Government • Land Use • Environment • Energy

Development Rights

JMBM Summer 2009

Density Bonus Under Attack by Cities

by Benjamin M. Reznik

In adopting SB1818, the State Legislature thought it had figured out a way to force local jurisdictions to comply with the state mandate of providing more affordable housing long codified in Government Code Section 65915. Despite the fact that this law has been on the books for many years allowing the building of bonus market rate units to help defray the cost of mandated low income units, cities were able to skirt its intended result. They did this by refusing to change their development standards which limited structures in height, floor area, lot coverage, and so forth. Many builders were thus unable to build affordable units simply because they could not squeeze in the density bonus units under the cities' building envelopes. Without these bonus units, it was economically infeasible to include the affordable housing.

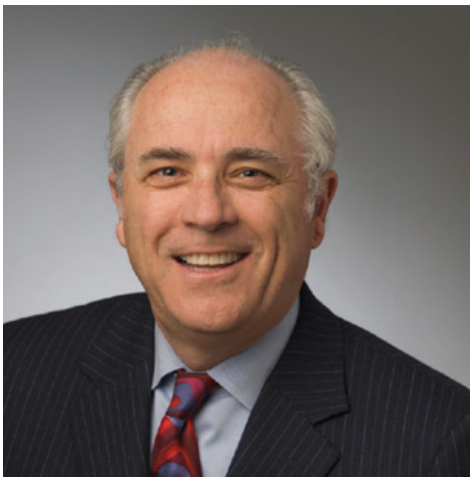
Tired of this gamesmanship, the Legislature adopted SB1818. Now, a city cannot apply any development standard that will have the effect of physically precluding the construction of a density bonus project. A builder can apply for concessions or incentives such as a reduction in development standards (e.g., setbacks, parking, height, square footage, etc.) which the city can only deny if it can make the finding, based on substantial evidence, that the sought after concession or incentive would have a "specific adverse impact..... upon public health and safety or the physical environment..." A city cannot deny a requested concession or incentive as being inconsistent with its general plan or zoning because SB1818 specifically precludes doing so. Finally, SB1818 provides for mandatory attorney fees to a litigant who prevails.

So what's the problem? Some cities, such as Los Angeles, West Hollywood and Santa Monica have figured out new ways to skirt the requirements of the state density bonus laws. In Los Angeles, the Community Redevelopment Agency has embarked upon a program of downzoning sections of the North Hollywood Area Plan so that when a developer seeks to apply SB1818, he or she comes up with far fewer allowable units. The CRA has done this without the adoption of new zoning ordinances or following the state procedures for public hearings. Our office has filed a lawsuit challenging this action and it is now pending before the Court of Appeal.

West Hollywood has also created a set of new zoning rules to protect itself from SB1818. In 2007, West Hollywood adopted a building moratorium on multi-family construction while it proceeded to downsize the allowable development in all of its multi-family zones. Doing it under the guise of trying to stop the proliferation of large luxury condos, the city proceeded to reduce height and limit the size of each unit that can be built, thereby making it economically infeasible to construct a state density bonus project.

Lest it be outdone, Santa Monica also adopted a moratorium on its very own affordable housing ordinance. Back in 2005, Santa Monica adopted an ordinance that incentivized affordable housing development by allowing any project with at least 20 percent affordability to proceed on a quick Administrative Approval process, in lieu of a more lengthy zoning process. One of our clients decided to take advantage of this incentive and proposed two projects, each with *100 percent affordable housing!* Santa Monica immediately adopted a moratorium to stop his projects and then proceeded to change its own laws. How is this an attack on SB1818? The city removed an incentive it created for encouraging the development of affordable housing for fear that SB1818 would restrict its ability to control or deny future affordable housing projects.

Looks like the Legislature may have to make the next chess move!



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New Air Quality Regulations Heading Your Way

by Peter C. Mieras

A new twist on air quality regulations is taking shape around the state of California. It involves mitigation fees or mitigation measures required of developers for the additional air pollution generated by new development and redevelopment projects. According to air regulators, these projects increase air emissions from a number of sources, including the number and length of vehicle trips, the use of consumer products, landscape maintenance, energy usage, and industrial or commercial operations that involve fuel combustion.

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JMBM LAWYERS WORK RECOGNIZED

SCHLAGE LOCK SITE WINS SAN FRANCISCO AWARD

In the last issue of "*Development Rights*" we reported on the pivotal role played by JMBM GLUEE lawyer David Cincotta in obtaining entitlements for a $500 million brownfield site near the San Francisco/ Brisbane border. Thanks to his diligent work, including assisting in settling a law suit, indemnifying parties from claims of future environmental liability, obtaining fixed cost contracts for remediation and securing environmental liability insurance, JMBM's client Universal Paragon Corporation (UPC) is in the process of developing the 20-acre former industrial site.

Recently the *San Francisco Business Times* honored David's work on the so-called Schlage Lock Project, with its award for the "Best Land Deal of the Year for 2008". Business Times reporter J.K. Dineen quoted UPC's general manager Steven Hanson as saying, "It's a fantastic opportunity for the property, which has been standing unused for ten years, to get a new lease on life." On the boards for this new San Francisco neighborhood are 100,000 square feet of retail, 1,200 units of housing and three parks. The company also intends to convert the existing historic Schlage Lock office building, which is currently boarded-up, into community space and offices.

Air Quality Regulations *continued from page 1*

Air districts in this state have the authority under Health and Safety Code Section 40716 to regulate "indirect sources," which the California Attorney General has interpreted to mean "any facility, building, structure or installation, or combination thereof, which generates or attracts mobile source activity that results in the emissions of any pollutant for which there is a state ambient air quality standard," 76 Ops. Atty. Gen. 11, 12-13. If, for example, malls or sports venues attract motor vehicles -- and they do -- then the air districts maintain that they have the authority to implement transportation control measures to reduce vehicle emissions, plus other measures to reduce emissions from the mall or venue's energy use or fuel combustion, or other uses resulting in air pollution. If this view is correct, then air districts can regulate any covered air pollutant from any source meeting this broad definition.

Air Districts Adopt Regulations

Already, eight air districts in California (out of 35 in the state) have adopted this type of indirect source regulation. Some of these regulations date back to 1979, but most are recent. The regulations typically impose a fee, such as the San Joaquin Valley rule, but the one proposed by the South Coast district will require the implementation of a mitigation plan. This article looks at both types.

> Proposed Rule would reduce ozone-forming emissions from new development and redevelopment projects

San Joaquin adopted its indirect source regulation on December 15, 2005. Rule 9510 is designed to reduce air pollution from new development to the extent needed to attain ozone and PM10 standards. The rule has been challenged in court and the matter is on appeal. But here's how it would work: the rule is triggered when a discretionary approval by a land use agency results in new construction. The trigger thresholds are 50 residential units; 2,000 square feet of commercial space; or 25,000 square feet of industrial space. New project proponents must submit to the district an Air Impact Assessment ("AIA") before or concurrent with final discretionary approval of the project. The AIA determines the emissions attributable to the new development and the mitigation fee required, if any. The air quality impacts from the project are calculated by URBEMIS, a computer model that quantifies emissions from project information inputted into the model. Depending on the project, the mitigation fee could exceed $50,000.

South Coast District Takes Other Approach

The South Coast district takes the other approach, the implementation of mitigation measures. Proposed Rule 2301 would reduce ozone-forming emissions from new development and

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A Sign of the Times *by Sheri Bonstelle*

Signs are on the minds of elected officials, government agencies and neighborhood groups in every community of Los Angeles as the City seeks to overhaul its Citywide and Hollywood sign codes this year in response to multiple lawsuits from sign companies and property owners, and outcry from residents.

> The CRA removed the Temporary Special Display from its sign policy guidelines

On May 26, 2009, the Los Angeles City Council voted to delay adoption of the revised Citywide sign code until after July 1, 2009, so that City Attorney-elect Carmen Trutanich can review the language. Mr. Trutanich appointed Jane Usher as his Executive Director, who as former President of the City Planning Commission was a strong advocate for limiting off-site signage. The City Attorney's office is also currently evaluating the revised Hollywood Signage Supplemental Use District ordinance. The City Council also moved to extend the current Interim Control Ordinance (ICO), which suspends the issuance of building permits for off-site signage, including supergraphic and digital signs, for an additional 90 days until September 22, 2009 to allow for maintenance of the status quo during the City's evaluation of the two sign codes.

Off-Site Signage in the Hollywood Signage SUD

The City Council issued a ban on off-site signage in 2002, but allowed for exceptions in Specific Plan areas and Supplemental Use Districts (SUDs). In 2005, the City Council adopted the Hollywood Signage Supplemental Use District, which permitted off-site signage as either a 120-day Temporary Special Display or as a permanent sign through approval of either (i) a sign reduction plan for removal of billboards in the Hollywood Community Plan area, or (ii) a signage agreement with the Community Redevelopment Agency (CRA). In 2007, in response to a court ordered injunction for a failure to apply its sign policy equally, the CRA removed the Temporary Special Display from its sign policy guidelines. The proposed revised Hollywood Signage SUD similarly removes Temporary Special Display as a sign type and requires a sign reduction plan for any new off-site supergraphic sign. This provision clearly benefits owners and sign companies with existing billboards to the detriment of other property owners and smaller sign companies.

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City Grants Time Extension for Tentative Tract Maps & Parcel Maps *by Ellia Thompson*

SB 1185 provides for possible ten-year life for subdivision maps

Responding to concern over lack of new housing construction, the City of Los Angeles passed an ordinance with an urgency clause extending the lives of tentative and vesting tentative tract maps, preliminary parcel maps and associated discretionary entitlements. Ordinance No. 180,647 has been signed by the Mayor and is currently in effect.

The City's action follows Senate Bill 1185 (SB 1185) which was passed last year. SB 1185 extends the life of a subdivision map (tentative tract map, vesting tentative tract map, or preliminary parcel map) by one additional year. Before SB 1185 was passed, an applicant had three years to record a final subdivision map before the tentative or preliminary map expired. The applicant could apply for extensions for up to five additional years. Under SB 1185, the initial period was increased from three to four years for those subdivision maps that would have expired on or after July 15, 2008 and before January 1, 2011. SB 1185 also increased the additional extensions for subdivision maps from five to six years. Altogether, SB 1185 provides for a possible ten-year maximum life for tentative and preliminary maps.

Currently, the State Senate is considering another bill (SB 333) which would extend the life of a subdivision map for a two-year period (in addition to the one-year period approved by SB 1185). That bill is still in committee, but a final vote on the bill is expected next month.

Los Angeles Offers Time Extensions

Ordinance No. 180,647 implements SB 1185 by providing time extensions to all tentative tract and preliminary parcel maps as well as adding an additional year to the life of all related entitlements. Since housing projects often require entitlements such as zone changes, variances or specific plan exceptions in addition to a subdivision map, ensuring these entitlements are also extended is vital to the project's viability. In most cases, an extension for a subdivision map alone, without a similar extension for project related entitlements, would have no benefit.

It is important for developers to understand that various approvals which may have been bundled together for one project will likely have different expiration periods. The one-year extension for related entitlements does not synchronize those entitlements or their expiration period with the subdivision map. It does provide an additional year to all entitlements associated with an SB 1185 eligible subdivision map. However, projects that do not contain a subdivision map (i.e. an apartment building) will not be granted an additional year for entitlements.

The table below was provided by the City Planning Commission and illustrates the changes to the initial expiration periods for common discretionary land use entitlements.

Ellia Thompson is an Associate in the Government, Land Use, Environment & Energy Department at JMBM.

Discretionary Action	Current Initial Expiration Period (Years)	Proposed Initial Expiration Period (Years) *
Coastal Development Permits (LAMC 12.20.2)	2	3
Conditional Use Permits & Plan Approvals (LAMC 12.24)	2	3
Variances & Plan Approvals (LAMC 12.27)	2	3
Adjustments & Slight Modifications (LAMC 12.28)	2	3
Specific Plan Project Permit Compliance Reviews, Adjustments & Exceptions (LAMC 11.5.7)	2	3
Specific Plan Project Permit Compliance Reviews, Adjustments & Exceptions (LAMC 11.5.7)	2	3
Zone & Height District Changes (LAMC 12.32)	6	7
Site Plan Review (LAMC 16.05)	3	4

**only for maps with initial expiration dates between 7/15/2008 - 1/1/ 2011*

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The revised SUD will also reduce by up to 25 percent the sign reduction plan credit that may be obtained from removal of billboard and pole signs. JMBM has successfully obtained sign reduction plan credits for property owners for removal of billboards and pole signs on their property and applied these credits to new supergraphic signs in Hollywood.

Sign Company Settlements

In 2007, the City Attorney settled a lawsuit with CBS Outdoor and Clear Channel Communications, which allowed the sign companies to maintain certain unpermitted signs while converting other billboards to digital signs. The City entered similar settlements with other sign companies. The companies then erected digital signs in residential areas of Silverlake and Venice without any public review or input. In reaction, neighborhood and non-profit groups, such as Ban Billboard Blight, lobbied City Council for tougher regulations and enforcement.

City Sign Enforcement Policy

The City's comprehensive sign code revision will create a new era of sign enforcement and regulation. The draft Citywide sign code proposes penalty fees of $2,000 to $48,000 per day for unpermitted signs, based on the sign area, and allows a private right of action of individuals against their neighbors. The Los Angeles Department of Building and Safety (LADBS) has also employed 16 additional inspectors, who have reviewed permits for over 5,400 existing signs this year. The City enforcement policy seeks to eliminate existing and new unpermitted signs as a means of reducing clutter; however, this task is daunting due to the City's lack of organized sign permit records prior to the late 1990s. JMBM has successfully defended building owners against sign violations issued by the City, where the City officials failed to identify approvals and permits in their own records.

> The Citywide sign code proposes penalty fees of from $2,000 to $48,000 per day

Recent Signage Litigation

The City has also been the target of multiple recent federal lawsuits regarding the constitutionality of the City sign code. In August 2008, in *World Wide Rush et al v. City of Los Angeles*, District Court Judge Audrey Collins found that the exceptions to the off-site sign ban provided unfettered discretion to City officials, and issued an injunction to restrain the City from enforcing certain provisions against the company. Other sign companies erected off-site signage without permits in reliance on this decision and subsequently filed suit. Judge Collins consolidated six of the sign cases, known as the Billboard Cases, and in April 2009 extended the injunction to include 18 signs leased by SkyTag, Inc. and others.

Similarly, in *Roosevelt Hotel et al v. City of Los Angeles*, JMBM represents the hotel owner and sign company, In Plain Sight Media, claiming that the City and CRA used unfettered discretion in failing to issue a sign permit for a supergraphic sign on the Roosevelt Hotel despite the City Planning Director's approval. It also alleges that the City unconstitutionally applies its regulations unequally to the disadvantage of small sign companies. The case is currently pending in Federal Court.

The courts have upheld the Citywide sign ordinance in certain instances. In the January 2009 decision of *Metro Lights, LLC v. City of Los Angeles*, the U.S. 9th Circuit Court of Appeals held that allowing certain exceptions, such as advertising on City owned bus stops and kiosks, did not invalidate the City's ban on off-site signage. Although the City is revising its Citywide and Hollywood sign codes in response to the recent Federal Cases, it is likely that the amended codes will be the subject of future litigation after adoption.

Sheri Bonstelle is an attorney at Jeffer Mangels Butler and Marmaro LLP in the firm's Government, Land Use, Environment and Energy Department. Sheri's practice focuses on land use and construction matters. She is currently representing a number of clients seeking to secure signage rights in the City of Los Angeles. Sheri is both a lawyer and an architect.

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redevelopment discretionary projects. As presently drafted, the rule would require a specified percent reduction of Nitrogen Oxide (NOx) from the total operational emissions of projects generating 10 tons per year (after 1/1/10), 4 tons per year (after 1/1/11) and 2 tons per year (after 1/1/12). The project proponent will be required to use either the default reductions specified in the rule or project-specific reductions based on the URBEMIS model or other approved calculation method. The failure to implement these reductions could subject the developer to enforcement action.

Are the air districts straying from their jurisdiction and now assuming a role in land use determinations? The air districts say no -- they are not imposing fees or mitigation measures as a condition for project approval. But this, as with so many other controversial accretions of regulatory authority, will be decided in the courts.

Peter Mieras is Of Counsel to Jeffer, Mangels, Butler & Marmaro. He is an air quality expert in the firm's Government, Land Use, Environment, and Energy Department. Mr. Mieras is the former Chief Prosecutor of the South Coast Air Quality Management District.

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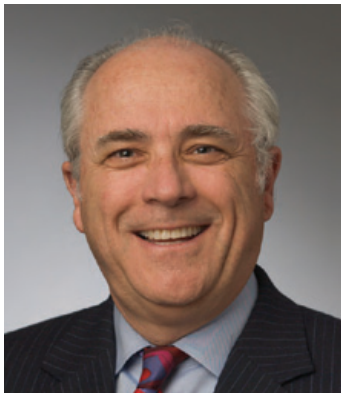

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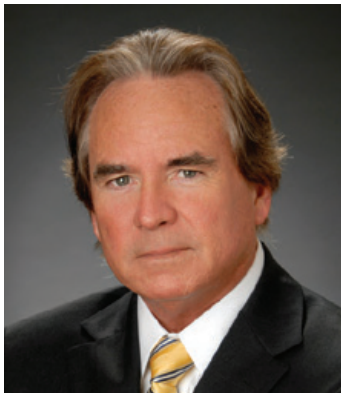

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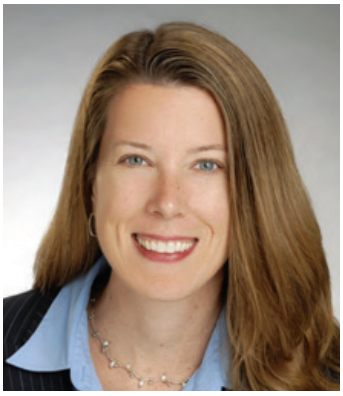

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