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Court Provides Further Clarity on State Density Bonus Law

The information in this alert affects developers.

In the recent case of *Wollmer v. City of Berkeley*, the Court of Appeal, First Appellate District, Division 1 provides valuable additional guidance concerning the application of Government Code section 65915, the Density Bonus Law. The case reinforces the ability of local governments to grant density bonuses above and beyond what is authorized by the Density Bonus Law, and clarifies that issuance of variances, or other concessions, is mandatory, depending upon the percentage and type of affordable housing that is to be provided.

The Project

The City of Berkeley approved use permits and zoning variances for a five-story mixed-use development project, including 148 residential units over ground floor retailers. The project included an award of 32 "mandatory" density bonus residential units and an additional discretionary authorization of 25 density bonus residential units under Government Code section 65915 and Berkeley Municipal Code section 23C.12.050 and received various zoning variances from City height limitations, floor area ratio limitations, and front yard setback requirements. Allen Matkins attorneys represented the developer of the project, 1950 MLK, LLC, in the administrative proceedings before the City. A neighborhood group and a citizen (collectively "Wollmer") challenged the City's approval of the Project. Wollmer filed suit, contesting, among other things, the City's density bonus calculation and its issuance of the zoning variances. After the superior court upheld the City's actions, Wollmer filed an appeal.

The Court Upholds City Approvals

The court rejected Wollmer's argument that the City inappropriately exceeded the Density Bonus Law by authorizing "bonus" residential units in the Project in excess of standards set by the Density Bonus Law. The court reasoned that the Density Bonus Law dictates the "maximum amount of bonus a city is *required to provide*, not the maximum amount a developer can ever obtain" and reasoned that it would undermine policy to interpret the law as imposing any absolute cap. (emphasis in original). Accordingly, the court held the City was free to award bonus units above and beyond legislated mandatory maximums, and could do so without acting pursuant to a separate local ordinance.

Wollmer's related allegations of unlawful variances granted by the

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City were shot down in similar fashion. The court held that the City's awarded variances for additional building height, increased floor area ratio, and slashed setbacks were legal and well-founded concessions which made construction of the project economically feasible. Wollmer argued that some of the very project costs that would allegedly render the project economically infeasible were increased by inclusion of the bonus units themselves. But, the court noted that 2009 amendments to the Density Bonus Law eliminated the requirement that an affordable housing project must be economically infeasible in order for such concessions to be issued, meaning that if an affordable housing project satisfies the requirements of the Density Bonus Law, local governments must waive or modify their zoning standards to accommodate mandatory bonus units, regardless of whether the concessions are necessary for the project to become economically feasible.

A Trend of Judicial Deference

The *Wollmer* opinion bolsters and broadens the 2007 opinion in *Friends of Lagoon Valley v. City of Vacaville*. In that case, the Court of Appeal, First Appellate District, Division Three concluded that the City of Vacaville did not abuse its discretion in approving a density bonus of 40.5 percent. The *Lagoon Valley* court anchored its decision in subdivision (n) of the 2007 Density Bonus Law which stated: "Nothing in this section shall be construed to prohibit a city, county, or city and county from granting a density bonus greater than what is described in this section for a development that meets the requirements of this section…." The *Wollmer* opinion echoed the subdivision (n) language relied upon by *Lagoon Valley*, but went on to interpret the implications of the 2009 amendments to the Density Bonus Law.

Taken together, these two cases suggest a continuing trend of heightened deference by California courts to the affordable housing decisions of cities. *Wollmer* sheds new light on the circumstances under which cities must grant corresponding concessions to projects developed in accordance with the Density Bonus Law. While these decisions are encouraging for developers, the *Lagoon Valley* court appropriately noted the inherent complexities of the Density Bonus Law.

Cases Cited

Wollmer v. City of Berkeley, Case No. 122242; 09 C.D.O.S. 14112 (2009). Filed October 30, 2009. Certified for partial publication November 24, 2009.
Friends of Lagoon Valley v. City of Vacaville, 154 Cal.App.4th 807 (2007).

Please contact us with any questions.

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