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Density Bonus Law: Recent Court Decision Highlights Valuable Tool Available to Developers

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Technically defined as something given, paid, or received above what is due or expected, bonuses have long been used to incentivize people to act a certain way. As demonstrated by the recent decision in the case of *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329 (petition to publish granted March 30, 2011), Government Code section 65915, *i.e.*, the state "Density Bonus Law," is a tool that should be considered by all residential real estate developers, especially those focusing on affordable and/or infill development projects.

In its *Wollmer* opinion, the First District Court of Appeal not only offers important new guidance regarding the application of the Density Bonus Law, but joins its prior decisions in *Wollmer v. City of Berkeley* (2009) 179 Cal.App.4th 933 and *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807 to demonstrate that the courts are likely to continue to broadly interpret the Density Bonus Law and afford great deference to local agencies in support of their affordable housing decisions.

Density Bonus Law

To encourage developers to include low-income units within the mix of proposed residential projects, local governments must grant developers specified percentage increases from what would otherwise be the maximum allowable residential density under the applicable zoning ordinance and the land use element of the general plan when various types of affordable units are proposed. (Gov't Code § 65915 (b) and (f)). For example, an applicant is entitled to a 20% density bonus for proposing 5%, 10%, or 25% of total units that are affordable to very low-income, low-income, or moderate-income households, respectively, or for proposing a senior housing development or mobilehome park as defined in sections 51.3 and 51.12 (senior housing) and 798.76 and 799.5 (mobilehome park) of the Civil Code. While the law's mandatory density bonus is capped at 35%, section 65915 (n) expressly authorizes local agencies to permit even greater percentages of density bonuses by local ordinance. But that's not all.

In addition to such density bonuses, local agencies must also grant developers "incentives or concessions" (up to 3 depending on the number of affordable units proposed) and/or waive conflicting development standards that would physically preclude construction of the development unless specific findings regarding adverse project impacts or violations of state or federal law are made. (Gov't Code § 65915 (d) and (e)). Such incentives can include reductions in site development standards, modifications of zoning code or architectural design requirements, approval of mixed-use zoning or any other regulatory incentive that results in actual cost reductions. (Gov't Code § 65915 (k)).

Last but not least, the law authorizes developers to recover attorneys' fees and costs if there is a successful legal challenge to a local agency's refusal to grant a requested density bonus, incentive/concession or waiver of a conflicting development standard. (Gov't Code §§ 65915 (d)(3) and (e)). Without question, the Density Bonus Law offers significant and unparalleled incentives to residential developers

The Ashby Arts Infill Project

In November 2007, developers submitted an application to the City of Berkeley for a mixed-use project to be located on a 0.79 acre parcel at the southeast corner of San Pablo and Ashby Avenues. The project proposed a 5-story building with 98 residential units (74 base units plus 24 bonus units); 7,770 square feet of ground floor commercial retail space; 114 parking spaces; and dedication of a five

foot right-of-way to the City to accommodate a new left-turn lane to alleviate existing traffic concerns. Because 15 of the project's 74 base units would be affordable to low-income households if built as for sale condos and 8 would be affordable to very-low income households if built as rentals, the developers sought a 32.4% density bonus pursuant to section 65915. The developers also sought waivers of development standards applicable to building height, number of stories and setbacks.

After undertaking a traffic analysis which demonstrated that the project would not create any adverse traffic impacts, the City determined that the infill project qualified for a Class 32 Categorical Exemption from the California Environmental Quality Act ("CEQA"). The City's Zoning Adjustments Board approved the use permit application in January 2009, and the City Council subsequently denied Stephen Wollmer's appeal. A condition of the City's approval allowed rental subsidies through Section 8 for the eight very-low-income units qualifying for the section 65915 density bonus and the Berkeley Housing Authority subsequently awarded the proposed project a number of project-based Section 8 certificates.

Shortly thereafter, the City considered a modification to the use permit to allow the developer to construct either the previously approved project or a similar affordable housing project intended for seniors. After a revised traffic study demonstrated that the alternative senior affordable housing project would generate fewer trips than the already approved project, the City confirmed its determination that the project was exempt from CEQA on the same basis (infill exemption) and approved the modified project once again in June 2009 over Mr. Wollmer's objections.

Wollmer v. City of Berkeley

Mr. Wollmer then filed a petition for administrative mandamus (in pro. per) in Alameda Superior Court challenging the City's approval of the project and the trial court denied the petition in its entirety. Wollmer then appealed the case to the First District Court of Appeal. On appeal, Mr. Wollmer advanced a number of arguments asserting that the City's approvals violated the Density Bonus Law and CEQA. In a sharply worded opinion and with great deference to the City, a unanimous court of appeal rejected all of Mr. Wollmer's claims.

Mr. Wollmer's primary Density Bonus Law claim asserted that the City's condition of approval number 68, which allowed the developer to take advantage of Section 8 rental subsidies, violated the Density Bonus Law because it authorized the developer to receive substantially higher fair market rents than the maximum rents established for affordable housing. The Court quickly rejected this argument by pointing out that the applicable affordable rent requirements place restrictions on the amount a low-income tenant must pay for rent, not on the compensation to be received by the landlord/developer.

Mr. Wollmer also alleged that the City of Berkeley violated the Density Bonus Law by (i) using its zoning code instead of its general plan to set a density baseline and (ii) considering project amenities (such as a community plaza, an interior courtyard and higher ceilings) instead of just the affordable housing portion of the project when it decided to waive building height/stories and setback standards to facilitate the project. Again, the court rejected both arguments. The court found no conflict between the maximum permitted densities under the City's general plan and zoning code and held that the City properly calculated the density bonus based on the more specific provisions of its zoning code. Further, the court found nothing in the Density Bonus Law to support Wollmer's narrow interpretation of section 65915(e) and held that the city was entitled to consider project amenities in deciding to waive its conflicting development standards which otherwise would have physically precluded construction of the development.

The court also rejected all of Mr. Wollmer's CEQA arguments challenging the City's decision to exempt the project from environmental review pursuant to the categorical infill exemption in CEQA Guidelines section 15332. Specifically, Mr. Wollmer alleged that (i) the project's inconsistency with zoning regulations pertaining to building height, stories and setbacks precluded use of the infill exemption; (ii) the project's location (at intersection of two major thoroughfares – Ashby and San Pablo Avenues) and the City's use of a traffic study model (utilizing various trip reduction factors) qualified as unusual circumstances triggering the exception to the use of a

categorical exemption found in CEQA Guidelines section 15300.2(c); and (iii) the developer's dedication of land at the project site for use in developing a left-turn lane on Ashby Avenue was a project traffic mitigation measure that precluded use of the infill exemption.

Most significantly, the court held that because the city properly waived the conflicting development standards for building height, number of stories and setbacks pursuant to the Density Bonus Law the project's inconsistency with those standards did not preclude use of the infill exemption as they were not "applicable" zoning regulations as that term is used in CEQA Guidelines section 15332(a). The court then quickly rejected Mr. Wollmer's second and third CEQA arguments by pointing out that his claims regarding the project's unusual traffic circumstances stemmed simply from his own personal, lay opinion and thus did not amount to the substantial evidence necessary to refute the City's traffic experts and that the left turn lane planned on the land dedicated by the developer would resolve existing traffic problems and thus was not a measure intended to mitigate project impacts.

Conclusion

While the *Wollmer* (I and II) and *Friends of Lagoon Valley* decisions will certainly not be the last to address Density Bonus Law issues, they are the first and thus set important precedent illustrating the broad reach of the law and the deference to be afforded local agency affordable housing decisions.