goldfarb lipman attorneys

October 22, 2021

California Court of Appeal Weighs in on Approval and Denial of Density Bonus Concessions

The Second District Court of Appeal has issued the first published case on the standards that cities and counties must follow when an application is made for a "concession or incentive" under density bonus law.

California's density bonus law (Government Code Section 65915 et seq.) allows housing developers providing affordable housing in their project and qualifying for a density bonus to obtain "concessions" (up to four depending on level of affordability). Concessions, also referred to as incentives, include:

1. A reduction in development standards or modification in zoning or design requirements that exceed building code standards, or other regulatory incentives, that result in "identifiable, actual cost reductions" to provide for affordable housing in the proposed development; or
2. Approval of a change in the land use to allow non-residential uses that will "reduce the cost of the housing development" (Government Code Section 65915(k)).

The local agency can deny the requested concession if makes a written finding, based upon substantial evidence, that the concession:

1. will not result in identifiable and actual cost reductions, to provide for affordable housing costs;
2. would have a specific, adverse impact on 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 mitigation; or
3. would be contrary to state or federal law (Government Code Section 65915(d)(1)).

How should a local agency review a request for concessions and what information can it request to determine whether the concessions will result in a cost reduction? This question is addressed in *Schreiber v. City of Los Angeles*.

In *Schreiber*, residents of a single-family home near a proposed, mixed-use development that received a density bonus, concessions, and waivers, challenged the City's approval of concessions. Appellants contend the City approved the concessions "without obtaining the required financial documentation." The approved concessions were to increase the floor area from the allowed 21,705 square feet to 59,403 square feet and to increase the maximum height from the allowed 45 feet in the front and 33 feet in the back to 75 feet. In reviewing the application, the planning commission took into account AB 2501 which amended the density bonus law to eliminate the "ability of a local jurisdiction to require special studies. . .unless they meet the provisions of state law." Thus, a pro forma and third-party reviews were no longer required for a concession request. Appellants challenging the project approval believed that the planning commission misinterpreted AB 2501, claiming that project applicants must submit certain financial information to support their application. The Court disagreed with the appellants.

In order for a local agency to deny the applicant's request for concessions, the burden is on the local agency to make substantial findings that the requested concession will not result in identifiable, actual cost reductions that enable the provision of affordable housing; will cause an adverse impact

on the public health and safety, physical environment, or historical property; or will be contrary to state or federal law. Notably, in its analysis, the Court focused on the presumption that the concession would result in cost reduction but did not apply the rest of definition: “to provide for affordable housing costs…and rents.”

The Court held that the City is not required to make finding that the concession reduces costs, and the applicant is not required to affirmatively prove that the concession will result in cost reduction. There is a presumption that the concession will create cost reductions. However, to deny a request for a concession, the City's decision must be supported by substantial evidence.

While there is a presumption that the concession will reduce cost, the City may require the applicant "reasonable documentation" to establish eligibility or to demonstrate that the concession meets the definition in the density bonus law. However, the Court held that the City cannot require the applicant to provide documentation that the concession would make the development "economically feasible." The standard is merely that the concessions would create a "cost reduction."

Notably, in this case, there was financial documentation that the concession would reduce cost. As provided in the decision, "even if substantial evidence regarding cost reductions was required, the RSG analysis was sufficient for this purpose." Local agencies may wish to continue requesting financial documentation, especially since findings are necessary to deny a concession request. However, this decision could make it easier for developers to obtain concessions since the presumption is that the concessions create the required cost reduction.

Below are key takeaways from *Schreiber* for local agencies and developers:

a. The state density bonus law does not require findings or evidence for the local agency to approve a concession.
b. However, the local agency can require “reasonable documentation” to establish eligibility or to demonstrate that the concession meets the definition.
c. If the local agency does not believe that the concession will reduce costs or that one of the other findings can be made, the local agency must make findings supported by substantial evidence. The burden of proof is on the local agency.

For more information, please contact Erin Lapeyrolerie (elapeyrolerie@goldfarblipman.com), Barbara Kautz (bkautz@goldfarblipman.com), Gabrielle Janssens (gjanssens@goldfarblipman.com), or any other attorney at Goldfarb Lipman LLP.

Law Alert is published by Goldfarb & Lipman LLP as a timely reporting service to alert clients and others of recent changes in case law, opinions or codes. This alert does not represent the legal opinion of the firm or any member of the firm on the issues described, and the information contained in this publication should not be construed as legal advice. Should further analysis or explanation of the subject matter be required, please contact the attorney with whom you normally consult.