

Office of  
The City Attorney  
City of San Diego

MEMORANDUM  
MS 59

(619) 236-6220

DATE: February 26, 2007

TO: Jim Waring, Deputy Chief, Land Use and Economic Development

FROM: City Attorney

SUBJECT: Development Services Department February 27, 2007 City Council  
Agenda Item 335: Two actions related to Amendments to Affordable  
Housing Density Bonus

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On February 27, 2007 the City Council is scheduled to consider Agenda Item 335: Two actions related to Amendments to Affordable Housing Density Bonus. This item is docketed as an ordinance to amend the Land Development Code regulations and to certify the Supplement to Environmental Impact Report No. 96-0333. The City Council is to consider two ordinances, one presented by Development Services Department and one presented by the City Attorney. The staff report, submitted by Development Services provides, in part:

There are two alternative actions for consideration. First, the Council may adopt the state mandated density bonus regulations and deny or modify the city-initiated density bonus incentives and still be in compliance with state mandates. Second, the Council may deny and/or modify the state mandated provisions of the regulations. However, this action would cause the regulations to be out of compliance with state law.

(emphasis added) Additionally, the memorandum titled, "Responses to Council Member Frye's Questions Regarding Affordable Housing Density Bonus" prepared by City Planning & Community Investment and Development Services is replete with legal references and erroneous legal advice. The answer to question 13 is particularly misleading:

Section 65915(k) of the State Affordable Housing Density Bonus states that the granting of the incentive cannot require a discretionary approval as stated below.

'The granting of a concession or incentive shall not be interpreted, in and of itself, to require a general plan amendment, local coastal plan amendment, zoning change, **or other discretionary approval**. This provision is declaratory of existing law.'

That provision is stating existing law and provides that an additional level of discretionary review is not required to grant a concession or incentive. It does not state that concessions or incentives must be granted ministerially.

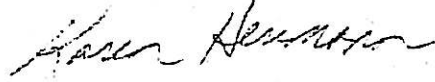
As you are well aware, it is not appropriate for City staff to provide legal advice to the City Council. Charter section 40 provides, in part:

The City Attorney shall be the chief legal adviser of, and attorney for the City and all Departments and offices thereof in matters relating to their official powers and duties..

It shall be the City Attorney's duty, either personally or by such assistants as he or she may designate, to perform all services incident to the legal department; to give advice in writing when so requested, to the Council, its Committees, the Manager, the Commissions, or Directors of any department, but all such advice shall be in writing with the citation of authorities in support of the conclusion expressed in said written opinions; to prosecute or defend, as the case may be, all suits or cases to which the City may be a party; to prosecute for all offenses against the ordinances of the City and for such offenses against the laws of the State as may be required of the City Attorney by law; to prepare in writing all ordinances, resolutions, contracts, bonds, or other instruments in which the City is concerned, and to endorse on each approval of the form or correctness thereof..

The City Attorney's Office has submitted to the City Council for consideration an "Alternative State Mandated Density Bonus Ordinance." to meet the legal requirements of state law. The ordinance presented by Development Services Department is misleading and ambiguous. The state density bonus law does not require removal of all other levels of discretionary review. The DSD staff report and memorandum answering Councilmember Frye's legal questions provides legal advice that is inaccurate. Further, providing legal advice to the City Council is contrary to the Charter mandate that the City Attorney is the legal advisor to the City.

MICHAEL J. AGUIRRE, City Attorney



By

Karen Heumann  
Assistant City Attorney

KH:jb

cc: Honorable Mayor and City Council  
Bill Anderson, Director, City Planning and Community Investment  
Elizabeth Maland, City Clerk