

SHANNON THOMAS
DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

1200 THIRD AVENUE, SUITE 1620
SAN DIEGO, CALIFORNIA 92101-4178
TELEPHONE (619) 236-6220
FAX (619) 236-7215

Michael J. Aguirre
CITY ATTORNEY

MEMORANDUM OF LAW

DATE: September 8, 2006

TO: Betsy McCullough, Deputy Director, City Planning and Community Investment

FROM: City Attorney

SUBJECT: State Density Bonus Law: Compliance with the State Coastal Act and Preemption of Local Initiatives and Regulations

INTRODUCTION

As the City of San Diego brings its density bonus ordinances into compliance with California density bonus law, questions have arisen as to how concessions or incentives can be granted in compliance with the California Coastal Act, as well as the applicability of local initiatives and regulations. Specifically, questions have been raised as to the availability of Proposition D as a concession or incentive.

QUESTIONS PRESENTED

1. How will density bonus concessions and incentives be granted in compliance with the State Coastal Act?
2. Can an exception to the local initiative Proposition D height limit be given as an incentive under State Density Bonus Law?

SHORT ANSWERS

1. Any incentives or concessions granted must be in compliance with the Coastal Act; therefore the incentives or concessions must comply with our Local Coastal Program or be processed as an amendment to the Local Coastal Program.

2. No. While generally, municipal initiatives and regulations are preempted by State Density Bonus Law, the height limit set forth in Proposition D has previously been certified by

How can you "process" a concession as an amendment to the LCP? Answer: you can't. You can "amend" the LCP and then process a concession under the amended LCP.

Betsy McCullough, Deputy
Director, Planning Department

-2-

This is misleading. We know that the City does not
have authority to grant an exception from Prop D.
The question is whether a Coastal Commission
certification protects EVERYTHING in an LCP from
being available as a concession under 65915. Neither
the Coastal Act nor the Density Bonus Act says it does.

the Coastal Commission as part of the City's land use plan. The City does not have any authority to grant a permit that is not in conformance with that certified land use plan.

BACKGROUND

The California Density Bonus Law is set forth at Government Code sections 65915 through 65918. To encourage the provision of affordable housing, the state statutes allow developers to build affordable housing above the current density allowed by zone, requires the granting of incentives and concessions by the local authority, and requires cities and counties to adopt ordinances specifying how the local agencies will implement the provision of incentives to these developers. The Density Bonus Law is applicable to charter cities. The Density Bonus Law specifies that nothing in section 65915 shall be deemed to supercede, alter, or lessen the effect of the provisions of the California Coastal Act of 1976.

On November 7, 1971, the citizens of the City of San Diego approved Proposition D. This proposition limits the height of buildings within the defined Coastal Zone to no more than 30 feet, except in the downtown area. The Coastal Zone was defined in Proposition D as the area from the US-Mexico border to the northern border of the City of San Diego, and from the Pacific Ocean to Interstate 5. Proposition D became effective on December 7, 1972. The area regulated by Proposition D has been amended by the voters three times to allow for the historic restoration of the chimney and rooftop of the Mission Brewery building, as well as development at Sea World and at the International Gateway of the Americas. Proposition D is currently codified at section 132.0505 of the San Diego Municipal Code, and was previously submitted to the California Coastal Commission as part of the City of San Diego's Local Coastal Program

ANALYSIS

1. How can density bonus concessions and incentives be granted in compliance with the State Coastal Act?

The State Density Bonus Law, section 65915(m) states that "[n]othing in this section shall be construed to supercede or in any way alter or lessen the effect or application of the California Coastal Act (Division 20 (commencing with Section 30000)) of the Public Resources Code." The purposes of the Coastal Act are to protect the state's natural and scenic resources, to protect the ecological balance of the coastal zone, and to ensure development occurs in a way that is consistent with the policies of the Act. Cal. Pub. Res. Code § 30001.

Public Resources Code section 30500 requires each government with jurisdiction within the coastal zone to prepare a local coastal program, which is defined as "a local government's (a) land use plans,¹ (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal

¹ A "land use plan" is defined as "the relevant portions of a local government's general plan, or local coastal element which are sufficiently detailed to indicate the kinds, location, and intensity

Betsy McCullough, Deputy
Director, Planning Department

-3-

"Including incentives and concessions". □
This is the chicken and the egg situation that needs to be resolved. This MOL is contradictory in that it says that the granting of a concession can only be done while remaining in conformity with the LCP but also recognizes that a concession does not require a change to the LCP. Which is it? □

resources areas, other implementing actions, which when taken together, meet the requirements of, and implement the provisions and policies of, this division at the local level." Cal. Pub. Res. Code § 30108.6.

Once the local coastal program is certified by the California Coastal Commission, the authority for approving development shifts to the local authority for issuance of a permit, upon a finding that the proposed development is in conformity with the certified land use plan. Cal. Pub. Res. Code §§ 30519(a); 30600.5(c). The increased density must be allowed unless the City, or, in the event of an appeal, the Coastal Commission, finds that the increased density cannot feasibly be accommodated on the site in conformity with the certified local coastal program. Cal. Pub. Res. Code §30604(f).² Therefore, the City of San Diego only has the authority to issue coastal development permits if the proposed development, including incentives or concessions, is in conformity with our certified land use plan.³

2. Can an exception to the local initiative Proposition D height limit be given as an incentive under State Density Bonus Law?

The State has shown a clear intent to preempt the field regarding the provision of both density bonuses and the granting of concessions and incentives.⁴ "The provisions of this chapter shall apply to charter cities." Cal. Gov. Code § 65918. As to matters which are of statewide concern, charter cities remain subject to and controlled by applicable general state laws regardless of the provisions of their charters, if it is the intent and purpose of such general laws to occupy the field to the exclusion of municipal regulation. This is known as the "preemption doctrine." *Bishop v. City of San Jose*, 1 Cal. 3d 56, 61-62 (1969). The charter city may, however, enact legislation on a matter of statewide concern which is not in conflict with state law, unless the Legislature has intended to preempt that field. If the state legislation is of statewide concern it prevails, provided it is reasonably related and narrowly tailored to the resolution of that

of land uses, the applicable resource protection and development policies and, where necessary, a listing of implementing actions." Cal. Pub. Res. Code § 30108.5

² All legislative analyses of Senate Bill 619, Statutes of 2003, which added subsection (f), refer to a required finding that there is no feasible method to accommodate the density without a "significant adverse impact" on coastal resources. However, the language of the bill itself contained only a reference to "consistency" with sections of the Coastal Act or the Local Coastal Program.

³ However, the granting of an incentive or concession itself shall not be interpreted to require a local coastal plan amendment or other discretionary approval. Cal. Gov. Code § 65915(k).

⁴ Cities and counties are not prohibited from granting a density bonus *greater* than that required in section 65915 for developments meeting the requirements of the section, or from granting a proportionately lower density bonus for those developments that do not meet the requirements. Cal. Gov. Code § 65915(n).

State Density Bonus law Section 65915(k) clearly provides for concessions from LCPs. It foresaw clashes between LCPs and concessions and provided for them by stating that concessions can be given without amending the LCPs.

concern. *Johnson v. Bradley*, 4 Cal. 4th 389, 399 (1992); *Cal. Fed. Savings and Loan Assn. v. City of Los Angeles*, 54 Cal. 3d 1, 17 (1991).

The provision of affordable housing has been stated to be a matter of statewide concern. Cal. Gov. Code § 65580. To allow local governments to create their own local regulations that are in conflict with the State Density Bonus Law would undermine the state's objective of encouraging the development of affordable housing. Therefore, local regulations, including propositions, must yield to the state law provisions. Regarding the denial of a requested incentive or concession, the Density Bonus Law requires that either of the following specific findings be made, based on substantial evidence, before the City can deny a requested incentive or concession:

(A) The concession or incentive is not required in order to provide for affordable housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).

(B) The concession or incentive would have a specific adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate- income households.

Cal. Gov. Code § 65915(d)(1)(A)-(B).⁵

However, the height limit in Proposition D was later submitted to the Coastal Commission as an implementing ordinance of the City's local coastal program and was thereafter certified by the Commission as such. While the effective date of Proposition D (1972) predates that of the Coastal Act of 1976, once Proposition D was approved by the California Coastal Commission pursuant to the Coastal Act as part of the City's local coastal program, it lost its character as simply a local regulation. As discussed above, the Density Bonus Law must be read in conjunction with the Coastal Act; concessions and incentives cannot be granted that conflict with the City's certified land use plan. The certification of Proposition D as part of the City's land use plan leads to the result that the height limits of Proposition D cannot be deviated from in any manner not provided for in that plan.

⁵ A specific, adverse impact is defined for this purpose as "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete." Cal. Gov. Code § 66589.5(d)(2).

If this City assertion is later disproved in court, the City would be in big trouble. This may be overstating the protection provided by the LCP and could lead to court challenges. If a single developer prevails, those who were previously denied will sue, plus the public will be up in arms for having been given false assurances by the City.

Betsy McCullough, Deputy
Director, Planning Department

-5-

This Conclusion better be right, otherwise it will have allowed a density bonus Ordinance to be adopted under misleading legal advice from the City Attorney. It will be too late to change it after an enabling Ordinance is passed. Was that the DSD plan?

CONCLUSION

State Density Bonus Law requires the granting of incentives and concessions under certain circumstances. However, because the Density Bonus Law also requires compliance with the Coastal Act, the City of San Diego has no authority to grant development incentives or concessions that are not provided for in the local coastal program as certified by the California Coastal Commission.

Local regulations and initiatives are generally preempted by the State Density Bonus Law. However, those regulations that are part of the certified local coastal program, including Proposition D, cannot be determined to be preempted, and must be read in conjunction and reconciled with the Density Bonus Law.

MICHAEL J. AGUIRRE, City Attorney

By

Shannon Thomas
Deputy City Attorney

ST:als
ML-2006-19