goldfarb lipman attorneys
1300 Clay Street, Eleventh Floor
Oakland, California 94612
510 836-6336

JULY 19, 2013

M David Kroot
John T. Nagle
Polly V. Marshall
Lynn Hutchins
Karen M. Tiedemann
Thomas H. Webber
John T. Haygood
Dianne Jackson McLean
Michelle D. Brewer
Jennifer K. Bell
Robert C. Mills
Isabel L. Brown
James T. Diamond, Jr.
Margaret F. Jung
Heather J. Gould
Juliet E. Cox
William F. DiCamillo
Amy DeVaudreuil
Barbara E. Kautz
Erica Williams Orcharton
Luis A. Rodriguez
Xochitl Carrion
Rafael Yaquian
Vincent L. Brown
Caroline M. Nasella

Facsimile
510 836-1035
San Francisco
415 788-6336
Los Angeles
213 627-6336
San Diego
619 239-6336
Goldfarb & Lipman LLP

LAW ALERT

LOCAL DENSITY BONUS ORDINANCES MUST OFFER A DENSITY BONUS FOR REQUIRED AFFORDABLE UNITS

On July 11, 2013, in *Latinos Unidos del Valle de Napa y Solano v. County of Napa ("LUNA")*, the First District Court of Appeal held that cities and counties must provide a State-required density bonus and other incentives for affordable units required by local inclusionary, or "below market rate" ("BMR"), ordinances. A "density bonus" is an increase in the number of housing units otherwise permitted by local zoning. The State's density bonus law requires that local governments provide density bonuses of up to 35 percent when developers "seek and agree to construct" affordable housing.

Napa County, like approximately 130 other cities and counties in the State, has an affordable housing ordinance requiring that a certain percentage of new housing be affordable. In Napa, up to 20 percent of new housing is required to be affordable to moderate-income households.

The County argued that State-mandated density bonuses are necessitated only when developers *voluntarily* agree to provide *more* affordable housing than required by the County's affordable housing ordinance. The County reasoned that offering a density bonus and other incentives for affordable housing already required by its ordinance would not increase the amount of affordable housing in the County. The Court, however, agreed with LUNA that the statute was "unambiguous," requiring local ordinances to provide density bonuses for all affordable housing in a development, whether or not required by an inclusionary ordinance.

This had been an unresolved issue. Some local ordinances provide the bonus for inclusionary units while others do not. That issue is now resolved: bonuses and other incentives must be provided, if requested, for required inclusionary units.

In affected communities, bonuses will now be available for developers providing *less* affordable housing than would otherwise have been required. Napa County's ordinance would have required projects to include 25 to 30 percent affordable housing to receive a density bonus. Now developers may obtain bonuses for providing only the required 20 percent affordable housing.

Application of Decision

LUNA will primarily affect common interest developments (generally those with homeowners' associations) where *on-site, for-sale affordable units* are included in the development pursuant to a local affordable housing ordinance. In

regard to other types of housing, the effects will vary.

Rental Housing. The Second District Court of Appeal in 2009 (*Palmer/Sixth Street Properties L.P. v. City of Los Angeles*) held that local inclusionary ordinances requiring affordable *rental* housing violate the Costa Hawkins Act, the State law governing rent control. Consequently, many affordable rental units provided since 2009 were provided voluntarily and were eligible for density bonuses even before the Court ruled in *LUNA*.

Proposed legislation (AB 1229) would reinstate the ability of communities to require affordable rental units. Density bonuses will be available for any required affordable rental units.

In Lieu Fees and Rental Impact Fees. Some communities permit developers to pay in-lieu fees rather than provide affordable units. Others, in the wake of *Palmer*, have completed nexus studies and have adopted rental impact fees to mitigate the effect of market-rate rental housing on the need for affordable housing. No density bonuses or other incentives are available under State law where fees are paid and no affordable units are provided.

Off-Site Units and Other Alternatives. The effect of *LUNA* on off-site provision of affordable housing will depend on the particular provisions of local ordinances. State density bonus law permits a density bonus for land donation conforming to a strict set of conditions. Other alternatives will need to be reviewed individually to see if the project is eligible for a density bonus pursuant to State law.

Complying with Both Density Bonus and Inclusionary Requirements.

If developers desire affordable units to meet both local inclusionary and State density bonus requirements, the units must meet both sets of criteria. For instance, for-sale moderate-income units qualify for a density bonus under State law *only* if they are located in a common interest development where all the units are offered for purchase; a single-family home subdivision that is not a common-interest development is not eligible for a density bonus under State law, even if it includes affordable units.

Similarly, many local ordinances require a longer period of affordability than State density bonus law, which requires only 30-year affordability. To meet local requirements, the affordable units would need to be affordable as long as required by the local ordinance. In general, the most restrictive provisions in State law and a local ordinance need to be met for affordable units both to qualify for a density bonus and to meet local inclusionary requirements.

If you have questions about this case, please feel free to contact Barbara Kautz, Juliet Cox, Polly Marshall, or any other attorney at Goldfarb & Lipman LLP for more information.

To receive Law Alerts by E-Mail, please visit: http://goldfarblipman.com/library/