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DENSITY BONUS BONANZA! STATE QUADRUPLES DOWN WITH FOUR NEW DENSITY BONUS BILLS

On January 1, 2017, four laws went into effect that amend California's mandatory density bonus program (Government Code sections 65915–65918). The density bonus law generally requires local governments to permit the construction of additional residential units if the development includes units affordable to low- and/or moderate-income households. In addition, developers of qualifying residential projects are entitled to receive certain benefits, including reduced parking requirements, "incentives or concessions," and waivers of certain development standards. The changes to the density bonus law in each of the four bills are summarized below.

AB 2501 (BLOOM—CHAPTER 758, STATUTES OF 2016)

AB 2501 contains the broadest changes in the density bonus law. AB 2501 requires all cities and counties to adopt procedures and timelines for processing a density bonus application; provide a list of submittal requirements; and notify applicants whether the application is complete as required by the Permit Streamlining Act. (§65915(a)(3).) While a special report or study cannot be required to justify the bonus or other benefits, reasonable documentation can be required to establish an applicant's eligibility for incentives, waivers, and reduced parking. (§65915(a)(2).)

AB 2501 confirms that the density bonus law applies to mixed-use developments (§65915(i)) and states that all density calculations must be "rounded up," including the base density, the number of bonus units, and the number of affordable units required to be eligible for a density bonus. (§65915(q).)

Previously, "incentives and concessions" were defined as regulatory incentives resulting in "identifiable, financially sufficient, and actual cost reductions." Incentives and concessions are now defined as regulatory incentives resulting in "identifiable and actual cost reductions to provide for affordable housing costs." (§65915(k)(1)(3).) A local government may deny an application for an incentive or concession if the concession "does not result in identifiable and actual cost reductions... to provide for affordable housing costs." (§65915(d)(1)(A).) This change appears to confine incentives and concessions to project modifications that actually reduce costs.

Finally, other changes clarify that developers eligible for a density bonus may request a concession even if they do not request increased density (§65915(f)) and that parking reductions must be provided in addition to any other concessions that the project may receive. (§65915(p)(8).) The local agency must bear the burden of proof if it denies an application for incentives and concessions (§65915(d)(4)), and the density bonus law must be interpreted liberally to produce the maximum number of housing units. (§65915(r).)

AB 2556 (NAZARIAN—CHAPTER 761, STATUTES OF 2016)

AB 2556 is a cleanup bill to Assemblymember Nazarian's AB 2222 (effective January 1, 2015), which required that projects using a density bonus "replace" each rental unit that (a) currently exists or existed in the past five years, and (b) is or was occupied by low-income or very low-income households in the

past five years, or was subject to a deed restriction or rent control. (§65915(c).) Because the incomes of prior or even current tenants could often not be ascertained, in many cases it could not be determined how many replacement units were needed.

AB 2556 clarifies that, when the incomes of existing or former tenants are unknown, the required percentage of affordability is determined by the percentage of low- and very low-income renters as shown in the HUD Comprehensive Housing Affordability Strategy database. Special rules apply to replacement of rent-controlled units. Replacement units must be of "equivalent size," defined as providing the same total number of bedrooms, allowing a developer to replace existing multi-bedroom units with more units with fewer bedrooms.

The provisions regarding replacement units are complex. Local agencies and developers should first ascertain if any rental units existed on a site in the past five years and then review closely the provisions of section 65915(c) to determine the project's replacement requirements, if any.

AB 2442 (HOLDEN—CHAPTER 756, STATUTES OF 2016)

AB 2442 provides a density bonus for projects where 10 percent of the total units are reserved for very low-income transition-age foster youth, disabled veterans, or persons experiencing homelessness. (§65915(b)(1)(E).) The bonus equals only 20 percent of the units reserved for youth, veterans, or the homeless. (§65915(f)(3)(B).)

Because such a project is also eligible for a 32.5 percent bonus for very low-income housing, the bill will likely have little practical effect. For instance, a 100-unit project with 10 units reserved for very low-income youth, veterans, or homeless persons would be entitled to two bonus units under AB 2442, but would be entitled to 33 bonus units under the existing very low-income bonus.

AB 1934 (SANTIAGO—CHAPTER 747, STATUTES OF 2016)

AB 1934 requires local agencies to grant a "development bonus" to a commercial development where the developer has entered into a contract with a housing developer to construct a housing project of any size where either 30 percent of the units are designated for low-income households or 15 percent of the units are designated for very low-income households. (§65915.7.) The housing must either be part of the commercial development or within one-half mile of a major transit stop. (§65915.7(a).) The affordable housing developer may also request a density bonus and all other incentives available under the density bonus statute for the housing development.

The local government must approve the contract between the commercial developer and the housing developer, and the "development bonus" must be mutually agreed upon by the city and the commercial developer. There are no standards in the statute for determining the commercial development bonus. Consequently, local agencies retain substantial control over the project and the development bonus provided to the commercial developer.

SUMMARY: AB 2501 was supported by Governor Brown as part of his housing program. Density bonuses have become one of the more important tools supported by the Legislature to produce more housing, and the statute has been amended almost every year to grant more benefits to developers and to ensure that cities and counties will grant the benefits. Developers should review the current legislation carefully to ensure that they are familiar with the current provisions and benefits. Local agencies may wish to review their ordinances and application procedures to ensure that they are consistent with the current version of the statute and that they understand the additional benefits provided to the development community.

For more information on this case or any of the issues discussed above, please contact Barbara E. Kautz, Eric S. Phillips, Justin D. Bigelow, or any other attorney at Goldfarb & Lipman LLP at 510-836-6336.

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