue, Planning has operated under the framework that the eight on-menu incentives “provide additional buildable area, which [therefore] . . . can be assumed to provide additional project income and therefore provide for affordable housing costs” (Planning Director Memo October 16, 2014). The Housing Accountability Act separately explains that receipt of a density bonus “shall not constitute a valid basis” upon which to find a project is noncompliant with an applicable plan, policy or standard (Gov. Code §65589.5(j)(3)). In order to deny a density bonus project under the Housing Accountability Act, the City must also have evidence to make a finding that there is a specific adverse impact based on objective written health and safety standards that cannot be feasibly mitigated (Gov. Code §65589.5(j)(1)).

On-menu requests are ministerial based on the restrictions in State law and the lack of authority provided in LAMC §12.22 A.25 to deny or conditionally approve on-menu incentives except to comply with objective, identified, written public health and safety standards, policies or conditions. The new procedures described in this memo will align on-menu incentive processing with State housing laws. In contrast, because Government Code §65915 does not contain similar language regarding waivers of development standards, waivers will continue to be processed through the City’s off-menu process as a discretionary request subject to review under CEQA.

### **A Ministerial Process for Requesting On-Menu Incentives Aligns With CEQA**

The interpretation which treats on-menu incentives as ministerial actions exempt from CEQA review is consistent with CEQA. Ministerial actions are exempt from CEQA (Public Resources Code [PRC] §21080(b)(1)). Under CEQA Guidelines Section 15369, CEQA defines a ministerial decision as one that involves little or no personal judgement by the public agency or official as to the wisdom or manner of carrying out the project. A ministerial decision involves the use of fixed or objective standards rather than subjective decision making. The agency or official merely applies the governing statute, ordinance, regulation or other fixed standard to the facts.

Prior court decisions have recognized that even if a statute grants an agency *some* discretionary authority over an aspect of a project, such as aesthetic design review, the project is ministerial for CEQA purposes if the agency lacks authority to address *environmental* impacts. As discussed above, the City has no subjective discretion to approve or deny on-menu incentives, and therefore is unable to address environmental impacts related to the project.

Based upon this authority, the City's practice of preparing CEQA for on-menu incentives where no other discretionary entitlement was sought for the project was inconsistent with CEQA. Historical practice was inconsistent for reasons including: (1) the City did not have subjective discretionary authority under the LAMC to conditionally approve on-menu density bonus projects to address environmental impacts; (2) the City's on-menu process provides objective criteria for approving known, objectively calculated, and standardized incentives; and (3) CEQA does not give any independent authority to impose mitigation.

### **Changes to Density Bonus Procedures**

As of the date of this memo, a project that solely requests Density Bonus on-menu incentives, and is not subject to other entitlements, will not trigger analysis under CEQA. In addition, projects that are currently in the review process for an On-Menu Density Bonus entitlement will be treated ministerially, unless there are other discretionary entitlements requested as part of the project. All other LAMC-required processes and procedures, including but not limited to those for notification and appeals, will not change, and projects will continue to receive a Letter of Determination describing the approved project and any applicable conditions of approval. Applicants must still obtain a signed Affordable Housing Referral Form from the Housing Services Unit prior to filing their case at one of the Development Services Centers. To reflect the ministerial process, an ADM (Administrative) prefix will replace the current DIR (Director) prefix.

VPB:KJK:ALV:MG:BS:ch