



News & Publications

Density Bonus Law Does Not Allow Lead Agencies To Play Architect

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The California Court of Appeal recently issued an important decision in *Bankers Hill 150 v. City of San Diego* (Jan. 7, 2022, No. D077963) ___Cal.App.5th___ (*Bankers Hill 150*), which confirms that the State Density Bonus Law, Government Code section 65915, prevails over local development standards.

Summary of Density Bonus Law

To address the shortage of affordable housing in the state, the Density Bonus Law mandates that a developer is entitled to the following benefits if it agrees to include a specific percentage of affordable housing units in a project:

- a density bonus to allow for additional units of up to 50% above the maximum under the zoning;
- “incentives or concessions” to reduce the applicable development standards, including height limitations and setbacks, and other zoning code or architectural design requirements;
- “waivers or reductions” of any development standards that physically preclude the construction of the project as designed; and
- significantly reduced parking ratios.

Pursuant to the Density Bonus Law, a local agency may not deny a requested incentive or concession unless it makes a written finding, based on substantial evidence, that: (1) there is no identifiable and actual cost reductions; (2) there would be a specific, adverse impact on public health and safety or on a historic resource; or (3) the

Related Professionals

Amy Y. Foo

Linda C. Klein

Sean Matsler

Mitchell B. Menzer

concession or incentive would be contrary to state or federal law.

The Court Upholds the Approval of a Project with a Density Bonus and Incentives

In *Bankers Hill 150*, the developer, Greystar GP II, LLC (“Greystar”), submitted an application to construct a 20-story mixed-use project, at a building height of 223 feet, that would include 204 dwelling units, office space, a large courtyard, and underground parking. The proposed project qualified as a Density Bonus project because it set aside 18 dwelling units as affordable for very low-income residents. Accordingly, the City of San Diego (the “City”) granted Greystar a density bonus to exceed the zone’s maximum density of 147 units, as well as incentives to exceed the City’s 65-foot building height limit, eliminate requirements for a 15-foot setback and on-site truck loading and reduce private storage areas.

Two community groups, Bankers Hill 150 and Bankers Hill/Park West Community Association (collectively, the “Association”), filed a petition for writ of mandate challenging the City’s approval of the project application, alleging that the project is inconsistent with the City’s development standards for that neighborhood. The trial court denied the Association’s writ petition because it fatally failed to address the application of the Density Bonus Law.

The Court of Appeal affirmed the trial court’s denial of the writ petition. The court emphasized that, under the Density Bonus Law, absent very limited exceptions, the project is entitled to the waiver of any development standards that would have precluded the project’s construction as designed, including those with which the Association alleged the project is inconsistent. Furthermore, the waiver or reduction in development standards is in addition to the incentives and concessions mandated by the Density Bonus Law.

The Association argued that the project could be redesigned to yield a shorter and less bulky building by eliminating a courtyard. Reaffirming the holding in *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, the court rejected the Association’s argument. According to the court, the City could not demand that Greystar redesign its building to better meet City development standards even if a design existed that would allow fewer deviations from the City’s requirements.

Importance for Density Bonus Law Projects

Bankers Hill 150 is a welcome addition to *Wollmer* and confirms that developers proposing Density Bonus Law projects have considerable freedom to design their projects using the incentives/concessions and waivers to which they are entitled. Further, this case clarifies that projects meeting Density Bonus Law’s requirements cannot be denied based on their design absent very limited circumstances.

In addition, by utilizing the incentives, concessions and waivers mandated by the Density Bonus Law, the project will satisfy the applicable objective zoning standards. As a result, the developer can gain the protections of the Housing Accountability Act, Government Code section 65589.5. Foremost among the benefits of the Housing Accountability Act is the prohibition against the city disapproving the project or imposing conditions that reduce its density unless the city can make written findings based on a preponderance of the evidence that (1) the project will have a specific,



adverse impact upon the public health or safety unless the project is disapproved or reduced in density, and (2) there is no feasible method to satisfactorily mitigate or avoid the adverse impact.

If you would like to know more about *Bankers Hill 150*, Density Bonus Law, the Housing Accountability Act or other laws affecting housing and mixed-use development, please contact any of our experienced land use attorneys.