

# DEVELOPMENT RIGHTS

WINTER 2009

## Superior Court Rules in Favor of JMBM Client in Density Bonus Case

by Benjamin M. Reznik



**R**ecently, JMBM lawyers successfully challenged an attempt by the City of Los Angeles to unlawfully impose conditions of approval on a proposed infill apartment project that was entitled to a height increase under SB 1818, the state density bonus law. The case involved the request by JMBM's client Louise Apts. LLC to increase the height limit on its 25-unit apartment project in West Los Angeles from 45 feet to 50 feet to better accommodate the project and, in doing so, add two affordable apartment homes. This request was also in line with Los Angeles City regulations aimed at encouraging developers to build more affordable housing in urban areas.

The court found that despite a clear mandate under Government Code section 65915 (d) (1) to allow the height limit increase in return for the building of additional affordable units, the Planning Commission refused to approve the request unless JMBM's client was prepared to change the design of its project by stepping back the structure on all sides beginning at the 20-foot mark. This requirement would have significantly reduced the rentable space in the apartment building, rendering the project infeasible. "The effect of such a requirement is to nullify the density bonus by decreasing the amount of rentable space in the development," the court said. The court further noted that the Planning Commission had no choice but to grant the application for an increase in height limit unless it could show that such an action would have a negative impact upon health or safety, or the physical environment, which is the legal standard in SB 1818. A finding of this type would need to be based upon "objective, indented written public health or safety standards, policies and conditions as they existed on the date the application was deemed complete." The Planning Commission attempted to prove that increasing the height of the

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## JMBM Lawyer Plays Key Role in Successful Strategy for Brownfield Development

**J**MBM Government, Land Use & Environment lawyer, David Cincotta, played a pivotal role in clearing the way for the development of a \$500 million project on 20 acres of brownfield in the Bay Area, near the San Francisco/Brisbane border. In a complex deal that involved settling a lawsuit, 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 now moving forward with plans to develop the former industrial site.

On the drawing board are 1,250 housing units (with 25% set aside as affordable); 100,000 square feet for retail, including a supermarket; and 3 parks. UPC also plans to convert the existing historic Schlage Lock Co. office building, which is currently boarded up, into community space and offices.

As part of the agreement, Ingersoll-Rand, the longtime owner of the Schlage Lock Co. factory that existed on the site, transferred the 12.3-acre Schlage property to UPC and, in exchange, UPC dropped its decade-old \$100 million lawsuit alleging that the Schlage operations had polluted the groundwater at UPC's adjacent parcel. UPC also agreed to pay a portion of the \$25 million cleanup of the site.



An aerial view of part of the UPC redevelopment site featuring the Schlage Lock Co. factory.

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### Gina Marie Lindsey, Executive Director of Los Angeles World Airports Speaks at JMBM Business Issues Forum

**G**ina Marie Lindsey began by saying she intended to focus her comments primarily on LAX. When she became executive director in early 2007, LAX had 61 million passengers flowing through its facilities; that's down 7 million from the high point of 68 million in 2000. LAX has also seen a 7% reduction in air traffic since the first quarter of 2007. While most major U.S. airports have recovered their passenger counts, LAX never recovered from the shock of 9/11. While there's continuing discussion about the need for increasing regionalization of its air traffic, much has been achieved. In fact, LAX has gone from handling 80% of all the air traffic in Southern California to just 57% today.

Given the current economic environment, the challenges facing LAX are magnified. When Ms. Lindsey arrived, the airport was in litigation with its air carriers over the issues of cost of operations and the need for them to support its capital program. Since there was no defined capital program at the time, it was imperative for LAX to conduct a needs assessment and define and prioritize the projects it needed to implement. Ms. Lindsey and her team have been successful in negotiating a standstill with the air carriers on litigation, while the two parties negotiate a trip settlement agreement. They have also been able to get the carriers to buy into the needs assessment they've developed for the capital improvements at LAX. Phase one will include the one million square foot expansion and renovation of the Bradley International Terminal and badly needed infrastructure repairs. LAX has at least 150 critical repairs and replacements needed, including retrofitting the central plant and basic mechanical systems, such as elevators. The upgrade of several terminals is badly needed, but will have to wait until capital is available. However, some of the infrastructure work LAX is contemplating will allow the airport to introduce a new concessions program in these terminals.

Another major issue requiring immediate focus is the need for LAX to reconfigure its facilities to handle the new generation of jumbo jets. Every airport authority in the U.S. understands that international flights produce major revenues so competition is fierce to provide the facilities to attract these carriers. If LAX wants to compete, it needs to provide the type of landing and ground support facilities that will

accommodate this new generation of aircraft.

Ms. Lindsey concluded her remarks by emphasizing that LAX has many positives working for it. It's in an excellent cash position, the air carriers have become partners rather than adversaries and relations with the community contiguous to the airport have improved significantly. She believes airports like LAX should be run as a business, and that's her goal as executive director.

Ms. Lindsey then fielded several questions from the attendees. These included a question about which agency handles security at LAX. She indicated that security costs \$110 million each year and there are 200-300 Los Angeles Police Department and 1,000 airport police on duty. The subject of extending the light rail line into the airport was raised. Ms. Lindsey said she believes there is money available through the recent passage of Measure R. However, there are several technical issues to be resolved before the line can be extended. The question of naming rights was raised. Ms. Lindsey related that any and all ideas, including naming rights at the airport which would generate revenue, are under consideration. The final question dealt with the current status of the North runway expansion. Ms. Lindsey explained that the proposal was undergoing a new Environmental Impact Report (EIR) and independent safety study. She expects to have recommendations from the safety study in six months and the EIR completed by the fall of 2009. ■



Gina Marie Lindsey and Ben Reznik at JMBM's Business Issues Forum.



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The terms of the settlement also included environmental insurance provisions with third party insurance companies that transferred liability for the soil and groundwater cleanup to insure against the possibility of unknown contaminants and unexpected costs, and indemnifying UPC and Ingersoll-Rand from future claims. Fixed cost remediation contracts for the environmental cleanup were also negotiated.

The deal clears one of the biggest obstacles blocking a community-blessed plan to clean up and convert the brownfield to a mixed-use residential area. The brownfield property is within walking distance of a Caltrain station, includes 2 municipal bus stops and is a short distance from the San Francisco airport.

The nearby community, which successfully fought against the development of a big box store on the property, supports the development of this mixed-use project. After years of battles with potential developers of the site, UPC and the San Francisco Redevelopment Agency have worked closely with the community over the last two years to produce a Redevelopment Plan that is widely supported.

JMBM lawyer David Cincotta represented UPC in the real estate transaction and is continuing to work on the land use entitlements and the development agreement for UPC. During the transaction, he worked closely with UPC to pull the numerous parties and the various legal components together. "This property is perfect for the kind of transit village needed in metropolitan areas," he said. "It is especially satisfying to work on a deal where everyone seems to win, most importantly, the surrounding community."

The San Francisco Redevelopment Commission and San Francisco Planning Commission approved the Redevelopment Plan and certified the Environmental Impact Report in mid-December 2008. Demolition and remediation activities are expected to begin immediately. Negotiations for a development agreement between UPC and the Redevelopment Agency will be finalized by Spring 2009. ■



**David Cincotta** is based in the Firm's San Francisco office. He specializes in obtaining land use entitlements for large commercial, mixed-use and residential developments in San Francisco and throughout Northern California. His practice focuses on land use, zoning and environmental law, and includes real estate financing, real estate transactions and historic preservation law. David served as Deputy Director of Housing and Community Development under San Francisco Mayors Alioto, Moscone and Feinstein. David can be reached at 415.984.9687 or [DCincotta@JMBM.com](mailto:DCincotta@JMBM.com).

### JMBM Lawyer Wins Attorneys' Fees for Client in CEQA Lawsuit Defense

On November 14, 2008, federal court Judge A. Howard Matz of the United States District Court, Central District of California, awarded JMBM's client, CEMEX, the full amount of attorneys' fees requested for its defense of a California Environmental Quality Act (CEQA) lawsuit.

The attorneys' fees were incurred in the last round of litigation involving actions brought against CEMEX with respect to a proposed sand and gravel quarry in Southern California. In this action, JMBM successfully defended the adequacy—under CEQA—of an environmental impact report prepared by the County of Los Angeles. JMBM sought and obtained on behalf of CEMEX, a substantial award of attorneys' fees.



*CEMEX is a worldwide producer of cement, ready-mix concrete and aggregates. For more information on this case and JMBM's capabilities in representing construction and building materials companies, contact JMBM's Environmental Group co-chair, [Kerry Shapiro](mailto:KShapiro@JMBM.com) at 415.984.9612 or at [KShapiro@JMBM.com](mailto:KShapiro@JMBM.com).*

## JMBM Real Estate and Land Use Survey

Check your e-mail early in January for the first edition of The JMBM Real Estate and Land Use Survey. Please take 5 minutes to respond to the few questions and e-mail the survey back to us. When we complete compilation of the results we'll be sure to send you a copy.

Thank you in advance for your cooperation!



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project would have a negative impact on the environment by citing Los Angeles' "CEQA Thresholds Guide." The court found there was no record to indicate that the Planning Commission ever relied upon or even considered the Threshold Guide when deciding to deny Apts. LLC's application. In addition, the court found that the company's project was specifically exempt from CEQA because it "satisfies all the requirements of CEQA Guideline 15332 for in-fill development projects."

In finding for JMBM's client and directing the Planning Commission to allow the increase in height without any other conditions, the court stated that "the action taken by the Planning Commission is arbitrary, capricious and is not justified by any evidence. It is an abuse of discretion because it constitutes a refusal to

comply with the literal wording and the legislative intent of Government Code section 65915 (d) (1)."

*Louise Apts. LLC v. City of Los Angeles* is the first successful lawsuit of its kind against the City of Los Angeles. It also shows that SB 1818 limits local government discretion to impose additional conditions on projects that are entitled to development incentives. ■

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Our experience ranges from individual properties to billion dollar portfolios. Large or small, routine or complex, if a legal matter has your attention, it deserves ours too.

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