

Allen Matkins

Beyond Building Castles in the Sky:

Innovative Strategies for Developing Affordable Housing Under California's Density Bonus Law

Presented By:
Fernando Villa, Allen Matkins

April 23, 2021

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

1

Program Agenda

1. **California's Density Bonus Law:** Overview & 2021 Amendments
2. **Using the Density Bonus Law:** Obtaining Relief from Development Standards
3. **SB 330:** Creating Certainty in the Development of Housing Projects
4. **Vested Rights:** Under the Common Law, Tract Maps, and Development Agreements
5. **Development Agreements:** Contracting for Vested Rights
6. **Questions**

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins

2

2

California's Density Bonus Law

- State Density Bonus Law enacted in 1979
- Incentivizes developers to construct affordable ("BMR") housing
- Below market rate units must be provided on-site or via land dedication
- Density bonus depends on % of BMR units and affordability (% AMI)
- Current density bonus maximum is 50%
- Waiver of local development standards
- Concessions/incentives

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 3

3

Maximum Density Bonus Tiers

| | <i>Pre-2021 Density Bonus Law</i> | <i>AB 2345 Amendments</i> |
|------------------------|-----------------------------------|-----------------------------|
| Very Low Income | 35% bonus for 11% set aside | 50% bonus for 15% set aside |
| Low Income | 35% bonus for 20% set aside | 50% bonus for 24% set aside |
| Moderate Income | 35% bonus for 40%* reserve | 50% bonus for 44%* reserve |

*For-sale units only.

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 4

4

Incentives and Concessions

- Incentives or concessions must result in identifiable and actual cost reductions to provide for affordable housing costs. They could include:
 - A reduction in site development standards or a modification of zoning or architectural design requirements (*e.g.*, a reduction in setback and square footage requirements);
 - Approval of mixed-use zoning; or
 - Any other regulatory incentives or concessions that would result in identifiable and actual cost reductions.
- Local government also prohibited from applying any development standard that would physically preclude construction of the development with the density bonus and incentives and concessions to which the project is entitled.

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 5

5

Incentives and Concessions Tiers

| <i>Number Entitled To</i> | <i>Very Low Income</i> | <i>Low Income</i> | <i>Moderate Income</i> |
|---------------------------|------------------------|----------------------|------------------------|
| 1 | 5% | 10% | 10% |
| 2 | 10% | 20% → 17% | 20%** |
| 3 | 15% | 30% → 24% | 30%** |

** applies to a common interest development, as defined in Section 4100 of the Civil Code.

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 6

6

State-Mandated Parking Ratios

- Upon a developer's request, a locality must utilize state-mandated parking ratios (inclusive of handicapped and guest parking) for qualifying projects.

| Maximum Parking Requirements | |
|------------------------------|---------------------------------------|
| <i>Rooms</i> | <i>Number of spaces required</i> |
| Studio / 1 bedroom | 1 space |
| 2 bedroom / 3 bedroom | 2 space → 1.5 space |
| 4 bedroom | 2.5 space |

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 7

7

Other Recent Changes

- AB 2345 (2021) also amended the Density Bonus Law to:
 - Provide local governments discretion to grant additional waivers or reductions in development standards for projects located within a one-half mile radius of a major transit stop and
 - Provide further reduced parking standards for eligible residential projects that
 - (i) provide unobstructed access to a major transit stop or
 - (ii) are restricted to for-rent housing for individuals who are 62 years of age or older with paratransit service or unobstructed access to a fixed bus route that operates at least eight (8) times per day.

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 8

8

SB 330 – Housing Crisis Act of 2019

Government Code § 65589.5 (Housing Accountability Act) – Amended

- Effective January 1, 2020 through January 1, 2025
- Existing law provides that a local agency may disapprove a housing development project that complies with applicable objective planning, zoning, and subdivision standards as of the date that the application was determined to be complete only if the local agency finds that the project would have a specific adverse impact on public health or safety, and there is no feasible alternative method to mitigate or avoid the adverse impact
- Local government must provide written inconsistency determination within 30 or 60 days, based upon number of project units
- If local government fails to respond within timeframe, project deemed to be consistent

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 9

9

SB 330 – Housing Crisis Act of 2019

Government Code § 65589.5

- Establishes vesting of applicable objective planning, zoning, and subdivision criteria as of date of submittal of a preliminary application pursuant to Government Code § 65941.1
- Vesting includes impact fees – vesting good for 2½ years after project receives final approval

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 10

10

SB 330 – Housing Crisis Act of 2019

Government Code § 65941.1 – Added

- Once submitted, application automatically is “deemed complete”
- Revision of a project that changes the number of units or square footage of construction by more than 20 percent following submittal of a preliminary application will require submittal of a new preliminary application

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 11

11

SB 330 – Housing Crisis Act of 2019

Government Code § 65943 – Amended

- In determining that an application is incomplete, the local agency must provide an exhaustive list of items determined to be incomplete. The local agency may not subsequently request any new information that was not on the initial list

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 12

12

SB 330 – Housing Crisis Act of 2019

Government Code § 66300 – Added

- An “Affected” City or County may not change the land use or zoning of a parcel to a less intensive use, or impose more restrictive development standards than were in effect as of January 1, 2018, unless residential capacity is added elsewhere– no net loss
- Only applies to projects for which application is deemed complete after January 1, 2020

13

Vested Rights – Common Law

- **Avco Rule** – common law rule in California since 1976
 - If agency changes its land use regulations, a landowner cannot claim a vested right to build out a project under the prior regulations unless the owner has:
 - » Obtained a building permit;
 - » Performed substantial work; and
 - » Incurred substantial liabilities in good faith reliance on the permit
- **Harsh Rule** – Avco Community Developers had zoning and map approvals to develop 8,000 acres in Orange County
 - Built storm drains, utility improvements, etc., but had not acquired building permit
 - Spend \$2 million and incurred \$750,000 in liabilities
 - 1973 Coastal Act subsequently required Coastal Development Permit because small portion in Coastal Zone
 - CA Supreme Court said no to requested exemption from Coastal Development Permit and no to the vested right to develop

14

Vested Rights – Common Law

- **Refinements to the *Avco* Rule:**

- Rights that may vest are no greater than those specifically granted by the permit
- Owner of undeveloped land has no vested right in existing zoning, more valuable zoning that may be anticipated, or best and highest use of a property
- An invalid permit vests no rights and an owner cannot rely on the written statements of a public official who does not have the authority to make the statement
- Vested right may be limited or extinguished if the use would be a menace to public health/safety or would cause a public nuisance
- Open-ended conditions of approval can be interpreted to require satisfaction with later-enacted fee programs

Vested Rights – Vesting Tentative Map

- **Vested right to proceed with development (Gov. Code §§ 66498.1, et seq.)**

- Must be in **substantial compliance** with ordinances, policies and standards in effect **at the time the application is deemed complete**
- No vested right against planning and zoning changes city initiates and publishes notice of prior to application being deemed complete

- **Vesting occurs when application deemed complete:**

- No imposition of additional conditions
- Protection against new impact fee programs
- Can freeze amount of fees at time application is complete
- Must be processed by local government
- Vesting protection for one or two years after final map recordation

- **Agency can condition or deny if**

- Subdivision negatively impacts public health or safety or both; or
- State or federal law changes

Vested Rights – Development Agreements

- Municipalities have express authority to enter into a DA
 - Allows developer to negotiate for greater certainty because it “freezes” all rules, regulations and policies to those in effect at contract execution (unless contract applies to other timeframe)
 - Allows public agencies to negotiate for greater concessions (Gov. Code §§ 65864, *et seq.*)
- Enforceable by any party under general contract rules
- DA is a project under CEQA
- Legislative act – must be consistent with planning documents
- Subject to referendum within 30 days of adoption
- 90-day SOL to challenge

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 17

17

Drafting Considerations

- Time Period
 - Can require a generous term for vesting (e.g., 25 years)
- Extraordinary Exactions Required?
- Fee Protection?
 - New fees?
 - Freeze existing fees?
- Amendments are subject to notice, findings, and other procedural requirements that apply to DA adoption
- Restrict CEQA review of future approvals as allowed by law
- Define future regulations that cannot restrict project’s development
- Require streamlined review of future project approvals
- Can include all entitlements within scope and term of vesting

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 18

18

Memorializing Community Benefits

- Advantages
 - Enforceable rights
 - Adopted as an ordinance—may shield the DA from a referendum (memorializes consensus around community benefits)
 - Accountability: DA may specify amounts given for projects the city will undertake
 - Can only be amended subject to both parties' consent
 - Positive optics: demonstrable community benefits
- Risks
 - No nexus or rough proportionality requirements limit community benefits
 - Establishes a precedent for future community benefits (public document)
 - DA may still be challenged by a community group or group that feels unrepresented in community benefits negotiations
 - DAs are subject to CEQA
 - Potential legal challenges
 - Must clarify whether community benefits are part of the DA project subject to CEQA.

19

19

Vested Rights Comparison

VTM

- Mandatory processing
- Exactions subject to statute and case law
- Other entitlements are discretionary
- Freezes rules when app deemed complete
- 2 years + other extensions (statute, discretion, etc.)
- Does not limit other agencies
- Not subject to referendum
- Changes b/c health/safety; legal changes
- Local procedures required (or SMA)
- 90 day (file and serve) SOL

DA

- Elective processing – agency discretion
- Exactions negotiable
- Agency may agree to future entitlements
- Freezes rules when signed (or other)
- Life set forth in terms of DA
- Does not limit agencies if not parties to DA
- Subject to referendum
- No contrary rules unless per DA terms
- Local procedures if requested (or statute)
- 90 day SOL

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 20

20

Questions?

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 21

21



T (213) 955-5647
E fvilla@allenmatkins.com

EDUCATION

J.D., University of California, Berkeley,
 School of Law

B.A., *magna cum laude*, University of
 California, Los Angeles

SERVICES

Land Use
 Environmental & Natural Resources

INDUSTRIES

Healthcare Facilities & Operations
 Infrastructure

Fernando Villa

PARTNER | LOS ANGELES

Fernando Villa is a partner in the firm's Los Angeles Office. His practice focuses on land use, environmental law, local government matters, and real estate dispute resolution. He represents clients in land use entitlement, California Environmental Quality Act, and local government law matters involving a broad scope of entitlements for a variety of development projects, including mixed-use, industrial, residential, retail, master-planned, and commercial developments.

Fernando also represents clients in federal and state environmental cost recovery actions such as those under CERCLA, RCRA, and the California Hazardous Substance Account Act, and toxic tort litigation involving claims for real property damage arising from alleged hazardous substance disposal.

Concentrating much of his practice on Brownfield development projects, Fernando combines his environmental, land use, real estate, public agency law, and litigation expertise to entitle his clients' development projects and help them manage environmental risks.

Fernando handles a variety of real estate and related commercial disputes, including claims of breach and fraud involving purchase and sale agreements, commercial lease actions, business fraud involving oil and gas leases, and real estate based securities, and vendor-vendee actions. He is experienced at every phase of dispute resolution, from pre-litigation counseling through ADR and trial or arbitration.

CONFIDENTIAL MATERIALS | ATTORNEY ADVERTISING

Allen Matkins 22

22

Appendix A

AB 1482 – Tenant Protection Act of 2019 Establishes restrictions on termination of tenancy without just cause and imposes caps on annual rent increases

SB 330 – Housing Crisis Act of 2019

Reduces local restrictions on housing production and provides for preservation of existing housing stock

AB 1763

Provides additional density bonus to projects consisting entirely of affordable units

AB 1485

Expands permit streamlining requirements to allow for higher income levels in the San Francisco Bay area

AB 1483

Requires local governments to provide information to the public regarding zoning ordinances, development standards, fees, exactions, and affordability requirements

AB 1010

Includes Native American governments in the list of local agencies eligible to participate in state affordable housing programs

AB 1255

Requires local governments to report surplus land inventories to the state for inclusion in a digitized inventory of surplus land sites

AB 1486

Expands requirements for local governments regarding the disposition of surplus lands

SB 6

Requires the state to create a public inventory of local sites, including surplus lands, suitable for residential development

AB 68

Reduces local restrictions on development of accessory dwelling units

AB 671

Requires general plan housing elements to include a plan to incentivize creation of accessory dwelling units that can be offered at affordable rent to very low, low, and moderate income households

AB 881

Provides for streamlined permitting process for development of accessory dwelling units

SB 13

Reduces local restrictions on development of accessory dwelling units

AB 587

Provides exemption for affordable housing organizations to sell deed-restricted accessory dwelling units separately from the primary residence to eligible low income buyers

AB 1743

Excludes properties eligible to qualify for a welfare exemption from community facilities district assessments

AB 116

Establishes procedure for adoption of enhanced infrastructure financing plan and allows enhanced infrastructure financing districts to issue bonds without first obtaining voter approval

SB 113

Transfers \$331 million to National Mortgage Special Deposit Fund to provide sustainable, ongoing legal assistance to California renters and homeowners in housing-related matters through local nonprofit organizations.

SB 196

Creates welfare exemption from property taxes for property owned by a community land trust

SB 751

Creates the San Gabriel Valley Regional Housing Trust to finance regional affordable housing projects