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DEVELOPMENT RIGHTS

Summer 2008

Chair of California Air Resources Board Addresses JMBM Business Issues Forum

AB 32 Takes Center Stage

Mary Nichols, chair of the California Air Resources Board, was the featured speaker at a recent JMBM Business Issues Forum attended by over 100 of the firm's clients and other guests. Below is a summary of her remarks.

Urban development is a key contributor to climate change and an essential factor in addressing it. California has already begun the process by adopting AB 32, legislation that lays out the framework for action. Basically, AB 32 requires the state to reduce GHG emissions to 1990 levels by 2020. That means reducing the equivalent of 28 percent of emissions across every sector of the California economy. We can achieve this level only with a united effort. The idea behind AB 32 is to place our state on par with countries such as Great Britain and Japan when it comes to GHG emissions. Currently our efforts are being hindered by the Federal government which will not allow us to implement our regulations reducing GHG emissions in passenger cars. We're in the process of litigating this issue in Federal court.

Ben Reznik, Mary Nichols and members of JMBM's GLUEE Group

The transportation sector in California is responsible for about 40 percent of all GHG emissions. One of the best ways to reduce this impact is to implement planning procedures which will limit vehicle miles traveled (VMT). Local governments play a crucial role here in terms of the way they plan and approve projects in their jurisdictions. On every level our planning processes should be aimed at improving land use and transportation patterns to limit VMT because currently this transportation sector is growing at a rate of three percent a year, outstripping populations and any existing technological and fuel innovations. Over 40 national studies have shown conclusively that land use variables are most important in impacting household VMT. These studies also indicate that suburban smart growth measures can reduce these emissions by ten percent, while urban infill development can reduce them by 30 percent or more.

Projects subject to National Environmental Policy Act (NEPA) and/or California Environmental Quality Act (CEQA) requirements are facing increasing pressure to identify and address climate change. The U.S. Supreme Court has ruled that GHG's fall within the Clean Air Act's definition of pollutants, thus requiring the U.S. Environmental Protection Agency (EPA) to regulate them. In California there are several CEQA lawsuits citing inadequate environmental review of GHG emissions. These are incentivizing local governments to include analyses of climate change issues for proposed projects. In addition to AB 32, California has adopted SB 97 which requires the Governor's Office of Planning and Research to prepare guidelines for the feasible mitigation of GHG emissions by July 2009 and have these certified by the Resources Agency by January 1, 2010. Hopefully, this action will establish a single state threshold for such emissions. *JMBM will continue to host important policy and decision makers relevant to the real estate industry.* ■

District Prosecutor for South Coast AQMD joins JMBM

Peter C. Mieras joins Government, Land Use, Environment and Energy Group from the South Coast Air Quality Management District (SCAQMD). Peter brings an extensive background in air regulatory matters as a high-level government lawyer . Over an 18 year career with the SCAQMD, Peter served 6 years as Principal Deputy District Prosecutor and 12 years as Chief Prosecutor. Peter managed the District Prosecutor's Office, which resolves all matters and disputes related to permitting and enforcement. Peter brings an intimate and wide-ranging expertise with the agency that will serve our clients. ■

DEVELOPMENT RIGHTS

In California the Magic Number is 99!

by Benjamin M. Reznik

California voters have spoken and the state now has a new law on eminent domain. On June 3rd, California voters overwhelmingly approved Proposition 99, while sending the rival Proposition 98, down to defeat. The genesis of both initiatives was the landmark decision in the case of Kelo v. City of New London. That decision upheld the right of government to take private property via eminent domain and turn it over to a private developer as long as the taking is for a public use. In 2006, spurred by objections to Kelo and general eminent domain complaints, proponents of restrictions on the process placed Proposition 90 on the statewide ballot. Proposition 90 failed. Undaunted, proponents continued their quest to limit the use of eminent domain. This year voters were faced with not one but two competing propositions, 98 and 99, each aimed at changing the application of eminent domain. The propositions were quite different, however. Proposition 99 will make minor changes in the use of eminent domain, while Proposition 98 would have instituted many of the sweeping changes that Proposition 90 sought.

Proposition 99 Approved

Voters saw Proposition 99 as more directly addressing the concerns brought about by the Kelo decision without unnecessarily undercutting the use of eminent domain. Proposition 99 zeroes in on a central complaint of Kelo; namely, that government may take a private residence and turn the property over to a private developer. Proposition 99 prohibits the use of eminent domain to acquire an owner-occupied single-family home for the purpose of turning it over to another private party. This prohibition would not apply if the property were to be used for a "public work or improvement." It further requires a home owner to have lived in the residence for at least a year. The new law will not apply to eminent domain actions initiated by governmental entities within 180 days after June 3rd. ■

Benjamin M. Reznik is Chairman of the Government, Land Use, Environment & Energy Department at JMBM. Mr. Reznik's practice emphasizes real estate development entitlements, zoning and environmental issues, including frequent appearances before city planning commissions, city councils and other governmental boards and agencies on behalf of real estate development firms. For more information, please contact him at 310.201.3572 or bmr@jmbm.com.

CRA Down-Zoning Under Guise of "Design Guidelines"

by Ellia Thompson

On September 20, 2007, during a public board meeting, the Community Redevelopment Agency (CRA) adopted the "North Hollywood Redevelopment Project Commercial Core Urban Design Guidelines". These design guidelines were presented by CRA staff as providing "some guidance and additional direction for development in the core area, as well as to provide some certainty for the development community." However, on closer review, these so-called design guidelines were in reality much more. They included new regulations on land use, density, building height and floor area ratio-areas normally reserved for the City Council to regulate.

The design guidelines radically decrease the allowable height, size, floor area and residential density on some projects while significantly increasing the same land use allowances of other similarly situated property sites—namely two parcels owned by the Los Angeles Metropolitan Transit Authority (MTA). These newly "established" height and density reduction standards for certain property sites directly contradict the City's Municipal Code and General Plan. In addition, many of the property sites on which the CRA decreased the allowable height and density are sites that are within walking distance of the North Hollywood MTA station—in direct contravention of the City's stated goal of providing greater density close to public transportation.

For the parcels owned by MTA which have direct portal access to public transit, these property sites can now be built at a density of 108 units per acre and more than 200 feet in height. At the same time, other parcels just a block or two away from the MTA station and facing a busy street were reduced to only 35-55 units per acre and a maximum height of 45-65 feet. While more than doubling the allowable density for the MTA parcels, the CRA effectively down-zoned other parcels to less than half the allowable height and density under the City's Municipal Code, all under the guise of "design guidelines."

In its presentation, the CRA staff made assurances to the board that the design guidelines were developed with input from local developers. In fact, under the State's Health & Safety Code Section 33349(b), the owners of projects affected by the design guidelines were entitled to notice of the hearing. However, most of the area's developers were never told about these design guidelines and never participated in any discussions. In fact, one property owner who learned of this at the last minute attended the hearing to let the Board know he had no idea these design guidelines were being considered. Other property owners did not attend the meeting because none were given any

(continued on page 3)

DEVELOPMENT RIGHTS

Los Angeles Adopts Provisions of SB 1818

by Amy Tsai-Shen

After two years of toiled history, the City of Los Angeles adopted a Density Bonus Ordinance to implement the State Density Bonus requirements prescribed by Senate Bill (SB) 1818. The L.A. Density Bonus Ordinance became effective on April 15, 2008.

The L.A. Density Bonus Ordinance provides a minimum 20% density bonus to any residential development that provides 10% of the total units of the proposed project for low-income households or 5% of the total units of the proposed project for very low-income households. Additional density would also be provided to senior citizen housing developments or projects which include a child care facility on the premises. Alternative options for density bonus projects located near a transit stop or major employment center are further described in the L.A. Density Bonus Ordinance.

The reduced parking requirements dispenses with code-required guest parking and requires one on-site parking space for each studio or one-bedroom unit, and two on-site parking spaces for each two or three-bedroom unit. Oftentimes, the parking reduction, on its own, sufficiently serves as justification for a developer to include affordable housing on the premises.

Under the L.A. Density Bonus Ordinance, an apartment project which does not require any incentives or concessions (beyond the automatic increased density and reduced parking) is treated as a "ministerial" application. However, the L.A. Density Bonus Ordinance allows developers to select from a menu of incentives—increased height, increased lot coverage, reduced setback, decreased lot width, reduced open space and averaging of floor-area ratio (FAR) calculations. Embarking on a density bonus project with on-menu incentive(s) is a longer process, which could include an appeal to the City Planning Commission. In Los Angeles, such an application could easily be a six-month ordeal. Developers may also seek off-menu incentives, which are subject to a more burdensome review. The L.A. Density Bonus Ordinance permits up to three incentives on a development project, depending on the percentage of affordable housing provided.

The procedures for approval of a density bonus project can be complicated. This is particularly true where an applicant is requesting an off-menu incentive that is not subject to any other discretionary approvals. Here, the applicant must provide a pro forma or other documentation to show that the waiver or modification of any development standard(s) are needed to make the affordable units economically feasible.

Given the current political climate surrounding the much debated L.A. Density Bonus Ordinance, and the lawsuits which have ensued as a result of the same, it is probable that we may see some changes to the L.A. Density Bonus Ordinance. As the number of density bonus projects are processed, it remains to be seen how the LA Density Bonus Ordinance will be implemented. ■

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Design Guidelines... continued from page 2

direct notice of the hearing nor of the potential impact these design guidelines might have on their future development rights.

At the end of the hearing, CRA staff assured its board that the design guidelines would be presented to the City Council for their approval in a public hearing. Several weeks later, after phone calls to the CRA staff, we were told the design guidelines would not go before the City Council and the approval process was complete. This is in direct violation of the North Hollywood Redevelopment Plan, as well as Ordinance No. 171745, which the City Council passed in order to adopt the 1997 Amendment to the Redevelopment Plan. ■

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DEVELOPMENT RIGHTS

JMBM WELCOMES NEW MEMBERS

The Government, Land Use, Environment & Energy (GLUEE) Department at Jeffer, Mangels, Butler and Marmaro LLP is proud to announce the addition of three new associates to JMBM's Los Angeles office.

Associate **Noel Tapia** comes to GLUEE with significant experience in land use law advising both public agencies and private developers. Noel has specific expertise with CEQA issues from reviewing initial studies to the successful defense of certified environmental impact reports (EIR). Noel is a graduate of the Boalt Hall School of Law, at UC Berkeley, where he also received his Masters in Community Planning (M.C.P.). Noel has served as Vice President of the Los Angeles Mexican American Bar Association.

Alex DeGood, a new GLUEE associate, focuses on land use and zoning issues, as well as environmental compliance and litigation. Alex was previously Director of Legislative Affairs for a Washington, D.C. governmental affairs firm. Alex holds a J.D. from the University of Southern California. Alex previously worked in municipal law at Burke, Williams & Sorenson.

Associate **Amy Tsai-Shen's** practice focuses on land use, zoning, environmental, and administrative law. Amy has experience in obtaining and negotiating land use entitlements for large mixed-use, residential, commercial and hotel projects. Amy is also a CPA and worked at PricewaterhouseCoopers and holds a J.D. from the Benjamin N. Cardozo School of Law. ■

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