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California Affordable Housing: **A Narrowed Invalidation of the Los Angeles Density Bonus Ordinance**

Paul Rohrer

In April, the Los Angeles Superior Court raised concerns when it issued a potentially expansive injunction prohibiting the City of Los Angeles (the "City") from applying certain portions of its Ordinance Number 179681 (the "Implementing Ordinance") granting density bonuses and other incentives to qualifying residential projects that include certain levels of affordable housing units. Last week, however, the Superior Court clarified its order by narrowing the scope of its injunction. While subject to further reconsideration and appeal, the Superior Court's recent ruling has clarified that projects granted incentives under the Implementing Ordinance, which were subject to environmental review under the California Environmental Quality Act ("CEQA"), are not within the scope of the injunction. The injunction only applies narrowly to those projects that received certain incentives in excess of the State of California's guidelines, through a ministerial procedure and without CEQA review.

The Implementing Ordinance was adopted by the City in April 2008 to comply with SB 1818 (Government Code Section 65915), which mandates that municipalities provide certain density bonuses and other incentives to qualifying projects containing affordable housing. A year after the Implementing Ordinance was adopted by the City, a pair of cases, *Environment and Housing Coalition Los Angeles v. City of Los Angeles* (BS 114338, April 13, 2009) and *Hubbard v. City of Los Angeles* (BS 114091, April 13, 2009), invalidated sections of the Implementing Ordinance that provided incentives in excess of the minimum guidelines set forth in SB 1818, because the City had not subjected the Implementing Ordinance to environmental review under CEQA. In its rulings, the Superior Court prohibited the City from entitling new projects using the invalidated incentives of the Implementing Ordinance and also invalidated "any approvals already extended to projects under the invalidated provisions." Those rulings appeared problematic for developers intending to apply for entitlements using the invalidated incentives under the Implementing Ordinance and potentially catastrophic for developers who have entitled and/or constructed projects using such invalidated incentives.

Newsletter Editors

Roger Grable
Partner
rgrable@manatt.com
714.371.2550

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On June 8, 2009, the Superior Court issued an order clarifying that its previously issued injunction only prohibits the City from providing incentives that exceed the SB 1818 mandate through *ministerial* procedures and only invalidated entitlements already made through such *ministerial* procedures. The Superior Court made it clear that it was modifying its previous order to "reflect[] the courts [*sic*] intention to invalidate those approvals that were granted ministerially and not those that underwent environmental review commensurate with discretionary actions." Moreover, the Superior Court acknowledged that subsequent to the passage of SB 1818 and the Implementing Ordinance, California adopted AB 2280 (Government Code Section 65915(o)(1)), effective January 1, 2009, "which amended State law to include Floor Area Ratios as an element of 'development standards' that can be reduced to serve as an incentive to qualifying housing projects." Accordingly, the Superior Court also limited the application of the injunction to the incentives set forth in Section 25(c)(3) (applicable to projects providing for-sale or rental senior housing) and Section 25(c)(4) (applicable to projects providing for-sale moderate-income units).

Consequently, applications for incentives under the Implementing Ordinance for development projects for which discretionary entitlements are sought and CEQA review will be completed may move forward unaffected by the Superior Court's rulings. Moreover, contrary to initial appearances, entitlements for projects that were granted incentives under the Implementing Ordinance are not threatened, so long as such projects were subjected to CEQA review. Although the Implementing Ordinance was drafted so that certain projects could receive ministerial approval, only for-rent projects not requiring a tract map or variance of any sort would have fallen into the set of eligible ministerial projects. Therefore, it is expected that the Superior Court's clarification this week will come as a relief to most, but not all, developers who have elected to provide affordable housing in exchange for incentives under the Implementing Ordinance.

The rulings do remain problematic for developers who intend to submit an application for ministerial entitlements relying on incentives that are included in the Implementing Ordinance, but not in SB 1818 or AB 2280, or who have previously received such entitlements through a ministerial procedure. Consequently, while no action is currently required from developers whose projects have received incentives through a discretionary procedure subject to CEQA review, developers who intend to request or who have received incentives as part of a by-right entitlement process need to determine whether the particular incentives they seek or have received are the subject of the Superior Court's injunction.

Section 25(c)(3) provides incentives for projects providing for-sale or rental senior housing with low- or very low-income restricted units, and Section 25(c)(4) provides incentives for projects providing for-sale housing with moderate-income restricted units. Because, as a practical matter, most developments containing for-sale units have or will have filed a tract map subject to CEQA review, the set of projects affected by the Superior Court's rulings will mostly be restricted to for-rent senior housing projects.

Developers intending to submit an application for a senior housing project containing affordable units not otherwise subject to CEQA review will now need to tailor

such application for discretionary review and go through the time and expense of providing at least an Initial Study and Negative Declaration or a Mitigated Negative Declaration. Although the CEQA process and the required discretionary procedures will impose an additional administrative burden on such developers, it will also provide them with an opportunity to ask the City for greater entitlements and incentives than those that may be provided under the ministerial process. Therefore, for developers who intend to apply for incentives as part of their senior housing entitlement applications, the Superior Court's adverse rulings will be balanced by potential entitlement opportunities.

Developers who had previously entitled a senior housing project containing affordable units using a ministerial process will need to consider resubmitting their project applications subject to the City's provision of discretionary incentives. Such discretionary incentives may include the exact same incentives that the Superior Court invalidated in their ministerial form. Moreover, it appears that the City will be constrained to review an application for discretionary incentives under the same standard it used in the previous ministerial grant of incentives. Thus, although a reapplication strategy places an administrative burden on a developer who had previously applied for and received incentives using a ministerial procedure, such reapplication should be assumed not to create a high risk of discretionary rejection by the City. The assumption made in the preceding sentence arises because, among other things, AB 2280 reversed the burden of proof so that a municipality must grant certain discretionary incentives unless such municipality makes a written finding based upon substantial evidence that the concession or incentive would be contrary to state or federal law. Therefore, even in the most problematic instance, the Superior Court's ruling should be expected to involve only administrative hassles and delays, but should not be expected to result in a permanent, irresolvable loss of entitlements.

The bottom line is that the Superior Court's rulings now have the potential to impact only a small subset of developers who seek or who have received incentives through a ministerial procedure. Those developers should be able to gain or retain such entitlements through a discretionary approval procedure that includes CEQA review – and developers may have an opportunity to seek additional incentives though the discretionary entitlement process.

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FOR ADDITIONAL INFORMATION ON THIS ISSUE, CONTACT:

Paul Rohrer Mr. Rohrer represents governmental entities, nonprofit educational institutions, developers, and property owners in land use and entitlement matters, the acquisition, sale, optioning, and ground leasing of real property and in the making of various agreements including joint development agreements and construction related agreements. He has worked extensively with public/private transactions, air-rights or "TFAR" transfers and in the creation of special use districts for signage. Mr. Rohrer has appeared in front of city councils, planning and architectural

commissions and community redevelopment agency boards in support of his clients' projects. He works with governmental officials, private parties and nonprofit entities to create economically and socially viable development solutions.