The Density Bonus Law: Has Its Time Finally Arrived?

By David H. Blackwell

I. INTRODUCTION

The confluence of a declining single-family market and a growing emphasis on "smart growth" infill projects has created an increased demand for urban multifamily development.[1] These projects, particularly those that include affordable housing units, face considerable financial and political constraints. To make such projects feasible, some California developers rely on California's Density Bonus Law.[2] In general, this statute allows developers whose housing development[3] proposals meet certain thresholds of affordability to receive density bonuses,[4] incentives, and development waivers from the local agency.

The Density Bonus Law is not well-organized, however, and its application by cities and counties (collectively "cities") varies considerably throughout the state. As noted during the most recent attempt to clean up the statute in 2008:

> Due to the substantial changes the law has undergone over the years, it is confusing to interpret and is the subject of numerous debates as to both its intent and its actual requirements. Developers and cities frequently clash over what the law dictates, with developers increasingly demanding concessions and waivers that cities do not feel they should have to grant under the law.[5]

Unfortunately, there is little guidance from the courts, as only a handful of published appellate court decisions have examined the Density Bonus Law since its adoption in 1979. In particular, the courts have not yet addressed in any detail how much discretion a city retains to condition or *deny* a proposed project that otherwise qualifies under the Density Bonus Law. As with any exercise of police power, local development requirements cannot be imposed in a manner that conflicts with state statutes. However, the application of this limitation to specific projects is often disputed.

A few key cases, however, have provided limited insight into the application of the Density Bonus Law to promote development and the corresponding limitations imposed upon cities. Most recently, the court in *Wollmer v. City of Berkeley* ("*Wollmer II*")[6] provided some guidance concerning the scope of the statute and underscored the courts' growing reluctance to constrain cities' ability to use the Density Bonus Law to promote the development of affordable housing units. However, even the *Wollmer II* decision leaves questions unanswered.

The Density Bonus Law has the potential to provide developers of multifamily housing projects considerable leverage during the entitlement process. The awkwardness of the statute and the uncertainty of its application sometimes dissuades developers (and practitioners) from utilizing its provisions. Indeed, many cities exhibit an inherent distrust of the statute or are uncertain about what it actually requires a city to do. This article explores some of these practical and political realities, while positing that the Density Bonus Law is an often-neglected device that developers should consider using more frequently in this challenging real estate market.

II. BACKGROUND

The Density Bonus Law is one of several California statutes designed to implement "an important state policy to promote the construction of low-income housing and to remove impediments to the same."[7] As summarized in *Wollmer II*, the Density Bonus Law "is a powerful tool for enabling developers to include very low, low, and moderate-income housing units in their new developments."[8] The purpose of the Density Bonus Law is to encourage cities to offer bonuses and incentives to housing developers that will "contribute significantly to the economic feasibility of lower income housing in proposed housing developments."[9] As recognized by California courts, "the Density Bonus Law 'reward[s] a developer who agrees to build a certain percentage of low-income housing with the opportunity to build more residences than would otherwise be permitted by the applicable local regulations.'"[10] By incentivizing developers, the Density Bonus Law promotes the construction of housing for seniors and low-income families.[11]

When the Legislature adopted the Density Bonus Law, it declared that a housing shortage crisis must be addressed and that the State should rely on local governments to provide the necessary increased housing stock "provided, that such local discretion and powers not be exercised in a manner to frustrate the purposes of this act."[12] The author of a successful 2002 amendment to the statute noted that "too many local governments have undercut [the Density Bonus Law] by layering density bonus and second unit projects with unnecessary and procedural obstacles."[13] According to the author and sponsors of the 2002 amendment bill, its purpose was to simplify the process for obtaining density bonuses "in order to increase California's supply of affordable housing."[14]

The Density Bonus Law applies to both general law and charter cities.[15] It requires cities to adopt an ordinance that specifies how local compliance with the statute will be implemented, though failure to adopt such an ordinance does not relieve the city from complying with the law.[16]

III. DENSITY BONUS LAW MECHANICS

A. Density Bonuses

1. Density Bonus Thresholds

A housing project must first meet certain thresholds of affordability in order to qualify for a density bonus. As

explained in *Wollmer II*:

> Section 65915 mandates that local governments provide a density bonus when a developer agrees to construct any of the following: (1) 10 percent of the total units within the project for lower income[17] households; (2) 5 percent of total units for very low income[18] households; (3) a senior citizen housing development or mobilehome park restricted to older persons, each as defined by separate statute; or (4) 10 percent of units in a common interest development for moderate-income[19] families or persons.[20]

Section 65915(b)(1) of the Density Bonus Law provides that requests for a density bonus and incentives[21] *must* be granted "when an applicant for a housing development seeks and agrees to construct a housing development" that meets one or more of the statute's thresholds. Although a city may eventually deny a request for an *incentive* if certain limited findings are made,[22] the Density Bonus Law does not identify any findings that would allow a city to deny a *density bonus* request.

Some have argued that the "seeks and agrees" phrase in the Density Bonus law limits its application to housing developments that are not otherwise required to provide affordable units under an inclusionary zoning ordinance. Indeed, this issue was the subject of a 2005 debate in the legislature concerning the intent of SB 1818 and SB 435, which were proposed amendments to the Density Bonus Law.[23] If that interpretation were followed, however, cities could thwart the Density Bonus Law by imposing inclusionary zoning requirements at or above the qualifying thresholds in the Density Bonus Law, thereby preventing any project from qualifying for a density bonus.

Despite these uncertainties with the Density Bonus Law, it is clear that cities cannot impose thresholds higher than those provided under the Density Bonus Law for a project to qualify for a density bonus. In *Friends of Lagoon Valley v. City of Vacaville*,[24] the city's density bonus ordinance contained thresholds similar to those set forth in an earlier version of the Density Bonus Law. "However, once the Legislature amended Section 65915 [to impose lower thresholds], state law preempted inconsistent provisions in these municipal ordinances."[25] Therefore, as a matter of practice, applicants should compare any local density bonus thresholds to those set forth in Section 65915(b) to ensure that the city is applying the correct figures.

2. *Density Bonus Calculations*

Once a project meets one of the minimum thresholds,[26] the size of the density bonus is governed by the number of affordable units the project will provide. "In its specifics, section 65915 establishes a progressive scale in which the density bonus percentage available to an applicant increases based on the nature of the applicant's offer of below market rate housing."[27] By linking the size of the density bonus to the number of affordable units offered by the developer, the statute promotes the voluntary production of more affordable housing. "The progressive level of benefits for deeper affordability is the mechanism by which municipalities entice developers to build low-income housing."[28]

Proposed projects reserving a minimum of 10% of total units for moderate-income households receive a 5% density bonus, with every additional percentage point increase in applicable units above the minimum (up to 40%) receiving a 1% increase in the density bonus, up to a maximum 35% bonus.[29] Developers agreeing to construct a minimum of 10% of units for low-income households are eligible for a 20% density bonus, and the multiplier for each additional increase in units above the minimum amount (up to 20%) is 1.5%.[30] A similar scale applies to construction of very low-income units, except the minimum 20% density bonus kicks in when only 5% of units are reserved for this classification, and the multiplier for each additional percent increase in units above the minimum amount (up to 11%) is 2.5%.[31] Finally, for a senior housing development or age-restricted mobilehome park, the density bonus is 20% of the number of senior housing units.[32]

The total number of units for the purpose of calculating the percentages described above does not include units added by a density bonus awarded under the Density Bonus Law or any local law granting a greater density bonus.[33] If permitted by local ordinance, nothing prohibits cities from granting a density bonus greater than what is described in the Density Bonus Law.[34]

B. Incentives and Concessions

1. *Defined*

Applicants for density bonuses may also request specific incentives or concessions from cities.[35] Thus, "when an applicant seeks a density bonus for a housing development that includes the required percentage of affordable housing, section 65915 *requires* that the city not only grant the density bonus, but provide *additional* incentives or concessions where needed based on the percentage of low income housing units."[36] A "concession or incentive" (together, "incentive" as the statute does not distinguish the terms) includes:

- a reduction in site development standards, or a modification of zoning code or architectural design requirements, including reductions in otherwise mandated setback, square footage, and parking ratio requirements, resulting in identifiable, financially sufficient, and actual cost reductions;
- approval of mixed-use zoning in conjunction with the housing project if the nonresidential land uses would reduce the cost of the housing development and are compatible with the housing project and the surrounding area;
- other regulatory incentives proposed by the developer or city that result in identifiable, financially sufficient, and actual cost reductions.[37]

The legislative history indicates that the "identifiable, financially sufficient, and actual cost reductions" text in the incentive definitions was added to protect the developer from a city's attempt to force a developer to accept marginal incentives.[38] The intent of the Density Bonus Law is to ensure that incentives offered by the city "contribute significantly" to the development of affordable housing and, therefore, unless the developer expressly agrees otherwise, "a locality shall not offer a

density bonus or any other incentive that would undermine the intent of" the Density Bonus Law.[39]

The "incentive" definition does not limit or require the provision of direct financial incentives by a city.[40] Some commentators believe that an incentive also includes designating the development as "by right," and exemptions from any local ordinances that would indirectly increase the cost of the housing units to be developed.[41]

2. Calculations

As with density bonus calculations, the number of incentives to which a developer is entitled depends upon the percentage of very low, low, or moderate-income units provided (no incentive is provided for the provision of non-income restricted senior units). The developer must receive the following number of incentives:

- One incentive for projects that include at least 10% of the total units for low-income, at least 5% for very low income, or at least 10% for moderate-income households.[42]
- Two incentives for projects that include at least 20% of the total units for low-income, at least 10% for very low income, or at least 20% for moderate-income households.
- Three incentives for projects that include at least 30% of the total units for low-income, at least 15% for very low income, or at least 30% for moderate-income households.[43]

In addition, an applicant may request that the city not require a vehicular parking ratio for a density bonus project that exceeds the following: 1 onsite space for 0-1 bedroom; 2 onsite spaces for 2-3 bedrooms; and 2.5 onsite spaces for four or more bedrooms.[44] An applicant also may request parking incentives beyond those expressly set forth in the Density Bonus Law.[45]

3. Required Findings for Denial of an Incentive Request

A city must establish local procedures, approved by the city council, for complying with incentive provisions of the Density Bonus Law.[46] Even if local procedures are not established, a city *must* grant the incentive requested by the applicant unless the city makes a written finding, based upon substantial evidence,[47] that the incentive:

- is not required in order to provide for affordable housing costs;
- would have a "specific adverse impact . . . upon public health and safety or the physical environment" that cannot be feasibly mitigated without rendering the development unaffordable to low- and moderate-income households; or
- would be contrary to state or federal law.[48]

The statute does not provide guidance on how a city should demonstrate that the incentive is not required in order "to provide for affordable housing costs." A 2002 amendment to the Density Bonus Law generated opposition from local government advocates who argued that this provision would require cities to prepare separate project feasibility analyses in order to refute an incentive request.[49] Even though there is no generally accepted methodology to date, one potential approach is to subtract the mandated lower sales price for the affordable unit from the actual cost to build the unit, and then to compare that developer cost to the financial benefit created by the incentive. Local attempts to restrict the developer's profit margin by denying an incentive request under the first criterion, however, are suspect and may be considered hostile to the Density Bonus Law.[50]

The second finding expressly borrows the definition of a "specific adverse impact" from the Housing Accountability Act,[51] specifically, "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."[52] This finding is narrower than the local standards used to deny use permit applications, which often invoke broader "general welfare" considerations. "Moreover, mere '[i]nconsistency with the zoning ordinance or general plan land use designation shall not constitute a specific, adverse impact upon the public health or safety.'"[53]

The third finding is self-explanatory, although as discussed below,[54] issues may arise if a city attempts to rely on other development-related statutes such as the California Environmental Quality Act, the Subdivision Map Act, or other provisions of the Planning and Zoning Law to provide justification for denying an incentive.

To add some teeth to a city's application of these findings, the Density Bonus Law mandates that a court award the successful plaintiff reasonable attorney's fees and costs if a city refused to grant a requested incentive and the court later determines that the refusal lacks the requisite written findings and evidence.[55]

C. DEVELOPMENT STANDARD WAIVERS

In addition to, and separate from, requests for incentives, a density bonus applicant may request a waiver or reduction of development standards that would have the effect of physically precluding the construction of the project at the densities or with the incentives permitted under the statute.[56] "Development standard" means a site or construction condition, including, without limitation, local height, setback, floor area ratio, onsite open space, and parking area ratio requirements that would otherwise apply to residential development under local ordinances, general plan elements, specific plans, charters, or other local condition, law, policy, resolution, or regulation.[57]

A request for a development standard waiver neither reduces nor increases the number of incentives to which the developer is otherwise entitled.[58] Furthermore, there is no limit on the number of waivers that may be issued.

As with incentives, although a city might ask a developer to modify a requested development standard waiver, it cannot force the developer to do so. Instead, a city's refusal to waive or reduce development standards must be supported by one or more findings similar to those available for denying a request for an incentive.[59] Again, if a court determines that such refusal was unwarranted, it must award the developer attorney's fees and costs of suit.[60]

Importantly, even if the developer does not submit a request for a development standard waiver, a city is prohibited from

applying a development standard that would have the effect of physically precluding the construction of the project at the densities or with the incentives permitted under the Density Bonus Law.[61] This statutory restriction on a city's planning and zoning powers raises important questions about what a city can and cannot do when considering a project that qualifies for a density bonus.

IV. RELATIONSHIP TO THE HOUSING ACCOUNTABILITY ACT

Context for the interplay between the state mandates under the Density Bonus Law and local government discretion is afforded by the Housing Accountability Act for guidance,[62] which similarly promotes the development of affordable housing (and housing generally).

The Housing Accountability Act implements the state policy "that a local government not reject or make infeasible housing developments" that contribute to meeting the state's housing need "without a thorough analysis of the economic, social and environmental effects of the action and without complying with subdivision (d)."[63] Courts have clarified that subdivision (d) of the Housing Accountability Act imposes strict limitations on a city's ability to disapprove or conditionally approve certain low-income housing projects, while subdivision (j) applies to housing development projects generally.[64] Both subdivisions apply to affordable housing developments.

Under subdivision (d), a city cannot disapprove or conditionally approve an affordable housing project in a manner that renders it infeasible (including through the use of design review standards) unless it makes one of five written findings based on substantial evidence in the record.[65] One of those findings is that the development project would have a "specific, adverse impact upon the public health or safety," which is similar to the finding available for denying an incentive request under the Density Bonus Law, although the latter includes consideration of impacts to the "physical environment."[66] An affordable housing project under subdivision (d), however, differs slightly from a project that may qualify for a density bonus because the former requires that at least 20% of the units be sold or rented to "lower-income households" or 100% of the units be sold or rented to "moderate-income households."[67] Therefore, a project that may qualify for a density bonus by providing only 10% of its units for lower-income households[68] may not qualify for the protections under subdivision (d) of the Housing Accountability Act.

Subdivision (j), which is not limited to affordable housing projects but applies to housing development projects generally, provides that if the proposed development project complies with applicable planning and zoning standards and criteria (including design review standards) that are in effect at the time of project application completion, a city *cannot* disapprove or conditionally approve the project with a lower density unless it makes written findings supported by substantial evidence in the record that the proposed project "would have a specific, adverse impact[69] on the public health or safety" and that there is no feasible mitigation.[70] Notably, this limitation on a local agency's discretion is similar to the Density Bonus Law's restrictions for denying an incentive request or a proposed waiver or reduction of development standards.

Section 65589.5(j) of the Housing Accountability Act thus imposes mandatory conditions limiting cities' discretion to deny the permit, and "does so by setting forth the *only* conditions under which an application may be disapproved."[71] In addition, the Act places the burden of proof on cities if its project disapproval or conditional approval is challenged in court.[72]

V. CITY DISCRETION TO TAKE ACTIONS NECESSARY TO EFFECTUATE THE DENSITY BONUS LAW

Keeping the above framework in mind and understanding the interplay between the various requirements will help to understand the 2011 appellate decision in *Wollmer II*.

Wollmer II continued the trend begun by *Friends of Lagoon Valley* and *Wollmer I* in 2007 and 2009, respectively, in which the courts deferred to a city's decisions promoting the supply of affordable housing.[73] The key facts in *Wollmer II* involved the City of Berkeley's ("City") approval of a use permit to construct a five-story, mixed-use building with 98 residential units (74 base units plus 24 bonus units), including 15 affordable units, commercial space, and parking. In addition to a 20.3% density bonus, the City granted the developer's requests for development standard waivers applicable to building height, number of stories, and setbacks. Project opponent Wollmer sued, but the trial court denied his petition for writ of administrative mandate and entered judgment in favor of the City.

On appeal, Wollmer raised three density bonus related arguments (in addition to unsuccessful CEQA-based arguments): "(1) condition 68 of the use permit allowed the Developers to receive Section 8 subsidies for density-bonus-qualifying units, thereby exceeding the maximum 'affordable rent' established in Health and Safety Code section 50053; (2) the City's approval of amenities should not have been considered when deciding what standards should be waived to accommodate the project; and (3) the City improperly calculated the project's density bonus."[74] The court of appeal rejected all three arguments.

Wollmer first argued that the total amount of rent the developer would receive from very low income tenants qualifying for Section 8 subsidies would exceed the "affordable rent" allowed under the Density Bonus Law because the additional federal subsidies would exceed the statutory amount. In determining the merits of this argument, the court concluded: "Under this reasoning, the density bonus law *caps* the total rent a housing provider can receive *from any source* to the above amount, whether that rent comes from direct tenant payment or a combination of tenant contributions and a Section 8 subsidy. This is not the law."[75] The court continued, "'affordable rent' within the meaning of our density bonus law is concerned with the rent that a tenant pays, not with the compensation received by the housing provider. . . . It would be nonsensical to equate the notion of setting of 'an affordable rent' with that of setting and capping the developer's compensation."[76] Finally, "imposing 'costs' on a developer attempting to build affordable units is hostile to the letter and spirit of the density bonus law."[77]

Next, Wollmer argued that by granting a development standard waiver, the City violated the Density Bonus Law because it was granted to accommodate certain project amenities, including an interior courtyard, a community plaza, and higher ceilings. The appellate court again rejected this argument,

holding that "nothing in the statute requires the applicant to strip the project of amenities. . . . Standards may be waived that physically preclude construction of a housing development meeting the requirements for a density bonus, period."[78] The court's reasoning suggests that a city may not micromanage the design of a project. If the project meets the requirements of the Density Bonus Law, the city must grant development standard waiver requests to ensure the project as designed is not physically prevented from being developed. Quoting the prohibition contained in section 65915(d)(1), the *Wollmer II* court warned, as it did in *Wollmer I*: "Had the City failed to grant the waiver and variances, such action would have had 'the effect of physically precluding the construction of a development' meeting the criteria of the density bonus law."[79]

Third, Wollmer argued that the City's calculation of the density bonus was improper because the City relied on the densities set forth in its zoning ordinance instead of its general plan. In rejecting Wollmer's third argument, the court explained that the City does not apply the general plan density standards to specific parcels, and found that the City properly calculated the density bonus based on the more specific provisions of its zoning code.[80]

The *Wollmer II* decision reaffirms cities' ability to apply broadly the Density Bonus Law to promote its goals through the award of density bonuses and incentives, and by providing flexibility in granting development standard waivers.

VI. LIMITS ON ABILITY TO CONDITION OR DENY A QUALIFIED HOUSING DEVELOPMENT

What happens, though, if a city wants to *deny* a density bonus project or impose conditions that make the project infeasible? As explained above,[81] the Housing Accountability Act expressly provides that a city may not take such action against a qualified affordable housing project unless one of that statute's limited findings can be made, and similarly, the Density Bonus Law prohibits a city from denying a request for an incentive or development standard waiver on grounds not identified in that statute.

There is less certainty, however, about whether a city can grant the density bonus, and incentive and waiver requests, then deny the project on other grounds. The Density Bonus Law provides that if a general plan amendment, zoning amendment, or other discretionary approval would not otherwise be required for a proposed project, approval of a density bonus or incentives does not require such approvals.[82] For example, even if an approved density bonus makes the project's density exceed what was otherwise allowed under the applicable general plan land use designation and zoning district, the applicant would not be required to seek amendments of those local regulations.

There may be situations, however, where a project may nonetheless require discretionary approvals not directly related to the density bonus or incentives. In such cases, some cities may argue that the Density Bonus Law does not affect their ability to deny or condition a project under their broad police powers: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[83] This constitutional authority given to cities to adopt local ordinances is derived from the "inherent reserved power of the state to subject individual rights to reasonable regulation for the general welfare."[84] A city's police power "is as broad as that of the state Legislature itself."[85] For example, local regulations based on aesthetics are permissible so long as they are reasonably related to the general welfare.[86] Even though the police power is broad, it must not "conflict with the general laws."[87] A local regulation conflicts with the "general laws," including statutes such as the Density Bonus Law, if it "duplicates, contradicts or enters an area fully occupied by general law, either expressly or by legislative implication."[88]

It is important to consider this issue in its historical context. Throughout the Density Bonus Law's development, the Legislature declared that affordable housing was critical to California and that cities should not create obstacles to developing affordable housing. This mandate is not limited to the Density Bonus Law, but is also embodied in other statutes, many of which are identified in Government Code section 65582.1. This legislative directive has been accepted by the courts, which have held that the Density Bonus Law should be fully implemented to encourage the creation of more affordable units.[89] Therefore, the Legislature and the courts recognize that more affordable housing is badly needed in California, and local agencies should not impose roadblocks to thwart such development unless they can make one of the statutory findings.[90]

For example, in *Building Industry Association v. City of Oceanside*, the court held that a local ballot measure facially conflicted with, and was preempted by, the Density Bonus Law when it impeded the Density Bonus Law's promotion of construction of low-income housing.[91] Similarly, in *Friends of Lagoon Valley*,[92] the court examined the Density Bonus Law and its relationship to the city's police powers, and held that a local ordinance's imposition of a higher threshold for a project to qualify for a density bonus would be preempted by the Density Bonus Law and therefore void. Finally, *Wollmer I* and *Wollmer II* suggest that disapproving a density bonus project would invoke the prohibition in the Density Bonus Law against applying development standards that would physically preclude construction of the project.[93]

In *Wollmer I*, the City of Berkeley approved use permits and variances for a mixed-use density bonus project consisting of residential units and retail commercial space.[94] When the legality of the City's approval was challenged, the appellate court held:

> Had the City failed to grant the variances the result would "have the effect of precluding the construction of a development" (§ 65915, subd. (e)), which met the criteria of the Density Bonus Law. If the Project as a whole was not economically feasible, then the below market rate housing units would not be built, and the purpose of the Density Bonus Law to encourage the development of low and moderate income housing would not be achieved.[95]

A similar conclusion was reached in *Wollmer II* regarding the City's consideration of the project's use permit application.[96] Thus, both *Wollmer* courts have warned that denial of a use permit or variance might be contrary to the Density Bonus law, specifically, section 65915(e)(1). This judicial language implies that if a city

disapproves a density bonus project's application for a use permit, variance, design review, or similar permit, and the city cannot make any of the findings set forth in the Density Bonus Law to justify the disapproval, then the action would be contrary to the purpose of the Density Bonus Law and vulnerable to a writ of mandate issued by the courts,[97] including attorney's fees and costs.

To interpret the law otherwise would allow a city to undermine the purpose of the Density Bonus Law by subjecting the project to a discretionary approval process such as a conditional use permit, then disapproving the project based on broad "general welfare" concerns or similar grounds. Even though such an adjudicatory action would be subject to the standard of review in Code of Civil Procedure section 1094.5, which is a less deferential standard than is typical for legislative actions,[98] it is a far easier to meet than the "specific adverse impact" standard provided in the Density Bonus Law. Denying density bonus projects or rendering them infeasible through excessive conditions would mean "that housing units for lower-income households would not be built and the purpose of the density bonus law to encourage such development would not be achieved."[99]

As a practical note, an applicant should consider formally requesting an incentive or development standard waiver that addresses potential grounds for denial (or excessive conditions of approval). This will invoke the restrictions on denial set forth in subdivisions (d)(3) and (e)(1) of the Density Bonus Law, thereby preserving the opportunity to recover attorney's fees if a subsequent lawsuit is successful.

VII. POLITICAL REALITIES

Although many cities struggle to meet their fair share of their respective regional housing need,[100] particularly the provision of affordable housing units, developers often encounter local resistance when proposing density bonus projects that would help remedy this shortfall. Indeed, affordable multifamily projects are regularly opposed by neighborhood groups. (These groups often include citizens who identify themselves with "anti-sprawl" and "smart growth" policies — an irony not lost on the development community.) Project opposition in California's urban centers is often highly-educated and organized, and exerts significant influence on city staff and elected officials. As a result, density bonus projects regularly confront strong third-party opposition and unenthused local officials.

A related political consideration is the resistance that developers encounter when city staff and elected officials perceive a development project is forced upon them. If a city believes that a developer is using the Density Bonus Law as a hammer without considering the effect of the project on the community, the city might resist the project with the tools it has available. Given this potential agency reaction, a developer should consider spending time with city staff and officials to discuss not only how the Density Bonus Law affects the project, but also how the project positively affects the city (e.g., by helping attain regional housing requirements, and promoting transit-oriented and sustainable development policies). A mutual understanding of the applicable legal environment and the impact of the project on the community should be viewed as a means for advancing the dialogue between the developer and the city, and need not be characterized as a confrontation.

The reality, however, is that even if the statute limits a city's discretion to condition or deny a density bonus project, a city may decide to do so anyway due to neighborhood pressure or as a reaction to perceived strong-arming by the developer. A developer then must decide whether to seek judicial relief, which many are reluctant to do despite the potential to recover attorney's fees and costs, especially if the developer fears repercussions on future projects within that jurisdiction.

Because key elements of the Density Bonus Law are still subject to various interpretations that have not been clarified by the Legislature, it will likely be the courts that provide guidance to both developers and cities on future projects.

VIII. CONCLUSION

The Density Bonus Law is a potentially powerful tool for developers of multifamily projects. Although the Density Bonus Law has existed for over thirty years, both developers and cities have struggled with its application. The statute "is confusing, convoluted, and subject to endless debate about its requirements."[101] As a result, many developers are either unaware of the law or unsure about how it works. Many cities share this unfamiliarity and are resistant to attempts to limit their police powers when considering multifamily development applications. The current residential real estate market has begun to sharpen the focus of developers, cities, and practitioners with regard to this statute, and all parties should expect the Density Bonus Law to become a more integral component of the local multifamily housing projects entitlement process.

David H. Blackwell is a partner in the Walnut Creek office of Allen Matkins Leck Gamble Mallory & Natsis LLP, where he specializes in all aspects of land use entitlements and litigation. David represents landowners, businesses, developers, and governmental agencies before administrative agencies and state and federal courts.

ENDNOTES

1 *See, e.g.*, J.K. Dineen, *Peninsula Housing: If You Build It, They Will Rent*, S.F. Bus. Times, Aug. 26, 2011, *available at* http://www.bizjournals.com/sanfrancisco/print-edition/2011/08/26/peninsula-housing-if-you-build-it.html; Roger Vincent, *Apartments Are the Development Du Jour Among Builders*, L.A. Times, July 17, 2011, *available at* http://www.latimes.com/business/la-fi-commre-quarterly-apartments-20110717,0,4977484,print.story.

2 Cal. Gov't Code § 65915. All statutory references are to the California Government Code unless otherwise specified.

3 Defined as a "development project for five or more residential units." *Id.* § 65915(i).

4 Defined as "a density increase over the otherwise maximum allowable density as of the date of application" to the local agency. *Id.* § 65915(f).

5 A.B. 2280 Bill Analysis, at 8 (Cal. Apr. 21, 2008).

6 *Wollmer v. City of Berkeley*, 193 Cal. App. 4th 1329 (2011) [hereinafter *Wollmer II*]. An earlier First District opinion involving Mr. Wollmer's challenge to the City of Berkeley's application of the Density Bonus Law to a different project is *Wollmer v. City of Berkeley*, 179 Cal. App. 4th 933 (2009) [hereinafter *Wollmer I*].

7 *Bldg. Indus. Ass'n v. City of Oceanside*, 27 Cal. App. 4th 744, 770 (1994); CAL. GOV'T CODE § 65582.1(f).

8 *Wollmer II*, 193 Cal. App. 4th at 1339.

9 CAL. GOV'T CODE § 65917.

10 *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 824 (2007) (quoting *Shea Homes Ltd. P'ship v. County of Alameda*, 110 Cal. App. 4th 1246, 1263 (2003)).

11 *Friends of Lagoon Valley*, 154 Cal. App. 4th at 825.

12 Notes to Stats. 1979, ch. 1207, at 4738, sec. 3 (Cal. 1979).

13 A.B. 1866 Bill Analysis, at 3-4 (Cal. Aug. 28, 2002).

14 *Id.* at 4.

15 CAL. GOV'T CODE § 65918.

16 *Id.* § 65915(a).

17 CAL. HEALTH & SAFETY CODE § 50079.5.

18 *Id.* § 50105.

19 *Id.* § 50093.

20 *Wollmer II*, 193 Cal. App. 4th at 1339; *see* CAL. GOV'T CODE § 65915(b)(1)(A)-(D).

21 *See* discussion *infra* Part III.B.3.

22 *See* CAL. GOV'T CODE § 65915(d)(1).

23 Stats. 2005, ch. 496, sec. 3.

24 *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 824 (2007).

25 *Id.* at 830.

26 *See* discussion *supra* Part III.A.1.

27 *Wollmer II*, 193 Cal. App. 4th at 1340.

28 *Id.* at 1343.

29 CAL. GOV'T CODE § 65915(f)(4).

30 *Id.* § 65915(f)(1).

31 *Id.* § 65915(f)(2).

32 *Id.* § 65915(f)(3).

33 *Id.* § 65915(b)(3).

34 *Id.* § 65915(n). The "[i]f permitted by local ordinance" limitation was added by AB 2280 in 2008. Both *Friends of Lagoon Valley*, 154 Cal. App. 4th at 826, and *Wollmer I*, 179 Cal. App. 4th at 944, analyzed the pre-AB 2280 version of section 65915(n) to hold that no implementing ordinance was required for a city to allow a greater number of density bonus units.

35 CAL. GOV'T CODE § 65915(d)(1).

36 *Wollmer I*, 179 Cal. App. 4th at 944.

37 CAL. GOV'T CODE § 65915(k).

38 The legislative analyses of SB 1818 indicate that the purpose of this provision was to "ensure that the incentives have some value. The intent of adding 'financially sufficient' is [to] ensure that value is more than nominal and actually of benefit to the developer." A.B. 1818 Bill Analysis, at 5 (Cal. Apr. 16, 2004).

39 CAL. GOV'T CODE § 65917.

40 *Id.* § 65915(l). The receipt of direct financial incentives provided under the Density Bonus Law, however, removes a rental housing project from the preemption provisions of the Costa Hawkins Act, as explained in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396, 1402 (2009).

41 Mitchell B. Menzer & Svetlana G. Attestatova, *A Guide to California Government Code Section 65915: Density Bonuses and Incentives for Affordable Housing*, 23 CAL. REAL PROP. J., Spring 2005, at 6-7.

42 Moderate income units must be in a common interest development. CAL. GOV'T CODE § 65915(b)(1)(D).

43 *Id.* § 65915(d)(2).

44 *Id.* § 65915(p)(1).

45 *Id.*

46 *Id.* § 65915(d)(3).

47 Although not defined in section 65915, "substantial evidence" is generally defined as evidence of "ponderable legal significance . . . reasonable in nature, credible, and of solid value, and relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Young v. Gannon*, 97 Cal. App. 4th 209, 225 (2002) (internal citations omitted).

48 CAL. GOV'T CODE § 65915(d)(1).

49 A.B. 1866 Bill Analysis, at 5 (Cal. May 7, 2002); A.B. 1866 Bill Analysis, at 6 (Cal. Apr. 22, 2002); A.B. Bill Analysis, at 1 (Cal. Apr. 8, 2002).

50 *See Wollmer II*, 193 Cal. App. 4th at 1344.

51 *See* discussion *infra* Part V.

52 CAL. GOV'T CODE § 65589.5(j)(1).

53 *Wollmer II*, 193 Cal. App. 4th at 1349-50 (quoting CAL. GOV'T CODE § 65589.5(d)(2)).

54 *See* discussion *infra* Part VI.

55 CAL. GOV'T CODE § 65915(d)(3).

56 *Id.* § 65915(e)(1). The 2008 amendments added the references to "physically precluding" the construction of a density bonus project, and deleted subdivision (f), which read: "The applicant shall show that the waiver or modification is necessary to make the housing units economically feasible." *See Wollmer II*, 193 Cal. App. 4th at 1346.

57 CAL. GOV'T CODE § 65915(o)(1).

58 *Id.* § 65915(e)(2).

59 *Id.* § 65915(e)(1). The statute does not identify any findings that may be applied to deny a density bonus request.

60 *Id.*

61 *Id.*

62 *Id.* § 65589.5.

63 *Id.* § 65589.5(b).

64 *N. Pacifica, LLC v. City of Pacifica*, 234 F. Supp. 2d 1053, 1057-58 (N.D. Cal. 2002).

65 The Housing Accountability Act defines "feasible" as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." CAL. GOV'T CODE § 65589.5(h)(1).

66 *Id.* § 65589.5(d)(2); *see also id.* § 65915(d)(1).

67 *Id.* § 65589.5(h)(3).

68 *Id.* § 65915(b)(1)(A).

69 Similar to the definitions in subdivision (d)(2) and (d)(1)(B) of section 65915, a "specific, adverse impact" is defined as "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." *Id.* § 65589.5(j)(1).

70 *Id.* § 65589.5(j).

71 *N. Pacifica, LLC v. City of Pacifica*, 234 F. Supp. 2d 1053, 1060 (N.D. Cal. 2002).

72 *Id.* at 1059.

73 *Wollmer I*, 179 Cal. App. 4th 933 (2009); *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807 (2007).

74 *Wollmer II*, 193 Cal. App. 4th at 1338.

75 *Id.* at 1342.

76 *Id.* at 1342-43.

77 *Id.* at 1344.

78 *Id.* at 1346.

79 *Id.* at 1347 (quoting *Wollmer I*, 179 Cal. App. 4th 933, 947 (2009)).

80 *Id.* at 1344-45.

81 *See* discussion *supra* Part IV.

82 CAL. GOV'T CODE § 65915(f)(5), (j).

83 CAL. CONST. art. XI, § 7.

84 *Cotta v. City & County of San Francisco*, 157 Cal. App. 4th 1550, 1557 (2007) (citing 8 WITKIN, SUMMARY OF CAL. LAW *Constitutional Law* § 784 (9th ed. 1988)).

85 *Richeson v. Helal*, 158 Cal. App. 4th 268, 277 (2007).

86 *See, e.g., Novi v. City of Pacifica*, 169 Cal. App. 3d 678, 682 (1985).

87 CAL. CONST. art. XI, § 7.

88 *Viacom Outdoor, Inc. v. City of Arcata*, 140 Cal. App. 4th 230, 236 (2006).

89 *See, e.g., Bldg. Indus. Ass'n v. City of Oceanside*, 27 Cal. App. 4th 744, 770 (1994); *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, 823-24 (2007); *Shea Homes Ltd. P'ship v. County of Alameda*, 110 Cal. App. 4th 1246, 1263 (2003); *Wollmer I*, 179 Cal. App. 4th at 940-41; *Wollmer II*, 193 Cal. App. 4th at 1339 .

90 *See* discussion *supra* Part III.B.3.

91 *Bldg. Indus. Ass'n*, 27 Cal. App. 4th at 770, 772.

92 *Friends of Lagoon Valley*, 154 Cal. App. 4th at 830.

93 CAL. GOV'T CODE § 65915(e)(1).

94 *Wollmer I*, 179 Cal. App. 4th at 936.

95 *Id.* at 937.

96 "If the project were not built, it goes without saying that housing units for lower-income households would not be built and the purpose of the density bonus law to encourage such development would not be achieved." *Wollmer II*, 193 Cal. App. 4th at 1347.

97 At least one trial court has ruled that the Density Bonus Law requires a city to approve a density bonus project where housing was otherwise entirely *prohibited*. *See* Lewis J. Soffer, *Does the Density Bonus Law (Gov. Code § 65915) Require Local Government to Approve Mixed Use and Housing Projects Where Local Zoning Does Not Allow Housing at All?*, 18 MILLER & STARR REAL ESTATE NEWSALERT, July 2008, at 2.

98 *See, e.g., Topanga Assoc. for a Scenic Cmty. v. County of Los Angeles*, 11 Cal. 3d 506, 515 (1974).

99 *Wollmer II*, 193 Cal. App. 4th at 1347.

100 *See* CAL. GOV'T CODE §§ 65584-65584.7.

101 A.B. 2280 Bill Analysis, Staff Comments, at 11 (Cal. Apr. 21, 2008).