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FEATURE ARTICLE

A ROOM FIRST, THE VIEW CAN COME LATER: LOCAL AUTONOMY AND THE DENSITY BONUS LAW

By Andrew C. Bell

Few, if anyone, question that California has an affordable housing problem. Many developers, however, question the fairness of inclusionary zoning programs that require them to remedy the problem without compensation.

In 1979, the California Legislature enacted a Density Bonus Law to encourage the construction of affordable housing units. Cal. Gov't Code §§ 65915-65918. The Density Bonus Law requires local governments (*i.e.*, cities and counties) to award developers additional market rate units and other incentives in return for setting aside a proportion of their market-rate projects for affordable housing. The California Legislature has amended the Density Bonus Law more than a dozen times since its adoption. Many of the amendments override local zoning and planning regulations to the extent they interfere with the development of a qualifying affordable project.

Some local government advocates seek to prevent the Density Bonus Law from overriding local planning and zoning regulations. They claim that the Density Bonus Law only applies when a developer agrees to set aside more affordable units than required by a local inclusionary ordinance. Under this theory, local governments can circumvent the Density Bonus Law by adopting inclusionary housing ordinances that require higher affordable housing set-aside levels than the Density Bonus Law.

This article examines the underlying policies, evolution, and text of the Density Bonus Law to explain why local inclusionary zoning regulations are not exempt from its requirements.

California's Density Bonus Law—Background

The Density Bonus Law is but one component of the California Legislature's concerted effort over the past 30 years to ensure adequate housing for all California residents. Much of that effort has focused on reducing barriers to entry at the local level. This has frequently occurred at the expense of local planning and zoning autonomy.

Housing Element Law

The state's housing element law is a good example. The California Legislature requires all cities and counties in the state to adopt a housing element as part of their general plan. This requirement is based on the premise that "[t]he availability of housing is of vital statewide importance" and "[t]he provision of housing affordable to low and moderate-income households requires the cooperation of all levels of government." Cal. Gov't Code § 65580. While the housing element is just one of seven state-mandated elements of a general plan, it is subject to an unusually stringent regulatory framework. *See*, Cal. Gov't Code §§ 65580-65589.8. This framework is designed to ensure that local governments accommodate their regional share of housing at all economic levels. The housing element is also the only element which must be updated every five years.

Anti-NIMBY Law

Another example is the state's "Anti-NIMBY" (not in my back yard) law, designed to remedy the legislature's observation that:

> [t]he excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that fees and exactions be paid by producers of housing.

Cal. Gov't Code § 65589.5(a)(2). Renamed the "Housing Accountability Act" in 2006, this statute restricts a local government's ability to disapprove market rate and affordable housing projects or to conditionally approve such projects in a manner that makes them infeasible. Cal. Gov't Code § 65589.5(d)(5).

Density Bonus Law

The Density Bonus Law and its recent amendments also exemplify the legislature's policy of preempting local housing regulations to the extent they interfere with the availability of housing. The Density Bonus Law requires a local government to grant a density bonus and other incentives to a developer who agrees to construct affordable housing even if the resulting number of units exceeds what would otherwise be allowed under applicable zoning and general plan designations. Cal. Gov't Code §§ 65915(a), (b). The density bonus and incentives permit the developer to build more residential units than originally requested in proportion to the number of affordable units set aside; the notion being that the bonus units and incentives will reduce the cost of the affordable units. As demonstrated below, the California Legislature has substantially augmented its control over local implementation of the Density Bonus Law during the past decade.

SB 948

A good example is SB 948, passed in 1999, which was designed to generally "increase the development of affordable housing by reducing barriers at the local level." Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 948 (1999-2000 Reg. Sess.) Sept. 4, 1999, at 6. In addition to broadening the protections of the Anti-NIMBY law and clarifying how to challenge a deficient housing element of a general plan, SB 948 amended the Density Bonus Law to prohibit cities from requiring a "general plan amendment, zoning change, or other discretionary approval" as a condition of granting a density bonus. Stats. 1999, c. 968 (S.B. 948), § 7. The amendment also clarified that a developer could seek a smaller density bonus than the Density Bonus Law requires a local government to offer. *Id.*

AB 1866

In 2002, the California Legislature passed AB 1866, which prohibited local governments from applying any development standard precluding the construction of a project at the densities or with the concessions and incentives required by the Density Bonus Law. It also prohibited local governments from denying concessions or incentives requested by a developer. Certain exceptions apply, but they are narrow and require the local government to make special findings. Significantly, the bill also granted developers the right to file suit and receive attorney's fees if a local government's refusal to waive a development standard or grant an incentive or concession violated the Density Bonus Law. *See*, Stats. 2002, c. 1062 (A.B. 1866).

SB 1818

In 2004, SB 1818 amended the Density Bonus Law to deepen the *degree* to which the California Legislature overrides local development standards in the interest of affordable housing. The bill achieved this by reducing the Density Bonus Law's qualifying threshold and increasing the benefits of qualification; specifically, by: (1) halving the proportion of affordable units needed to obtain a density bonus and concessions; (2) increasing the maximum density bonus from 25 to 35 percent, based on a sliding scale; and (iii) increasing the number of required incentives and concessions from one to three, based on a sliding scale. SB 1818 also prohibited local governments, upon request of a developer who qualifies for a density bonus, from requiring more than one parking space per studio or one-bedroom unit, two parking spaces per two- or three-bedroom units and two-and-a-half parking spaces for larger units. *See*, Stats. 2004, c. 928 (S.B. 1818), § 1.

Local government advocates were particularly concerned by SB 1818's halving of the proportion of affordable units required to trigger the Density Bonus Law. By reducing the qualifying set-aside threshold from 20 to ten percent low-income and from ten to five percent very-low income, SB 1818 required local governments to issue a density bonus for affordable

housing set aside levels that could be below the levels required by local inclusionary housing ordinances. Local government advocates recommended amendments to specify that, in such circumstances, the local inclusionary ordinance should control as the threshold for triggering the Density Bonus Law. *See, e.g.*, Sen. Com. H & C. D., Rep. on Sen. Bill No. 1818 (2003-2004 Reg. Sess.) April 16, 2004, at 4; Assem. Com. Loc. Gov't, Rep. on Sen. Bill No. 1818 (2003-2004 Reg. Sess.) June 22, 2004, at 6. The California Legislature adopted no such amendment when it passed SB 1818, however.

SB 435

Approved by the Governor in April, 2005, SB 435 made minor changes intended to clarify SB 1818 (although it also extended application of the Density Bonus Law to senior mobile home parks and to all common interest developments). Stats. 2005, c. 496 (S.B. 435), § 2. However, the real debate behind SB 435 involved a change proposed by the bill's author that was ultimately removed from the bill. The change would have removed language from the Density Bonus Law stating that a local government must grant a developer a density bonus when the developer "seeks and agrees" to construct a housing development that qualifies for a density bonus.

Opponents of SB 1818 wanted to retain this language in SB 435 because they interpreted it to mean that the Density Bonus Law only applies to units that are voluntarily made affordable, as opposed to units that are required to be affordable by a local inclusionary zoning ordinance.

The California Assembly's final floor analysis, for example, interpreted "seeks and agrees" to mean that the Density Bonus Law does not apply to jurisdictions that already have inclusionary housing ordinances in place unless the developer proposes affordable units *over and above* those required by local ordinance. *See, e.g.*, Assem. Com. H & C. D., Rep. on Sen. Bill No. 435 (2005-2006 Reg. Sess.) Aug. 19, 2005, at 3. This marked a significant departure from the prior assumption of local government advocates opposed to SB 1818 that the Density Bonus Law *does* apply to inclusionary housing ordinances and that such ordinances could only be exempted by amending the Density Bonus Law (*see*, SB 1818 above).

When SB 435 returned to the Senate, the final floor analysis of the Senate took the contrary position that "seeks and agrees" does not exempt jurisdictions with inclusionary housing ordinances. Sen. Rules Com., Off. of Sen. Floor Analyses, Rep. on Sen. Bill No. 435 (2005-2006 Reg. Sess.) Aug. 29, 2005, at 6. Both views were also expressed in two letters submitted to the Senate Daily Journal and Assembly Daily Journal, respectively. *See*, Senator Hollingsworth's letter regarding Sen. Bill 435 (Aug. 25, 2005) Sen. J. (2005-2006 Reg. Sess.), at 2293-2294; Assembly member Mullin's letter regarding Sen. Bill 435 (Sep. 8, 2005) Assem. J. (2005-2006 Reg. Sess.), at 3670-3671.

A bill exempting local inclusionary zoning ordinances from the Density Bonus Law has been proposed since the enactment of SB 435, but it died on January 31, 2008 after failing to be passed by the Assembly (Assem. Bill No. 1256 (2007-2008 Reg. Sess.)).

AB 2280

The latest amendment to the Density Bonus Law, AB 2280, approved by the Governor on September 27, 2008, made several clarifying changes, but they do not significantly inform the debate over the effect of inclusionary zoning ordinances.

The above places the debate over inclusionary zoning in context by showing that the California Legislature has strengthened rather than weakened its control over local implementation of the Density Bonus Law during the past decade. The following explains why the text of the Density Bonus Law and case law confirm that local inclusionary zoning policies are not exempt from the trend towards greater state control.

Local Inclusionary Zoning Ordinances Are Subject to the Density Bonus Law

'Seeks and Agrees'

Local government advocates claim that the existence of two words, "seeks" and "agrees," at the beginning of the Density Bonus Law indicates that the statute only applies when a developer *voluntarily* sets aside units for affordable housing and therefore does not apply to affordable units *required* to be set aside by local inclusionary ordinance. A close reading of the Density Bonus Law confirms, however, that the words "seeks" and "agrees" do not exempt mandatory local

inclusionary zoning ordinances from the statute.

The first paragraph of the Density Bonus Law reads as follows:

> When an applicant *seeks a density bonus* for a housing development within, or for the donation of land for housing within, the jurisdiction of a city, county, or city and county, that local government *shall* provide the applicant with incentives or concessions for the production of housing units and child care facilities as prescribed in this section. *All* cities, counties, or cities and counties shall adopt an ordinance that specifies how compliance with this section will be implemented. Failure to adopt an ordinance shall not relieve a city, county, or city and county from complying with this section.

Cal. Gov't Code § 65915(a) (emphasis supplied).

This language unequivocally requires "all" local governments to grant incentives and concessions to any developer who "seeks" a density bonus by setting aside units or by dedicating land, irrespective of whether the local government has an inclusionary ordinance in place. Nothing in the first paragraph of the statute indicates that inclusionary zoning units are exempt from its requirements. Moreover, whether a developer qualifies for a density bonus because it voluntarily proposed to set aside affordable units or because it was required to do so by local ordinance has no bearing on the developer's independent decision to "seek" a density bonus.

The next subsection, § 65915(b), which is the crux of the present debate, states:

> A city, county, or city and county shall grant one density bonus ... and incentives or concessions ... when an applicant for a housing development *seeks and agrees* to construct a housing development ... that will contain at least any one of the following: (A) Ten percent of the total units ... for lower income households...; (B) Five percent of the total units ... for very low income households ...; (C) A senior citizen housing development ...; (D) Ten percent of the total units in a common interest development .... (emphasis supplied).

Here, the phrase "seeks and agrees" refers to the developer's request for a density bonus after consenting to include a particular level and amount of affordability in a housing development, whether that consent be consistent with an existing mandatory inclusionary housing ordinance or by promising a type or degree of affordability that the local government does not yet require.

The statute's use of the word "agree" is not evidence that the Density Bonus Law does not apply to local inclusionary housing regimes, particularly when most such regimes similarly require developers to "agree" to fulfill their mandatory affordable housing obligation through one of several alternatives, such as set-asides, in-lieu fees or land dedication, for example. This is especially the case when an exemption for local inclusionary zoning ordinances would exempt a significant proportion of regulated jurisdictions. If the California Legislature had intended to exclude roughly one-fifth of California's local governments because they have adopted inclusionary housing ordinances, surely it would have done so in express terms. *See*, Nico Calavita, *et al.*, "Inclusionary Zoning: The California Experience" *NHC Affordable Housing Policy Review*, V. 3, No. 1 (2004), at 9. No such language exists. Other sections of the Density Bonus Law confirm this conclusion.

'Total Units'

The Density Bonus Law requires local governments to grant a density bonus and incentives and concessions according to the "percent of the *total units* of a housing development" set aside as affordable. Cal. Gov't Code § 65915(b)(1)(A); *see also*, Cal. Gov't Code §§ 65915(b)(1) (B), (D); 65915(d)(2)(A), (B), (C) (emphasis supplied). While the statute clarifies that the term "total units" excludes density bonus units, including those generated by "any local law granting a greater density bonus," nowhere in the statute is there similar language excluding from the term "total units" those affordable units already set aside by any local law requiring inclusionary housing. Cal. Gov't Code § 65915(b)(3). Indeed, reading the statute to imply such an exemption would not make sense. The word "total" indicates that the baseline of a density bonus calculation is the percentage of *all of the units* of a housing development (except density bonus units), regardless of whether some of those units are required to be set aside for affordable housing by local ordinance.

'Economic Feasibility'

Government Code § 65917 states that:

> [i]n the absence of an agreement by a developer in accordance with § 65915, a locality shall not offer a density bonus or any other incentive that would undermine the intent of this chapter.

The same section states that the intent of the California Legislature in creating the Density Bonus Law is to "contribute significantly to the economic feasibility of lower income housing in proposed housing developments." Cal. Gov't Code § 65917. This language prohibits local governments from creating alternative density bonus and incentives frameworks that make affordable housing less, rather than more economically feasible.

If inclusionary units were exempt from the Density Bonus Law it would be harder to obtain state-mandated density bonuses and incentives in jurisdictions that have inclusionary zoning than in jurisdictions that do not. Affordable housing consequently would be less economically feasible in jurisdictions with inclusionary zoning ordinances. This result is contrary to the intent of the California Legislature to make affordable housing more economically feasible.

Preemption Case Law

Case law has held that local ordinances cannot discourage use of the Density Bonus Law. For example, *Building Industry Ass'n of San Diego, Inc. v. City of Oceanside* (1994) 27 Cal.App.4th 744, involved a local growth control initiative that limited the number of dwelling units that could be constructed in the City of Oceanside each year. The initiative exempted low-income and senior housing units. However, it did not exempt low-income or senior citizen projects "built with density bonuses or other development considerations under any program." Projects augmented by a density bonus consequently would require more dwelling unit allocations than projects with no density bonus. This, in turn, discouraged developers from proposing housing that qualified for a density bonus. Noting that the Density Bonus Law was part of "an important state policy to promote the construction of low income housing and to remove impediments to the same," the court held that, because the growth control initiative *discouraged* developers from proposing housing that qualified for a density bonus, it presented a "clear facial conflict" with, and therefore was preempted by, the Density Bonus Law. *Id.* at 770.

Local ordinances exempting inclusionary housing units from the set-aside calculations of the Density Bonus Law would effectively double the state-mandated threshold for density bonus and incentives qualification. Like the growth control initiative in *Oceanside*, this would discourage developers from proposing housing that qualified for a density bonus and incentives under Government Code § 65915. Any attempt to exempt inclusionary housing units from the Density Bonus Law is therefore preempted by Government Code § 65915 under the authority of *Oceanside*.

Conclusion and Implications

The Density Bonus Law contains no language exempting local inclusionary zoning regimes because such an exemption would be contrary to both the intent of the Density Bonus Law and the broader state policies underlying it.

The desire to exclude local inclusionary units arises not from affordability concerns, but rather from a desire to preserve as much local autonomy over planning and zoning affairs as possible. The Density Bonus Law is perceived as a threat to such autonomy because many of the incentives it creates expressly abrogate local density, development standard and parking regulations. This is a legitimate concern. However, the California Legislature has determined this concern to be less pressing than the need for affordable homes for California's citizens, a prioritization that the *Oceanside* decision affirmed.

The Density Bonus Law's preemptive effect is designed to "contribute significantly to the economic feasibility of lower income housing." Cal. Gov't Code § 65917. The economic feasibility aims of the Density Bonus Law would be undermined if inclusionary units were exempted. The exemption would render the statute's incentives less, rather than more, obtainable. This would in turn cause developers to avoid inclusionary housing jurisdictions—often times the jurisdictions most in need of affordable housing. Exempting inclusionary zoning units from the Density Bonus Law also could be used to foist a local government's regional housing obligation onto

another jurisdiction without having to undergo the state's supervisory approval process for such transfers. *See*, Cal. Gov't Code §§ 65584.5; 65584.7. Indeed, if local inclusionary requirements were set high enough, they could be used as an exclusionary tool designed to discourage the development of affordable housing under the guise of encouraging it.

The California Legislature decided to intervene in local housing affairs in order to prevent precisely these kinds of externalities. The Density Bonus Law plays an important role in the state's effort to encourage affordable housing by establishing an even playing field across the state for all housing developers. It should be construed—and implemented—in a manner that achieves this goal.

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