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**MEMORANDUM OF LAW**

**DATE:** August 8, 2005

**TO:** Brad S. Richter, Centre City Development Corporation

**FROM:** City Attorney

**SUBJECT:** Application of State Density Bonus Law to Two Development Projects

**INTRODUCTION**

You have asked our Office to provide opinions on three issues relating to the application of California Government Code sections 65915 - 65918 [the State Density Bonus Law] to two proposed housing developments located within the City of San Diego's [City's] Centre City Planned District [District].

**QUESTIONS PRESENTED**

1. Does a Single Room Occupancy [SRO] hotel development qualify as a "housing development" within the meaning of the State Density Bonus Law?
2. May the Centre City Development Corporation [CCDC], as the permitting agency, grant a deviation from Floor Area Ratio [FAR] requirements in lieu of granting a density bonus under the State Density Bonus Law, given that the Centre City Planned District Ordinance [PDO], which governs the building regulations for development within the District, does not impose any density restrictions?
3. If a developer proposes to dedicate less than the minimum number of affordable housing units necessary to obtain the density bonus granted under the State Density Bonus Law, may CCDC still grant a proportionately reduced density bonus?

**SHORT ANSWERS**

1. Yes, because the California legislature has determined that residential hotels are often the only form of housing affordable for very low and low income individuals, a SRO hotel qualifies as a "housing development" within the meaning of the State Density Bonus Law.

2. Yes, CCDC may grant a deviation from a FAR restriction as an alternative to the bonus incentive.
3. Yes, CCDC may grant a proportionately lower density bonus than what is required by the State Density Bonus Law for developments that do not meet the required minimum dedication of affordable housing units.

### BACKGROUND

A developer is proposing to construct a 285 unit SRO hotel within the District. One hundred of the SRO units will be dedicated for very low and low income housing. The building site has a FAR restriction of 3.0, resulting in a four story structure. The developer is seeking a deviation in the FAR restriction to 3.5, resulting in an additional story. The PDO does not impose any density requirements for housing development within the District.

Another developer is proposing to construct a 500 unit condominium tower within the District. The developer proposes to restrict pricing on ten percent of the units, some of which will be dedicated to lower income, very low income, or moderate income individuals, but the proposed dedication falls below the affordable housing thresholds necessary to obtain the density bonus and incentives provided under the State Density Bonus Law. Despite this shortfall, the developer is still seeking a reduced density bonus and other incentives proportional to the amount of housing that will be dedicated for lower income, very low income, or moderate income purposes.

### ANALYSIS

- I. **A SRO hotel qualifies as a “housing development” within the meaning of the state density bonus law because a SRO is often the only form of affordable housing for very low and low income individuals.**

The first issue is whether a SRO hotel development qualifies as a “housing development” under the State Density Bonus Law.<sup>1</sup>

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<sup>1</sup> In accordance with Section 65915(a) of the State Density Bonus Law, the City has adopted Affordable Housing Density Bonus Regulations (Chapter 14, Article 3, Division 7 of the San Diego Municipal Code)[City’s Bonus Regulations] to implement the State law. Consequently, the application of City’s Bonus Regulations should be interpreted in accordance with State law. We further note that the 2004 revisions to the State Density Bonus Law are in conflict with the City’s adopted regulations. *See* attached copy of Deering’s Annotated Government Code sections 65915 – 65917.5 (all changes are in bold). To the extent that the City’s Bonus Regulations conflict with State law, the latter would prevail in any matters of enforcement. *Johnson v. Bradley*, 4 Cal. 4<sup>th</sup> 389, 398-400 (1992). Therefore, this analysis only considers the statutory construction of the State Density Bonus Law and not the City’s Bonus Regulations.

A SRO hotel is a residential hotel that is used as a primary residence by many very low and low income individuals. *See* Cal. Health & Safety Code § 50519(a);<sup>2</sup> SDMC §§ 143.0510 – 143.0590. Consequently, the State legislature has enacted SRO preservation laws to preserve the availability of this type of residential housing. *See, e.g.*, Cal. Health & Safety Code §§ 50519 - 50522 (pertaining to residential hotel rehabilitation).

The purpose of the State Density Bonus Law is to “contribute significantly to the economic feasibility of lower income housing in proposed housing developments.” Cal. Gov’t Code § 65917. Section 65915 of the State Density Bonus Law provides, in relevant part, as follows:

When an applicant seeks a density bonus for a *housing development* within, or for the donation of land for housing within, the jurisdiction of a city, county, or city and county, that local government shall provide the applicant incentives or concessions for the production of housing units and child care facilities as prescribed in this section. (Emphasis added.)

The term “housing development” is defined in Section 65915(j) as “one or more groups of projects for residential units constructed in the planned development of a city, county, or city and county.” A SRO hotel is not expressly referenced within this definition. Consequently, in accordance with general rules of statutory construction, a reviewing court is likely to ascertain the intent of the Legislature so as to effectuate the purpose of the law and give a reasonable and common sense interpretation consistent with the statute’s apparent purpose. *See e.g., Burden v. Snowden*, 2 Cal. 4<sup>th</sup> 556, 562 (1992); *Industrial Risk Insurers v. Rust Engineering Co.*, 232 Cal. App. 3d 1038, 1042-43 (1991). Because the State legislature has recognized that SRO hotels provide an important source of residential housing for very low and low income housing individuals and the application of the State Density Bonus law is likely to contribute to the economic feasibility of lower income housing within a SRO hotel development, a reviewing court is likely to consider a proposed SRO hotel as a “housing development” within the meaning of the State Density Bonus law.

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<sup>2</sup> California Health and Safety Code section 50519(a) provides as follows:

The Legislature finds and declares that the need for decent housing among individuals of very low and low income is great, and that residential hotels are often the only form of housing affordable to these individuals. Many residential hotels are in poor condition and in need of rehabilitation, and many are being demolished or converted to other uses. The state can play an important role in preserving the existence and improving the quality of this housing resource through sponsoring demonstration projects which will enable local sponsors to acquire, rehabilitate, maintain, or otherwise protect and improve residential hotels as a housing resource for persons of very low and low income.

## **II. Section 65915(b) of the State Density Bonus Law allows CCDC to apply the density bonus or equivalent incentives, subject to the applicant's agreement**

The second issue is whether CCDC may grant a deviation from FAR requirements in lieu of granting a density bonus, given that the PDO does not impose any density restrictions.

Section 65915(b) of the State Density Bonus Law provides as follows:

A city, county, or city and county shall grant a density bonus and incentives or concessions described in section (d) when the applicant for housing development seeks and agrees to construct at least any one of the following:

- (1) Ten percent of the total units of a housing development for lower income households, as defined in Section 50079.5 of the Health and Safety Code.
- (2) Five percent of the total units of a housing development for very low income households, as defined in Section 50105 of the Health and Safety Code.
- (3) A senior citizen housing development as defined in Sections 51.3 and 51.12 of the Civil Code.
- (4) Ten percent of the total dwelling units in a condominium project as defined in subdivision (f) of, or in a planned development as defined in subsection (k) of, Section 1351 of the Civil Code, for persons or families of moderate income, as defined in Section 50093 of the Health and Safety Code.

A “concession or incentive” is defined in Section 65915(l) to mean a reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceeds minimum building standards and results in identifiable, financially sufficient, and actual cost reductions in the proposed affordable housing development.<sup>3</sup> A “development standard” is defined in Section 65915(o)(1) to include “site or construction

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<sup>3</sup> However, in accordance with Section 65915(d) of the State Density Bonus Law, a local public agency is not required to grant any concession or incentive in the event that the concession or incentive (a) is not required to provide for affordable housing costs or (b) that has a specific adverse impact, as defined in California Government Code section 65589.5(d)(2), upon public health and safety or the physical environment or on any real property that is listed in the California Register of Historical Resources and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to low- and moderate-income households.

conditions that apply to a residential development pursuant to any ordinance, general plan element, specific plan, charter amendment, or other local condition, law, policy, resolution, or regulation.” A FAR restriction is a site development standard. *See e.g.*, SDMC § 103.1915(d) (Property Development Regulations). Therefore, a deviation from a FAR restriction would be considered as a concession or incentive, assuming that the deviation results in identifiable, financially sufficient, and actual cost reductions in the proposed affordable housing development.

Although the State Density Bonus Law does not expressly address the issue of whether a local public agency may grant a concession or incentive in lieu of a density bonus,<sup>4</sup> a reviewing court is likely to interpret the statute to effectuate its purpose. *See e.g.*, *Burden v. Snowden*, 2 Cal. 4<sup>th</sup> at 562; *Industrial Risk Insurers v. Rust Engineering Co.*, 232 Cal. App. 3d at 1042. The stated purpose of the State Density Law is to contribute significantly to the economic feasibility of lower income housing. Cal. Gov’t Code § 65917. We could not find any case law that has opined on this exact issue, however, the California Attorney General’s Office has considered a similar issue in which a developer agreed to construct the requisite amount of low or moderate income housing, but sought other incentives in lieu of the density bonus and incentives specifically listed in Section 65915. In that case, the Attorney General determined that the public agency could provide alternative incentives that were acceptable to the developer in furtherance of the purpose of the statute. *See* 63 Ops. Cal. Atty. Gen. 478 (1980). Given the clear intent of the State Density Law, a court is likely to approve the granting of a concession or incentive in lieu of a density bonus, subject to developer approval.

**III. In accordance with recent amendments to the State Density Bonus Law, CCDC may grant a proportionately lower density bonus than what is required by section 65915 for developments that do not meet the requirements of this section.**

The last issue is whether CCDC may grant a partial density bonus or incentive to an applicant who proposes a development with affordable housing restrictions that fall short of the required thresholds set forth under Section 65915(b) of the State Density Bonus Law. The 2004 amendments to section 65915 of the State Density Bonus Law specifically address this issue. In particular, newly added Section 65915(n) reads as follows:

Nothing in this section shall be construed to prohibit a city, county, or city and county from granting a density bonus greater than what is described in this section for a development that meets the requirements of this section *or from granting a proportionately lower density bonus than what is required by this section for developments that do not meet the requirements of this section* (emphasis added).

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<sup>4</sup> Section 65917.5(b) of the State Density Bonus does allow a specified deviation from local FAR requirements for developments with at least 2,000 square feet of floor area and 3,000 outdoor square feet set aside for a child care facility.

Consequently, CCDC may grant a proportionately lower density bonus than what is required by State Density Bonus Law for developments that do not meet the affordable housing requirements, but it is not required to do so. In light of this discretion and the policy implications of granting a proportionately lower density bonus, CCDC and/or the City should implement this discretionary authority through a formal legislative process (e.g., through amendments to the City's Affordable Housing Density Bonus Regulations).

### CONCLUSION

The purpose of the State Density Bonus Law is to provide a density bonus and other incentives for "housing development" to encourage developers to build affordable housing units. Because the California legislature has determined that residential hotels are often the only form of housing affordable for very low and low income individuals, a SRO would qualify as a "housing development" within the meaning of the State Density Bonus Law.

A deviation from a FAR restriction would be considered a concession or incentive within the meaning of the State Density Bonus Law. In light of the clear intent of the State Density Bonus Law, CCDC may grant a concession or incentive as an alternative to the density bonus.

Finally, the 2004 amendments to the State Density Bonus Law clarify that a public agency may grant a proportionately lower density bonus than what is required by State Density Bonus Law for developments that do not meet the affordable housing requirements.

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By

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