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WIPE OUT! COASTAL ACT SUPERSEDES DENSITY BONUS AND MELLO ACT DEVELOPMENT PROTECTIONS

California law includes a suite of statutes—including the Housing Accountability Act, Density Bonus Act, and Mello Act—that are intended to encourage affordable housing and promote development notwithstanding certain local regulations. In *Kalnel Gardens, LLC v. City of Los Angeles* (filed 9/29/16), the Second District Court of Appeal reminded localities and developers that these statutes have limits.

Specifically, the court held that the Coastal Act trumps both the Density Bonus Act and the Mello Act. Accordingly, projects in the state's coastal zone cannot be approved unless they are consistent with the Coastal Act and local coastal programs that implement the Act. The court also held that it did not have jurisdiction to hear an appeal brought pursuant to the Housing Accountability Act that did not precisely follow the procedures specified by that act.

THE STATUTES

The Housing Accountability Act (Gov. Code, § 65589.5) requires jurisdictions to approve housing projects that comply with objective general plan and zoning standards unless the jurisdiction makes written findings based on substantial evidence that a proposed project would have a specific, adverse impact on the public health or safety and that there are no feasible methods to mitigate or avoid those impacts other than disapproval of the project.

The Density Bonus Act (Gov. Code, § 65915) entitles developers to exceed density limits and modify other generally applicable development standards in exchange for designating a set percentage of the project as long-term affordable housing. The Mello Act

(Gov. Code, § 65590) establishes minimum production requirements for affordable housing within the coastal zone.

Finally, the Coastal Act (Pub. Resources Code, § 30000 *et seq.*) is a comprehensive scheme that governs land use planning for the state's entire coastal zone. It requires local governments to develop local coastal programs composed of a land use plan and implementing ordinances to promote the Coastal Act's objectives. After the Coastal Commission certifies the local coastal program, local jurisdictions administer the plan and project approvals; however, development permits issued within the coastal zone are not just matters of local law. Rather, an action taken pursuant to a local coastal program is an extension of state policy that takes precedence over local government concerns.

KALNEL GARDENS BACKGROUND AND HOLDING

In *Kalnel Gardens*, a developer applied to the City of Los Angeles to construct a 15-unit housing project in Venice on a site within the coastal zone. The project included two units for very-low-income households, which, pursuant to the Density Bonus Act, entitled it to more units, greater height, and smaller setbacks than would otherwise be permitted on the project site under local regulations. The City denied the developer's application on the grounds that the project's height, mass, and scale were harmful to the surrounding neighborhood, and therefore violated the visual and scenic compatibility requirements of the City's local coastal program and the Coastal Act.

The developer filed suit against the City, alleging that the denial violated the Housing Accountability Act, the Density Bonus Act, and the Mello Act. The trial court held that substantial evidence in the record supported the City's findings that the project violated the Coastal Act, and that the Coastal Act took precedence over the other three other laws at issue. The developer appealed, but the court of appeal upheld the lower court's conclusion that the Coastal Act takes precedence over the Density Bonus Act and the Mello Act. It also dismissed the portion of the appeal relating to the Housing Accountability Act because the developer did not file a writ petition as required by that statute.

The developer argued that the Density Bonus Act's provision that approval of a density bonus or other development incentive "shall not be interpreted, in and of itself, to require... a local coastal plan amendment" meant that a project could be adopted notwithstanding inconsistencies with a local coastal plan if it qualified for a density bonus. The court relied upon Government Code section 65915(m), which states that the Density Bonus Act "does not supersede or in any way alter or lessen the effect or application of the California Coastal Act of 1976" and concluded that the Coastal Act takes precedence over the Density Bonus Act, and that density bonuses or incentives that are inconsistent with a local coastal program are improper.

Although the Mello Act says that it "shall apply within the coastal zone as defined by the Coastal Act," the court also rejected the developer's argument that the Mello Act supersedes the Coastal Act. Because Public Resources Code section 30007.5 states that

conflicts between the Coastal Act and other provisions of state law shall "be resolved in a manner [that] on balance is the most protective of significant coastal resources," the court held that the Mello Act's affordable housing production requirements can only be enforced if they are consistent with the local coastal program and the Coastal Act.

Finally, Government Code section 65589.5(m) provides that actions to enforce the Housing Accountability Act shall be brought as administrative mandate actions. The developer failed to file a writ petition and simply filed a notice of appeal of the entire judgment entered against it. Accordingly, the court concluded that it did not have jurisdiction because the developer never filed the writ petition expressly required by the Act.

FUTURE IMPLICATIONS

Developers who are seeking entitlements within the state's coastal zone cannot rely on the Density Bonus Act or the Mello Act to modify provisions of a local coastal program that would otherwise preclude development. Therefore, it is essential to confirm that a proposed project in the coastal zone is consistent with the Coastal Act and any applicable local coastal program adopted pursuant to the Act before proceeding with development entitlements.

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

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