Office of
The City Attorney
City of San Diego

MEMORANDUM
MS 59

(619) 236-6220

DATE: February 10, 2007

TO: Honorable Mayor and City Councilmembers

FROM: City Attorney

SUBJECT: Issues Relating to the Implementation of the State Density Bonus Law

---

INTRODUCTION

Recently, several recurring questions have arisen regarding the State Density Bonus law and the proposed ordinance implementing that law, O-2007-40. This memorandum will address those questions.

By way of background, California Government Code sections 65915-65918 contain mandates relating to the provision of affordable housing. This law requires cities and counties to allow applicants to exceed the allowable density when certain percentage of the units will be affordable. The law also requires that applicants receive requested incentives or concessions, unless findings can be made to deny the requested incentives or concessions. Cities and counties are required to adopt an ordinance specifying how compliance with this section will be implemented.

QUESTIONS PRESENTED

1. Does the state density bonus law allow an applicant to violate the Proposition D height limit as a requested incentive or concession?

2. Must a requested incentive or concession be granted at the Process One approval level?

3. Can the City limit the choices of possible incentives or concessions that an applicant may choose from?

SHORT ANSWERS

1. No. The state density bonus law does not allow an applicant to violate the Proposition D height limit as a requested incentive or concession.

2. Maybe yes. The decision on the requested incentive or concession would be consolidated with the decision on the project as a whole in accordance with San Diego Municipal Code section 112.0103. Therefore, if a project is otherwise Process One, the incentive or concession would be granted as a Process One.

3. No. The City may not limit the choices of possible incentives or concessions an applicant may choose from.

ANALYSIS

Proposition D

Proposition D is a local initiative currently codified in the San Diego Municipal Code at Chapter 13, Article 2, Division 5, that, with few exceptions, limits the height of buildings to 30 feet in the Coastal Zone, as defined in Proposition D. This Proposition was submitted to the Coastal Commission as part of the City's local coastal program and was certified as such by the Coastal Commission. The proposed ordinance does not amend that part of the City's local coastal program. However, because questions were raised regarding the relationship of Proposition D to the proposed ordinance, a provision was added to the proposed density bonus ordinance on January 30, 2007, stating that any requested incentives or concessions would be subject to the regulations of Chapter 13, Article 2, Division 5. (*See*, O-2007-40; §143.0740(b)(5).)

Chapter 13, Article 2, Division 5 is the codification of Proposition D. Section 132.0505(a) states: Notwithstanding any section to the contrary, no building or addition to a building shall be constructed with a height in excess of thirty feet within the Coastal Zone of the City of San Diego. A definition of "notwithstanding" is "in spite of." (Webster's Encyclopedic Unabridged Dictionary, 1996.) So, in spite of any other section of the municipal code to the contrary, the municipal code already provides that Proposition D will not be violated.

In addition, the City has no authority to grant an incentive or concession that conflicts with our certified local coastal program. Because the certified local coastal program includes the Proposition D height limit, and that height limit is not being amended, any request for a waiver of that limit must be denied. For a more lengthy analysis, please refer to the City Attorney Memorandum of Law on this subject dated September 8, 2006.

Processing of Incentives and Concessions

The state density bonus law mandates that "[t]he granting of an incentive or concession 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." Ca. Government Code §65915(k).

The City of San Diego's decision process for development permits is set forth in the San Diego Municipal Code in Chapter 11, Article 2, Division 5. The decision processes are Process One through Process Five. San Diego Municipal Code §§ 112.0502-112.0509. Process One is the only process which is ministerial; the application may only be approved or denied. San Diego Municipal Code § 112.0502. However, decisions made by Processes Two through Five allow the exercise of discretion, in that the application may be approved, conditionally approved, or denied. San Diego Municipal Code §§ 112.0503; 112.0505; 112.0507; 112.0509.

Under the decision making process as currently set forth in the San Diego Municipal Code, the only approval process available that does not require "discretionary approval" is Process One. The proposed ordinance therefore reflects that incentives or concessions shall be provided through Process One. O-2007-40, §143.0740(b).[1]

However, the San Diego Municipal Code also requires the decision making on a development application to be consolidated and heard by the highest level of authority for that development. San Diego Municipal Code §112.0103. Any decision on an incentive or concession would be consolidated with the entire development application and heard at the highest level of authority for that development application.

This is all we ask - that DSD obey the Muni Code!

Therefore, if a development is a Process One, the request of an incentive or concession would not elevate that application to a discretionary approval level, i.e., Process Two through Five. The application would remain a Process One. However, if the development is one which would require a Process Two through Five hearing, the decision on the requested incentive or concession would be consolidated and heard with the entire application.

The language in the proposed ordinance regarding the granting of incentives or concessions by a Process One has raised some concerns. Should the City Council decide to revise the language to eliminate the reference to Process One, proposed language is as follows:

> 143.0740(a)(2) The granting of an incentive shall not be interpreted, in and of itself, to require a General Plan amendment, zoning change or other discretionary approval~~, notwithstanding Planned Development Permit Procedures (Chapter 12, Article 6, Division 6)~~. A request for an incentive or concession shall not

---

[1]The proposed ordinance also provides that the granting of the density bonus shall be a Process One. O-2007-40, 143.0725.

This is the vital difference between Option 1 and Option 2

change the decision process otherwise applicable to the *development.*

143.0740(b) The following incentives shall be provided ~~through Process One~~ consistent with Tables 143-07A, 143-07B, and 143-07C:

Limiting Acceptable Incentives or Concessions

The state density bonus law states that when an "applicant seeks a density bonus for a housing development within, or for the donation of land for housing within, the jurisdiction of a city, county, or city and county, that local government shall provide the applicant incentives or concessions for the production of housing units and child care facilities as prescribed in this section. Ca. Gov. Code §65915(a) (emphasis added.)

Incentives or concessions are defined as:

(1) A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission as provided in Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable, financially sufficient, and actual cost reductions.

(2) Approval of mixed use zoning in conjunction with the housing project if commercial, office, industrial, or other land uses will reduce the cost of the housing development and if the commercial, office, industrial, or other land uses are compatible with the housing project and the existing or planned development in the area where the proposed housing project will be located.

(3) Other regulatory incentives or concessions proposed by the developer or the city, county, or city and county that result in identifiable, financially sufficient, and actual cost reductions.

Ca. Gov. Code §65915(l).

Although section 65915(l)(1) does allow the city to propose other regulatory incentives or concessions that result in identifiable, financially sufficient, and actual cost reductions; the city "shall grant the concession or incentive requested by the applicant unless the city, county, or city and county makes a written finding, based on substantial evidence, of either of the following:

(A) The concession or incentive is not required in order to provide for affordable housing costs, as defined in Section 50052.5 of the Health

> and Safety Code, or for rents for the targeted units to be set as specified in subdivision (c).
>
> (B) The concession or incentive would have a specific adverse impact, as defined in paragraph (2) of subdivision (d) of Section 65589.5, upon 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 method of satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households."[2]

There must always be "findings" for a refusal.

Ca. Gov. Code §65915(d)(1).

Therefore, the City may suggest, but cannot require, that the applicant choose an incentive or concession from a pre-approved list. The City must make written findings, based on substantial evidence, when denying any requested incentive or concession.

CONCLUSION

The key!

The height limit set forth in Proposition D is not subject to waiver as an incentive or concession pursuant to proposed ordinance O-2007-40. A requested incentive or concession, in and of itself, cannot be required to obtain a discretionary approval; however, the request for an incentive or concession will be consolidated with any discretionary approval already required by the project application, if any. Finally, an applicant may not be required to choose from a list of pre-approved incentives or concessions.

MICHAEL J. AGUIRRE, City Attorney

By
Shannon Thomas
Deputy City Attorney

ST:s

---

[2] "Specific adverse impact" on public health and safety means "a significant, quantifiable, direct, and unavoidable impact, based on objective, identified written public health or safety standards, policies, or conditions as they existed on the date the application was deemed complete. Inconsistency with the zoning ordinance or general plan land use designation shall not constitute a specific, adverse impact upon the public health or safety." California Gov. Code §65589.5.