

**Office of  
The City Attorney  
City of San Diego**

**MEMORANDUM  
MS 59**

**(619) 236-6220**

**DATE:** February 7, 2022  
**TO:** Honorable Mayor and Members of the City Council  
**FROM:** City Attorney Mara W. Elliott   
**SUBJECT:** *Bankers Hill 150 v. City of San Diego*, Case No. D077963

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We are pleased to report that the City prevailed in *Bankers Hill 150 v. City of San Diego*. As you may recall, the plaintiffs in this case challenged the City of San Diego's (City) approval of a housing development in the Bankers Hill area. On appeal, the court went beyond assessing the City's exercise of discretion under the Housing Accountability Act – the primary issue before the court – and opined on the California Density Bonus Law (Density Bonus Law), which was not briefed in this case. My Office asked the court not to publish the portions of the appellate opinion discussing the Density Bonus Law for a couple of reasons:

First, if published as written, the appellate opinion may be read to eliminate a city's control over its own land use decisions and instead defer its discretion to developers on density bonus projects. If that was the appellate court's intention, it potentially contradicts the City Charter, which incorporates the California Constitution's delegation of control over land use and zoning changes to charter cities. Cal. Const. art. XI, § 7. Charter cities like ours have "police powers" over their own municipal affairs, including land use matters, subject only to constitutional limitations and matters of statewide concern. *Associated Home Builders etc., Inc. v. City of Livermore*, 18 Cal.3d 582 (1976). The City's rights could be compromised if the court's ruling on Density Bonus Law is published.

Second, since the parties did not brief the court on Density Bonus Law, the opinion's impact is unclear and may have unintended consequences. The Density Bonus Law should be thoroughly vetted by all stakeholders before binding case law is created.

Attached are my Office's letter to the Court of Appeal and the letter sent by the League of California Cities. Please contact me if you have any questions.

MWE:sne

MS-2022-1

Doc. No.: 2884992

Attachment: Letter dated January 28, 2022 from Office of the City Attorney

Letter dated February 1, 2022 from League of California Cities

cc: Jay Goldstone, Chief Operating Officer

GEORGE SCHAEFER  
ASSISTANT CITY ATTORNEY

JANA MICKOVA WILL  
DEPUTY CITY ATTORNEY

OFFICE OF

THE CITY ATTORNEY

CITY OF SAN DIEGO

MARA W. ELLIOTT

CITY ATTORNEY

CIVIL LITIGATION DIVISION

1200 THIRD AVENUE, SUITE 1100

SAN DIEGO, CALIFORNIA 92101-4100

TELEPHONE (619) 533-5800

FAX (619) 533-5856

January 28, 2022

Acting Presiding Justice Judith L. Haller  
Associate Justice Terry O'Rourke  
Associate Justice Patricia Guerrero  
Court of Appeal of the State of California  
Fourth Appellate District, Division One  
750 B Street, Suite 300  
San Diego, CA 92101

Re: Bankers Hill 150, et al. v. *City of San Diego*  
(Case No. D077963, filed January 7, 2022)  
**Opposition to Request for Publication**

Dear Justices Haller, O'Rourke and Guerrero:

The City respectfully opposes the two requests for publication of *Bankers Hill 150, et al. v. City of San Diego* (Case No. D077963, filed January 7, 2022) only with respect to the Density Bonus Law portion of the opinion on grounds that this issue was not briefed by the parties and the broad implications of such ruling should be fully vetted before a published decision is issued. It is the City's understanding that other public agencies will be filing oppositions to the requests prior to the February 7, 2022 deadline.

Sincerely,

MARA W. ELLIOTT, City Attorney

*s/Jana Mickova Will*

By

Jana Mickova Will  
Deputy City Attorney

cc: Everett L. DeLano III, Esq.  
Heather S. Riley, Esq.

**COURT OF APPEAL, STATE OF CALIFORNIA**  
**FOURTH APPELLATE DISTRICT, DIVISION ONE**  
**PROOF OF SERVICE**

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*Bankers Hill 150, et al. v. City of San Diego*

Appeal No. D077963  
Superior Court Case No. 37-2019-00020725-CU-WM-CTL

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

On January 28, 2022, I served true copies of the following document(s) described as:

- **LETTER IN OPPOSITION OF REQUEST FOR PUBLICATION**

on the interested parties in this action as follows:

Everett L. DeLano, III, Esq.  
**DELANO & DELANO**  
104 W. Grand Ave., Suite A  
Escondido, CA 92025  
Tel: (760) 741-1200  
Fax: (760) 741-1212  
[everett@delanoanddelano.com](mailto:everett@delanoanddelano.com)

*Attorneys for Petitioner/  
Appellant*  
*BANKERS HILL 150 and  
BANKERS HILL/PARK  
WEST COMMUNITY  
ASSOCIATION*

**(via TrueFiling)**

Jeffrey A. Chine, Esq.  
Heather Riley, Esq.  
**ALLEN MATKINS LECK GAMBLE  
MALLORY & NATSIS LLP**  
600 W. Broadway, 27th Fl.  
San Diego, CA 92101  
Tel: (619) 233-1155

*Attorneys for Real Parties  
in Interest/Respondent*  
*GREYSTAR GP II, LLC,  
NUTMEG AND OLIVE,  
LLC and CATHEDRAL  
CHURCH OF ST. PAUL*

Fax: (619) 233-1158  
[ichine@allenmatkins.com](mailto:ichine@allenmatkins.com)  
[hriley@allenmatkins.com](mailto:hriley@allenmatkins.com)

(via TrueFiling)

Bryan W. Wenter, AICP  
**MILLER STARR REGALIA**  
1331 N. California Blvd, 5<sup>th</sup> Fl.  
Walnut Creek, CA 94596  
Tel: 925 935 9400  
Fax: 925 933 4126  
[bryan.wenter@msrlegal.com](mailto:bryan.wenter@msrlegal.com)

(via E-Mail)

- (BY ELECTRONIC SERVICE)** By transmitting via TrueFiling to the above parties at the email addresses listed above.
- (BY E-MAIL)** I caused to be served by electronically mailing a true and correct copy through electronic mail system to the e-mail addressee(s) set forth above.
- (BY PERSONAL SERVICE)** I provided copies to Nationwide Legal for personal service on this date to be delivered to the office of the addressee(s) listed above.
- (BY OVERNIGHT DELIVERY)** I enclosed said document(s) in a sealed envelope or package provided by Golden State Overnight (GSO) and addressed to the person(s) at the address(es) listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of GSO.
- (BY UNITED STATES MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service and that the correspondence shall be deposited with the United States Postal Service with postage fully prepaid this same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 28th day of January 2022, at San Diego, California.

*Marci Bailey*

Marci Bailey

February 1, 2022

via TRUE FILING

Judith L. Haller, Acting Presiding Justice  
Terry B. O'Rourke, Associate Justice  
Patricia Guerrero, Associate Justice  
California Court of Appeal, Fourth Appellate  
District, Division One  
Symphony Towers  
750 B Street, Suite 300  
San Diego, CA 92101

Re: *Bankers Hill 150 v. City of San Diego*  
Case No. D077963

Dear Justices Haller, O'Rourke, and Guerrero,

The League of California Cities (CalCities) respectfully requests that the Court deny the Building Industry Association (BIA)'s and Greystar GP II, LLC (Greystar)'s requests to publish the Density Bonus Law portion (Part (B)) of the Court's opinion in *Bankers Hill 150 v. City of San Diego*, Case No. D077963.

CalCities is an association of 479 California cities, dedicated to protecting the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. CalCities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, and identifies cases of state or national significance.

CalCities has a substantial interest in the resolution of Density Bonus Law issues because the cities it represents are land use regulators, charged by State law with planning and zoning for housing, commercial, and other land uses across California, within legal bounds, to promote and maintain the health, safety, and welfare of their constituents.

It is telling that the City of San Diego, the prevailing Respondent in this case, has requested that the Court not publish the Density Bonus portion of the Opinion. As San Diego has stated in its Opposition, the Density Bonus issues detailed in the Court's Opinion were not briefed by the parties. In order to assist the Court in resolving land use issues that have far-reaching implications not only for local government, but also for the development community, these issues should be thoroughly vetted before resolution. A review of the *Bankers Hill* appellate briefs reveals that the State Density Bonus Law, Government Code Section 65915 et seq., was not discussed in any of the briefs, and in fact not even cited. The parties' briefs primarily addressed general plan consistency. This Court also requested subsequent

letter briefs from the parties on the effect of the First District's decision in *California Renters Legal Advocacy and Education Fund v. City of San Mateo* (2021) 68 Cal. 5<sup>th</sup> 820. The *San Mateo* case is not a density bonus case, and the parties' letter briefs, like the previous briefs, did not touch on State Density Bonus Law at all.

The meaning and application of the Density Bonus Law is of critical importance to CalCities' members. To give just one example, Government Code Section 65915(e) states that local governments cannot apply a development standard that has the effect of physically precluding "a development" at the densities permitted under the Density Bonus Law. The meaning and application of Section 65915(e) is an issue that CalCities and its members (likely, along with the Building Industry Association (BIA) and its members) would have thoroughly briefed and analyzed, had the Density Bonus Law issues been identified and briefed by the parties as central to the resolution of this case. Because these issues are crucially important to local government and the development community, and have far-reaching consequences on the construction of housing across the State, Cal Cities respectfully requests that publication of an Opinion extensively addressing the Density Bonus Law should wait for a case in which the parties and amici have extensively briefed the issues.

For all of these reasons, Cal Cities asks that this Court deny the requests for publication of Part (B) of the *Bankers Hill* Opinion.

Thank you.

/s/

Corrie Manning  
General Counsel  
League of California Cities

cc: All counsel of record via True Filing (proof of service attached)

**PROOF OF SERVICE**

*Bankers Hill 150, et al. v. City of San Diego, et al.*  
Court of Appeal Case No. D077963  
Superior Court Case No. 37-2019-00020725-CU-WM-CTL

I, Laura L. Luz, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 1300 Clay Street, Eleventh Floor, City Center Plaza, Oakland, California 94612. My business email address is lluz@goldfarbblipman.com. On February 1, 2022, I served the document described as:

**CAL CITIES LETTER IN OPPOSITION  
TO REQUEST FOR PUBLICATION**

on the interested parties in this action as follows:

**SEE ATTACHED SERVICE LIST**

BY ELECTRONIC SERVICE: I caused the above-listed document to be served electronically by:

Sending it electronically to the above-named parties using the email addresses listed in this Proof of Service, via electronic filing and service provider TRUEFILING, which has been approved by the court to file and transmit the documents to opposing parties.

[State] I certify and declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[Federal] I declare that I am employed in the offices of a member of the State Bar of this Court at whose direction the service was made. I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on February 1, 2022, at Oakland, California.

  
\_\_\_\_\_  
Laura L. Luz

**SERVICE LIST**

*Bankers Hill 150, et al. v. City of San Diego, et al.*

Court of Appeal Case No. D077963

Superior Court Case No. 37-2019-00020725-CU-WM-CTL

Everett L Delano III DELANO & DELANO 104 W. Grand Avenue, Ste. A Escondido, CA 92025 Tel: (760) 741-1200 Fax: (760) 741-1212 Email: everett@delanoanddelano.com	<i>Attorneys for Appellants Bankers Hill 150 and Bankers Hill/Park West Community Association</i>  E-Service via TrueFiling
Mara W. Elliott, City Attorney George F. Schaefer, Assistant City Attorney M. Travis Phelps, Deputy City Attorney 1200 Third Avenue, Suite 1100 San Diego, CA 92101-4100 Tel: (619) 533-5800 Fax: (619) 533-5856 Email: cityattorney@sandiego.gov	<i>Attorneys for Respondent City of San Diego</i>  E-Service via TrueFiling
Jeffrey A. Chine Heather S. Riley Allen Matkins Leck Gamble Mallory & Natsis LLP 600 W. Broadway, Suite 2700 San Diego, CA 92101-0903 Tel: (760) 741-1200 Fax: (760) 741-1212 Email: jchine@allenmatkins.com hriley@allenmatkins.com	<i>Attorneys for Real Parties in Interest / Respondent Greystar GP, LLC, Nutmeg and Olive, LLC and Cathedral Church of St. Paul</i>  E-Service via TrueFiling
Bryan W. Wenter, AICP Miller Starr Regalia 1331 N. California Blvd, 5th Floor Walnut Creek, CA 94596 Tel: (925) 935-9400 Fax: (925) 933-4126 Email: bryan.wenter@msrlegal.com	<i>Attorneys for the California Building Industry Association and the Building Industry Association – Bay Area</i>  E-Service via TrueFiling

Clerk of the Superior Court County of San Diego 330 W. Broadway San Diego, CA 92101	via U.S. Mail only
California Attorney General's Office Information Only Environmental Section 1300 I Street Sacramento, CA 95814	via U.S. Mail only