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SAN DIEGO COUNTY, CA

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9 SUPERIOR COURT FOR THE STATE OF CALIFORNIA
10 SAN DIEGO COUNTY, NORTH COUNTY REGIONAL CENTER

11 DCM PROPERTIES, INC., a California
12 Corporation
13 Plaintiff and Petitioner

14 vs.

15 CITY OF ENCINITAS, a municipal
16 corporation, and DOES 1-25, inclusive,
17 Defendant and Respondent

) Case 37-2016-00002342-CU-MC-NC
) Judge:
) Dept.:

) VERIFIED PETITION FOR WRIT OF
) MANDATE AND COMPLAINT FOR:

-) 1) Declaratory and Injunctive Relief;
-) 2) Violation of Government Code § 65000,
et seq.
-) 3) Violation of Cal. Const. Art. XI, § 7

) Filed:

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24 Petitioner and Plaintiff DCM Properties, Inc. (DCM) complains of Defendant and
25 Respondent City of Encinitas, et al, and each of them, and alleges as follows:

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1 interest to DCM and its clients, as well as to the residents of the city of Encinitas and the state
2 of California.

3 5. In 2009, DCM was one of the plaintiffs who brought litigation against the City
4 related to its use of the state Density Bonus Law in the case of *Bahlmann Family Trust and*
5 *DCM Properties, Inc. v. City of Encinitas, et al.* which was designated as San Diego County
6 Superior Court Case No. 37-2009-00051139-CU-WM-NC (the "Bahlmann Lawsuit"). The
7 Bahlmann Lawsuit is discussed in more detail below.

8 6. In 2014, DCM was involved in the lawsuit filed by the Building Industry
9 Association of San Diego County to force the City of Encinitas to comply with the Density
10 Bonus Law. That lawsuit, entitled *Building Industry Association of San Diego County v. City of*
11 *Encinitas, et al.* was designated as San Diego County Superior Court Case No. 37-2014-
12 00034550-CU-WM-NC (the "BIA Lawsuit"). The BIA Lawsuit is discussed in more detail
13 below.

14 7. The true names and capacities, whether individual, corporate, associate, or
15 otherwise, of defendants named herein as Does 1 through 20, inclusive, are unknown to DCM,
16 who therefore sues said defendants by such fictitious names. DCM is informed and believes
17 and thereon alleges that each of the defendants designated herein as a Doe is legally
18 responsible in some manner for the acts, omissions, and events alleged herein and proximately
19 caused damages and injury to DCM as herein alleged. DCM will seek leave to amend this
20 Complaint to show the true names and capacities of such fictitiously named defendants when
21 the same have been ascertained.

22 8. DCM is informed and believes and thereupon alleges that at all times mentioned
23 herein, each of the defendants was and now is the agent, servant, employee, partner, principal,
24 representative, and/or alter ego of each of the remaining defendants and was acting within the
25 course and scope of their authority as such agent, servant, employee, partner, principal,
26 representative, and/or alter ego with the permission and consent of the remaining defendants.

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1 12. The California Legislature has declared that the availability of housing is of
2 vital statewide importance and has determined that state and local governments have a
3 responsibility to make adequate provision for the housing needs of all economic segments of
4 the community. (Gov. Code §65580(a) and (d)). Achieving the goal of providing housing
5 affordable to low- and moderate-income households thus requires the cooperation of all levels
6 of government. (*Id.* subd.(c)). The Legislature has also declared that “there exists within the
7 urban and rural areas of the state a serious shortage of decent, safe, and sanitary housing which
8 persons and families of low or moderate income, including the elderly and handicapped, can
9 afford. (Health & Saf. Code §50003(a)).

10 13. The Density Bonus Law is a powerful tool for enabling developers to include
11 very low-, low- and moderate-income housing units in their new developments. A “density
12 bonus” is a density increase over the otherwise maximum allowable residential density as of
13 the date of application by the applicant to the municipality.(Gov. Code §65915(f)). The express
14 purpose of the law is to encourage municipalities to offer incentives to housing developers that
15 will contribute significantly to the economic feasibility of lower income housing in proposed
16 housing developments. (Gov. Code §65917).

17 14. Although the details of the Density Bonus Law can seem complex, its aim is
18 fairly simple: When a developer agrees to construct a certain percentage of the units in a
19 housing development for moderate, low or very low income households, or to construct a
20 senior citizen housing development, the city or county must grant the developer one or more
21 itemized concessions, incentives, waivers and reductions and a “density bonus”, which allows
22 the developer to increase the density of the development by a certain percentage above the
23 maximum allowable limit under local zoning law. (Gov. Code §65915(a)(b); *Friends of*
24 *Lagoon Valley v. City of Vacaville* (2007) 154 Cal. App. 4th 807, 824.

25 15. The Density Bonus Law was passed in response to the dire need for affordable
26 housing in California, which is even more severe in coastal communities such as Encinitas.
27 This situation was addressed by the California Legislative Analyst’s Office in its publication
28 entitled “California’s High Housing Costs, Causes and Consequences”. A copy is lodged

1 herewith as Exhibit 2. On page 16 of the report, there is a discussion of how the opposition to
2 new housing appears to be heightened on the California Coast. The publication discusses the
3 many ways in which coastal cities use their planning process to slow and impede the approval
4 of new developments. These processes are well known to coastal cities such as Encinitas and,
5 as discussed below, are consciously being employed the City of Encinitas to thwart the
6 construction of both market rate and affordable housing.

7 16. The Density Bonus Law has been periodically amended by the Legislature to
8 address issues which have arisen in its implementation. Many such issues have arisen from the
9 interplay of the Legislature's mandate for more affordable housing and local jurisdictions
10 reluctance to implement that mandate.

11 17. Local agencies, such as the City, are required by the Density Bonus Law to
12 adopt an ordinance "...that specifies how compliance with [the Density Bonus Law] will be
13 implemented." Government Code §65915(a). But local politics in the City have intervened in
14 that process. Until recently, the City operated with an out of date ordinance and informal
15 policies which were inconsistent with state law.

16 18. The City has had a long and troubled history with regard to providing affordable
17 housing in the City. In part, its gyrations have corresponded to different Council majorities
18 being elected at different times. However, whatever the reason, the City Council has clearly
19 vacillated in its interpretation of Density Bonus Law, including its policy regarding "rounding
20 up" and "rounding down" when calculating density bonuses, as revised by the City's
21 ordinances and policies.

22 19. Before considering those vacillations in more detail, it is important to
23 understand the significance of the calculations involved in determining proper density bonuses
24 for a project. There are two separate calculations which must be made in order to make that
25 determination.

26 a. The first calculation which must be completed is referred to as the "Base
27 Density Calculation". That calculation involves computing the net acreage in the project and
28 multiplying by the maximum density allowed by the applicable zoning law. By way of

1 example, if a project has net acreage of 2.9 acres and the zoning allows a density of 3 units per
2 acre, the Base Density Calculation is as follows: Net Acreage of 2.9 acres x Zoning of 3 units/
3 acre= 8.7 lots (or units).

4 Since it is not possible to have fractional lots, something must be done with the “.7”
5 lots produced by the Base Density Calculation. This is where the dispute arises between
6 “rounding down” and “rounding up”. The state Density Bonus Law, in Government Code
7 §65915(f)(5) requires that “All density calculations resulting in fractional unit shall be rounded
8 up to the next whole number.” So, in the example, the Base Density Calculation is properly
9 concluded by rounding up 8.7 to 9 and therefore designating the base density as “9 lots”.

10 b. The second calculation involved is the “Density Bonus Calculation”. The
11 Density Bonus Law provides a sliding scale of bonuses available to a developer, depending on
12 the type of affordable housing it proposes to build. See Gov. Code §65915(f)(1-4). The
13 maximum density bonus provided by the Density Bonus Law is 35% and is wholly dependent
14 upon the developer’s selection of which type of affordable housing it proposes to build.

15 Continuing with the example set forth above, the Base Density Calculation has yielded
16 9 lots. Applying the 35% bonus density yields the following: 9 lots x 135%=12.2 lots. Again,
17 the Density Bonus Law requires the fraction to be rounded up, yielding a total of 13 lots.

18 Note that if the Base Density Calculation were to be “rounded down” to 8 lots, pursuant
19 to the City’s announced scheme to illegally utilize its zoning ordinance for the calculation of
20 bonus density, instead of “rounded up” to 9 lots, the total number of lots would only be 10.8
21 lots, which rounds up to 11 lots. In this example, there is an 18.2% reduction (2 lots) in total
22 lots using the City’s “rounding down” methodology. It is this differential which the City
23 improperly seeks to work to its advantage by the ordinance that it passed into law as Municipal
24 Code §30.16.020.C. This is discussed more fully below.

25 20. In the 2002 California Legislative Session, Assembly Bill 1866 (AB 1866) was
26 passed (effective January 1, 2003) adding the plan and simple language to the Density Bonus
27 Law that: “All density calculations resulting in fractional units shall be rounded up to the next
28 whole number.” This language is codified as Gov. Code §65915(f)(5).

1 21. However, in direct conflict with AB 1866, the City’s policy on density bonus
2 projects to round down in the calculation of Base Density continued by the City’s use of
3 Encinitas Municipal Code §30.16.010.B(1), which states: “Any fraction of a dwelling unit shall
4 be reduced to the next lower whole unit not less than one”. This policy was memorialized in a
5 City policy memo, dated September 20, 2005, a copy of which is lodged herewith as Exhibit 3.
6 The Density Bonus Calculation would then be rounded up.

7 22. In 2008, AB 2280 was adopted (effective January 1, 2009), again amending
8 Gov. Code §65915 with revisions to sub-section (o)(2) resolving any conflict over the
9 maximum allowed density between the zoning code and the land use element of the general
10 plan in favor of the land use density over the zoning code. Thus in the case of a density bonus
11 project, the City’s zoning code which requires fractional units to be rounded down to the
12 closest whole number, was no longer applicable.

13 23. However, the City did not abide by either of the revisions to the Density Bonus
14 Law. So, as noted above, in February 2009 the Bahlmann Lawsuit was filed against the City of
15 Encinitas. In part, that litigation was based on the City’s “rounding down” the Base Density
16 Calculation for a specific project. After a few months, the Bahlmann Lawsuit was settled with
17 the City agreeing to “round up” the Base Density Calculation.

18 24. Of broader significance, the City’s Department of Planning and Building also
19 adopted a revised method of calculating density for density bonus projects, which was reflected
20 in a policy directive dated March 24, 2009. A copy of that policy directive is lodged herewith
21 as Exhibit 4 and incorporated by this reference. That policy directive acknowledged that based
22 on the passage of AB 2280 that the City perform density calculations in conformance with the
23 land use element requirements, and the “...requirement of Section 65915(f)(5) to round up all
24 density calculations to the next whole number, the City is required to: “...round up the initial
25 calculation of maximum allowable residential density when density calculations result in
26 fractional units.” That refers to the Base Density Calculation.

27 25. From March 2009 until 2014, the City acted in compliance with the Density
28 Bonus Law in performing all density calculations for density bonus project applications by

1 rounding up both the Base Density Calculation as well as the Bonus Density Calculation.
2 However, political changes in the makeup of the City Council occurred during that time, with a
3 new majority of the Council being much more hostile towards density bonus projects.

4 26. At its February 12, 2014, meeting, the City Council directed staff to prepare a
5 report regarding the City's implementation of the Density Bonus Law due to frequent
6 complaints by certain residents regarding residential development projects processed by the
7 City pursuant to the Density Bonus Law.

8 27. At the March 26, 2014, City Council meeting, Encinitas Planning Director Jeff
9 Murphy ("Murphy") presented an overview of the Density Bonus Law. In that presentation,
10 Murphy stated that the City's density bonus ordinance does not comply with state law. He
11 asserted that, historically, the City has applied the standards outlined in state law, rather than
12 amending its outdated ordinance.

13 28. The focus of the March 26, 2014, presentation from Murphy to the City Council
14 was the City's approach to rounding fractional units in density bonus calculations. The Density
15 Bonus Law depends on the calculation of a base density, which is the net acreage multiplied by
16 the number of permissible units allowed by local zoning. Base density calculations rarely
17 produce a whole number, so the Density Bonus Law's mandate to round up fractional units to
18 the next whole number is meaningful. Rounding up results in a higher base number of units,
19 which can change the "density bonus" provided to the developer in return for making a certain
20 percentage of those units affordable. The early rounding becomes even more meaningful when
21 compounded by later steps in the equation. Rounding up results in greater density while
22 rounding down reduces the ultimate dwelling unit yield.

23 29. In his March 26, 2014, presentation to the City Council, Murphy shared
24 information about the City's historical policy on rounding. In 2005, the City rounded down.
25 However, the City acknowledged in 2009 that all density bonus calculations are required by
26 statute to be rounded up, and memorialized the City policy of rounding up in a letter from the
27 City Planning Department dated March 24, 2009. During his presentation, Murphy admitted
28

1 that the City policy prior to 2009 of rounding down fractional units violated subsection
2 69515(f)(5) of the Density Bonus Law.

3 30. After discussing this history, Murphy described the "impacts of rounding" by
4 providing a unit calculation comparison of development sites of different sizes. The City
5 Council and Murphy were careful to note that the March 26, 2014, presentation was not
6 intended to address any particular parcel or project. Instead, the discussion expressly related to
7 the overall policies and procedures adopted by the City in implementing the state Density
8 Bonus Law.

9 31. Murphy concluded his comments by stating that the City had contacted the
10 League of California Cities as part of its effort to understand potential methods of
11 implementing the Density Bonus Law so as to provide greater local control relative to density
12 bonus. This was framed as an effort to "improve state density bonus law," but Murphy
13 acknowledged that "until then, the City must apply the standards as set forth by the state." This
14 demonstrated a continuing desire on the part of the City Council to impede to the greatest
15 possible extent the application of the Density Bonus Law through the use of its own ordinances
16 and policies. During public comment on the item, substantial community commentary ensued,
17 with speakers expressing their frustration and hostility to density bonus projects.

18 32. During the Council discussion, Councilmember Teresa Barth stated she had
19 spoken with the City's Sacramento lobbyist about density bonus and she was told, "if we want
20 anyone to take us seriously that we had to have an approved Housing Element. Because
21 without an approved Housing Element, it does not show that we are genuinely concerned about
22 affordable housing in our community." Further Councilmember Tony Kranz questioned
23 Murphy regarding the City's zoning code that says to round down base density and "as soon as
24 the developer invokes density bonus that this [the City's Municipal Code round down
25 provisions [§30.16.0010.B(1)] no longer applies...the law was allegedly written in a way that
26 requires that we round up." Director Murphy replied, "In short, yes." Continuing, Kranz stated
27 that "So the State law is very troubling..." and that the City can "figure out a way to
28 discourage people from invoking the density bonus law." Finally, he stated that he hopes

1 anywhere the City may have discretion that it "shoots for keeping the density lower, not
2 higher."

3 33. On July 9, 2014, Councilmember Teresa Barth raised a "Council-Initiated Item"
4 to discuss the City's density bonus ordinance. She again stated that the issues should be
5 discussed in a general sense about the scope of City policies, rather than with regard to
6 particular parcels or projects. Her stated goal was to "clarify where the City does have
7 discretion and how that discretion should be used to maintain the character of our
8 neighborhoods and to encourage community-appropriate development." She requested that the
9 item be placed on the City's Planning Commission's agenda prior to August 7, 2014, with
10 direction to provide input to City staff and the City Council on five topics geared to test the
11 limits of the City's powers to restrict, deny, or otherwise inhibit density bonus projects in the
12 City.

13 34. Following Councilmember Barth's introductory comments at the July 9, 2014,
14 City Council hearing, substantial community commentary ensued, with speakers expressing
15 their frustration and hostility to density bonus projects regardless of Murphy's citation to the
16 requirements of state law. After showing frustration with the lengthy timeline to implement an
17 updated ordinance instituting the Council's desired interpretation of Density Bonus Law,
18 including the requirement for the ordinance to proceed first to the Planning Commission,
19 Councilmember Lisa Shaffer expressed her desire that the Planning Commission not have
20 discretion on the matter and the Council "go to [Planning] Commission with the answers we
21 want them to adopt." The City Council directed that the issue of the City's interpretation and
22 implementation of Density Bonus Law be placed on the agenda for the next City Council
23 meeting, set for July 16, 2014, for immediate action.

24 35. On July 16, 2014, the City Council reconvened and addressed the five topics for
25 discussion identified by Councilmember Barth. Murphy again explained the state and local
26 laws governing density bonus projects, noting that the "staff report was not intended to thwart
27 or to ignore the City Council's direction, but instead to advise as to the potential impacts of any
28

1 changes." The staff report provided citations to some of the applicable laws, and noted certain
2 areas where actions proposed by speakers or councilmembers would violate state law.

3 36. The five issues targeted for discussion at the July 16, 2014, City Council
4 meeting, as summarized by Murphy, were: (1) base density rounding requirements, (2)
5 environmental constraints and net acreage calculations, (3) the size of affordable units, (4)
6 financial pro forma requirements, and (5) requiring environmental impact reports ("EIRs") for
7 all density bonus projects. The staff report included, as a sixth item, a word of caution about
8 the applicability of any changes, citing subsection 65915(f) of the Density Bonus Law and
9 noting that "this code section is important as any changes considered by the Council relative to
10 the items in this Agenda Report can only be applied 'point forward,' and cannot be applied
11 retroactively to the Density Bonus projects currently being processed."

12 37. After significant public discussion, the City Council took action on the first four
13 items. No action was taken on the fifth item described above. The City Council ignored
14 Murphy's caution about section 65915(f), directing staff to apply the new policies "effectively
15 immediately and shall be applied [sic] to any projects not yet permitted or holding vested
16 rights." A true and correct copy of the City Council Minutes from the July 16, 2014, is lodged
17 herewith as Exhibit 5. The minutes reflect the actions taken by the City Council.

18 38. On July 25, 2014, Murphy issued a memorandum listing the City Council's July
19 16 policy pronouncements, each of which is described below in greater detail, and collectively
20 are referred to herein as the "Density Bonus Policies." A true and correct copy of the "July 25
21 Memorandum" is attached lodged herewith as Exhibit 6.

22 39. BIA members and BIA's Senior Public Policy Advisor Michael McSweeney
23 attended the July 16, 2014, meeting and spoke out in opposition to the City Council's proposed
24 actions. As noted above, the policies adopted by the City Council in July 2014 were in conflict
25 with the provisions of the Density Bonus Law. There were no relevant amendments to the
26 Density Bonus Law which might have justified these changes; they were purely political in
27 nature.

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1 40. As a result, on or about October 10, 2014 the Building Industry Association of
2 San Diego County (BIA) filed a verified Petition for Writ of Mandate and Complaint for
3 Declaratory and Injunctive Relief, Violation of Government Code §65000 *et seq.* and Violation
4 of the California Constitution, Article XI §7. The case was designated as San Diego Superior
5 Court Case No. 37-2014-00034550-CU-WM-NC (the BIA Lawsuit). In the BIA Lawsuit, the
6 litany of events that demonstrated the City was in violation of the Density Bonus Law and the
7 requirement to adopt a housing element to the General Plan. The Court is respectfully
8 requested to take judicial notice of the Petition filed in the BIA Lawsuit pursuant to Evidence
9 Code §452(d).

10 41. On or about November 14, 2014, the City filed its verified Answer to Petition
11 for Writ of Mandate, essentially denying all substantive allegations in the BIA Lawsuit. The
12 Court is respectfully requested to take judicial notice of the City's Answer filed in the BIA
13 Lawsuit pursuant to Evidence Code §452(d).

14 42. On or about July 22, 2015 this Court entered a Judgment Pursuant to Stipulation
15 in the BIA Lawsuit (the Stipulated Judgment). The Court is respectfully requested to take
16 judicial notice of the Stipulated Judgment as well pursuant to the provisions of Evidence Code
17 §452(d). A copy of the Stipulated Judgment is lodged herewith as **Exhibit 7** and incorporated
18 herein by this reference. Included in the Stipulated Judgment was the following covenant to be
19 performed by the City:

20 a. “Adoption of Density Bonus Ordinance. On the earliest reasonably
21 possible date after the Date of Approval, the City agrees to place on
22 its Planning Commission and City Council meeting agendas for
23 Planning Commission and City Council consideration a Density Bonus
24 Ordinance specifying how compliance with Government Code Section
25 65915 will be implemented, and, if adopted to submit the draft Density
26 Bonus Ordinance to the Coastal Commission for review and approval.”

27 43. However, rather than adopting a Density Bonus Ordinance that complied with
28 the State's Density Bonus Law, the Encinitas City Council (the "City Council"), bowing to the

1 pressure of certain residents fundamentally opposed to the application of the Density Bonus
2 Law in their neighborhoods, has intentionally and knowingly attempted to subvert the clear
3 intention and dictates of the Density Bonus Law. The City Council seeks to render the Density
4 Bonus Law ineffective and unduly burdensome in the City, in violation of the California
5 Constitution, the Density Bonus Law, and other zoning and planning laws.

6 44. The City's policy to oppose the Density Bonus Law has been conceded by the
7 City's own staff report to the Planning Commission dated August 6, 2015, which followed the
8 entry of the Stipulated Judgment:

9 "The Encinitas City Council has maintained its strong opposition to this
10 state law [the Density Bonus Law] arguing that most density bonus
11 projects do not fit within the existing character of the community and
12 the required number of reserved affordable housing units is disproportionate
13 to the number of additional market-rate units a developer is
14 allowed to construct."

15 (Planning Commission Agenda Report for August 6, 2015, emphasis added).

16 45. Essentially, the City has announced its intention to thwart the implementation
17 and use of the Density Bonus Law in Encinitas to the maximum extent possible. The City's
18 assault on the Density Bonus Law comes in the context of its continued failure to adopt a
19 housing element that will satisfy the mandate of sections 65580 to 65589.8, which require local
20 agencies to update the housing element of their general plans and thereby promote the
21 construction of affordable housing. The City has missed multiple cycles of required updates,
22 and has not updated its housing element since 1992. As a result, the City's own 2013 estimate
23 found that it was on track to provide only about 33% of the housing for very low and low
24 income families that is required under state law. Taken together, these policies of the City can
25 be seen to be directly antithetical to the clear mandate of the Density Bonus Law. However, as
26 shown more fully below, the recently enacted ordinance (Encinitas Municipal Code
27 §30.16.020.C) is not an effective mechanism to implement the policy of the Density Bonus
28 Law, and in fact, in several instances is in direct conflict with it.

1 46. DCM Properties, Inc., for itself, the Citizens of Encinitas brings this action to
2 enforce an important right affecting the public’s interest in obtaining affordable housing and to
3 further the public benefit contemplated by the Density Bonus Law and Housing Element Law.

4 **Events following the Stipulated Judgment in the BIA Lawsuit**

5 47. Following the entry of the Stipulated Judgment, the City returned to the
6 “drawing board” as required by paragraph 2(c) of the Stipulated Judgment. However, it did so
7 with the clear intent of avoiding and discouraging the use of as much of the Density Bonus
8 Law as possible.

9 48. As noted above, at the first meeting of the Planning Commission following the
10 entry of the Stipulated Judgment to deal with the issue, on August 6, 2015, a written report to
11 the Planning Commission was provided by staff, which specifically articulated the City
12 Council’s “strong opposition” to the Density Bonus Law (the Planning Commission Report). A
13 copy of that report is lodged herewith as **Exhibit 8** and incorporated herein by this reference.
14 The Planning Commission Report acknowledges that all cities are required to adopt an
15 ordinance that specifies how the Density Bonus Law will be implemented, citing Government
16 Code §65915(a).

17 49. Included in the August 6, 2015 Planning Commission Report was Attachment
18 B, a “July 8, 2015 Press Release Regarding Settlement”. That referred to the Stipulated
19 Judgment in the BIA Lawsuit and was apparently prepared by the City’s attorneys in that
20 litigation: Goldfarb & Lipman. It heralded the following:

21 “ In calculating “base density”—the density allowed before a
22 density bonus is calculated—the City will “round down” any
23 fraction of a unit to the next lower whole unit, except for the six
24 projects referenced below. The parties have reserved their rights
25 regarding the rounding issue.”

26 (emphasis included in original)

27 This “rounding down” of the base density calculation was the City’s practice
28 established in 2014 by City Council action, in part causing the BIA Lawsuit. Notably, the only

1 provision in the Stipulated Judgment about this issue is that the party's reserved their rights on
2 the question of "rounding down". Nothing in the Stipulated Judgment (Exhibit 6) authorized or
3 consented to the "rounding down" of the base density calculation. As shown below, the new
4 density bonus ordinance that the City enacted after the settlement of the BIA Lawsuit still
5 results in the unlawful "rounding down" of the base density calculation; albeit indirectly.

6 50. In keeping with the City's "strong opposition" to the Density Bonus Law, and
7 consistent with the City's press release, the August 6, 2015 Planning Commission Report
8 specifically stated on page 2 with regard to the Base Density Calculation in the proposed
9 ordinance:

10 "Base Density Calculation. The proposed ordinance clarifies that
11 fractional units in the base density calculation shall be rounded down to
12 the nearest whole number, consistent with EMC Section 30.16.010(B)(1). (§30.16.020.C.5.a)

13 This provision in the proposed ordinance clearly conflicts with the Density Bonus Law.
14 Government Code §65915(f)(5), which requires all density calculations to be rounded up. It
15 conflicts with the City's 2009 acknowledgment that the Base Density Calculation has to be
16 rounded up. (Exhibit 4) However, it is consistent with the City's "strong opposition" to the
17 Density Bonus Law.

18 51. The August 6, 2015 Planning Commission Report also specifically stated on
19 page 2 in summarizing the proposed ordinance that the City would now require a new "Density
20 Bonus Report" from all applicants as provided in §30.16.020.C.

21 52. The proposed ordinance illegally required the applicant to include in the
22 "report" sufficient evidence to demonstrate that any requested incentive results in "identifiable,
23 financially sufficient, and actual cost reductions to the housing development and is required in
24 order to provide for affordable rents or affordable sales prices." The "report" also illegally
25 required an applicant requesting any waivers of development standards to provide "evidence
26 that each development standard for which a waiver is requested will have the effect of
27 physically precluding the construction of the housing development with the density and
28 incentives that the applicant is entitled to. These provisions conflict with the Density Bonus

1 Law. That law does not require any such evidence to demonstrate that the incentives and
2 waivers which are granted to a developer of affordable housing by the Density Bonus Law are
3 “justified”. Nor does it allow the City to sit in judgment and exercise its discretion on these
4 issues.

5 53. The Density Bonus Law expressly states that: “When an applicant seeks a
6 density bonus for a housing development...that local government shall provide the applicant
7 with incentives or concessions for the production of housing units....” Gov. Code §65915(a).
8 Similar language is contained in subsection (b). This policy of mandated concessions and
9 incentives is further enunciated in subsection (d):

10 “An applicant for a density bonus...may submit to a city...a proposal
11 for the specific incentives or concessions that the applicant requests pursuant to this
12 section....The city...shall grant the concession or incentive requested by the applicant
13 unless the city...makes a written finding, based upon substantial evidence, of any of the
14 following:

15 (A) The concessions or incentive is not required in order to provide for affordable
16 housing costs, as defined in Section 50052.5 of the Health and Safety Code, or for rents
17 for the targeted units to be set as specified in subdivision (c).

18 (B) The concessions or incentive would have a specific adverse impact...upon
19 public health and safety or the physical environment....

20 (C) The concessions or incentive would be contrary to state or federal law.”

21 Clearly, the proposed ordinance placed burdens on the developer contrary to the
22 Density Bonus Law and improperly shifted the burden of establishing the propriety of the
23 requested incentives and concessions to the applicant. This is consistent with the City’s “strong
24 opposition” to density bonus and the comments from the Council set forth above to thwart
25 density bonus to the maximum extent possible.

26 54. The August 6, 2015 staff report included as Attachment C, Draft Ordinance
27 2015-05, the City’s proposed new ordinance (the Draft Density Bonus Ordinance). The Draft
28 Density Bonus Ordinance was riddled with additional infirmities, only some of which are

1 discussed herein. On August 6, 2015, the Planning Commission reviewed the Draft Density
2 Bonus Ordinance, considered public comment and testimony and by a vote of 4-0-1 (one
3 commissioner being absent), recommended approval of the Draft Density Bonus Ordinance
4 with certain revisions.

5 55. The Draft Density Bonus Ordinance was then considered at the City Council
6 meeting on October 14, 2015, having been continued twice from the August 26, 2015 meeting
7 agenda without hearing. The Agenda Report for that meeting, prepared by Jeff Murphy,
8 Director of Planning is lodged herewith as Exhibit 9 and incorporated herein by this reference.
9 It essentially tracks the Planning Commission Report dated August 6, 2015. It specified that
10 the Base Density Calculation would be rounded "down". It specified that applicants would be
11 required to submit the new density bonus report which required the applicant to document the
12 request, ensure that the City has adequate information to understand what was being requested,
13 and demonstrate why any requested incentive or waiver is necessary and complies with State
14 law.

15 56. Also submitted to the City Council for consideration on October 14, 2015 was
16 another Agenda Report (Item 10B) dated August 26, 2015, prepared by Barbara Kautz, as
17 "Special Counsel". Ms. Kautz was the attorney for the City in the BIA Lawsuit. That Agenda
18 Report is lodged herewith as Exhibit 10 and incorporated herein by this reference. Included in
19 Ms. Kautz' recommendations is:

20 "4. Direct staff to continue to utilize the provisions of the City's
21 existing Municipal Code in calculating Maximum Allowable Residential
22 Density and to ensure that density bonus applications fully comply with
23 the provisions of Government Code Section 65915."

24 57. The fact that this recommendation applied to the Base Density Calculation was
25 made clear in the following "Analysis" section of the Agenda Report (Item 10B), which also
26 stated that:

27 "Existing Municipal Code Section 30.16.010(B)(1) provides
28 for rounding down when the base density results in a fractional unit."

1 58. Ms. Kautz' recommendation concerning the Base Density Calculation is
2 internally inconsistent as the existing Municipal Code requires that the Base Density
3 Calculation be rounded down [EMC 30.16.010(B)(1)] whereas Government Code Section
4 65915 requires that all density calculations be rounded up. Section 65915(f)(5) and Section
5 65915(o)(2) states that if there is a conflict between any zoning ordinance and the land use
6 element of the general plan, the general plan density prevails, as acknowledged in the City's
7 own 2009 policy directive (Exhibit 4). Apparently, this was an attempt to delete any
8 "rounding down" calculations from the text of the Draft Density Bonus Ordinance while
9 surreptitiously importing the existing "rounding down" calculation from other zoning
10 ordinances already in the Municipal Code. The net effect of course, would be to "round down"
11 one of the density calculations used to determine the proper density bonus for a project, which
12 directly contravenes Government Code §65915(f)(5). That methodology is wholly consistent
13 with the City's "strong opposition" to the Density Bonus Law, but illegal nonetheless.

14 59. Also submitted to the City Council for its consideration at the August 26, 2015
15 meeting was a letter of that date from DCM Properties, Inc. (the DCM Letter). A copy of the
16 letter is lodged herewith as Exhibit 11 and incorporated herein by this reference. The DCM
17 Letter was specifically intended to address the Draft Density Bonus Ordinance in an effort to
18 encourage correction of the inconsistencies with Density Bonus Law, remove the obstructionist
19 language in the draft ordinance, and encourage the City to revise this draft ordinance to closely
20 comply with the spirit and intent of State law encouraging the production of sorely needed
21 affordable housing in Encinitas.. The letter set forth the interest of DCM Properties in the issue
22 and recited the purpose of the Density Bonus Law. The DCM Letter noted that the Draft
23 Density Bonus Ordinance was intended to obstruct and discourage the use of Density Bonus in
24 Encinitas. The letter then went on to point out numerous provisions in the Draft Density Bonus
25 Ordinance which were contrary to the Density Bonus Law and its stated intent to provide
26 affordable housing. The DCM Letter specifically identified the "Rounding Down base density"
27 provisions. It also addressed several ways in which the new "Density Bonus Report" amounted
28

1 to an unwarranted, unauthorized and unduly burdensome impediment to the Density Bonus
2 process.

3 60. As noted above, consideration of the Draft Density Bonus Ordinance was
4 continued twice from its initially scheduled hearing date of August 26, 2015. Prior to taking up
5 the Draft Density Bonus Ordinance for a vote, and recognizing the significance of the DCM
6 Letter, the City Council convened several special meetings for Closed Sessions on September
7 9, 2015, September 23, 2015 and October 14, 2015. One of the purposes for these Closed
8 Sessions was to discuss: "CONFERENCE WITH LEGAL COUNSEL, ANTICIPATED
9 LITIGATION, SIGNIFICANT THREAT OF LITIGATION". The public notice of the meeting
10 stated that this agenda item related to "DCM Properties, Inc. correspondence, dated August 26,
11 2015 challenging the legality of potential City Council action related to the proposed density
12 bonus implementation ordinance. A copy of the public notice is lodged herewith as Exhibit 12
13 and incorporated herein by this reference.

14 61. Following that Special Session, Special Counsel Barbara Kautz, then prepared
15 and submitted an additional Agenda Report for the City Council meeting of October 14, 2015.
16 A copy of Ms. Kautz' Agenda Report dated October 14, 2015 is lodged herewith as Exhibit
17 13. As two Agenda Reports were prepared by Ms. Kautz for the October 14, 2015, the first
18 report was designated as Item #10A. The Agenda Report (#10A) references the letter received
19 from David C. Meyer (which presumably refers to the DCM Letter signed by Mr. Meyer as
20 President of that corporation). The Agenda Report noted that the City Council had delayed
21 action on its proposed Density Bonus Ordinance in order to consider the comments in the
22 DCM Letter.

23 62. On page 2 of Ms. Kautz' Agenda Report of October 14, 2015, she describes
24 how the City now intended to address the "Density Bonus Calculation":

25 "Base Density Calculation. Base density will be calculated based
26 on the City's applicable zoning and general plan provisions.
27 [§30.16.020.C.5.a]. For the Council's information, Attachment F
28 shows how base rounding is calculated in other San Diego County cities."

1 63. Ms. Kautz' Agenda Report of October 14, 2015 (#10A) also discussed the
2 Density Bonus Report proposed in the Draft Density Bonus Ordinance:

3 "Density Bonus Report / Application Requirements. As part of the
4 application, applicants will be required to prepare and submit a
5 'Density Bonus Report' for any density bonus, incentive or waiver
6 being proposed as part of the project. The report will document the
7 request, ensure that the City has adequate information to understand
8 what is being requested, and demonstrate why any requested incentive
9 or waiver is necessary and complies with State law. [§30.16.020.C.4.a]"

10 64. Significantly, Ms. Kautz' October 14, 2015 Agenda Report (#10A) also
11 included "Attachment E" which purports to be a side-by-side comparison of the DCM Letter to
12 the provisions of the Draft Density Bonus Ordinance. "Attachment E" is included in Exhibit
13 13 at pages 40-47. In many instances, Attachment E concedes the validity of the objections
14 made in the DCM Letter but then shows the City's attempts to "work around" the objections in
15 the revised Draft Density Bonus Ordinance.

16 65. With respect to the "rounding down" issue, Ms. Kautz' Agenda Report (#10A)
17 at page 44, item 10, provides that the revisions to the Draft Bonus Density Ordinance reflect
18 "...precise language in state law, which indicates that base density is to be determined under
19 the applicable zoning and land use designations adopted by the City." The Agenda Report
20 sidestepped the issue of DCM's request to produce information obtained from the City's
21 lobbyist on the topic as the City had "...previously provided a response to the Public Records
22 request".

23 66. Contrary to the statements in Ms. Kautz' Agenda Report, the City's Draft
24 Density Bonus Ordinance is not at all consistent with the Density Bonus Law, which clearly
25 requires: "All density calculations resulting in fractional units shall be rounded up to the next
26 whole number. Gov. Code §65915(f)(5). (emphasis added). Density Bonus Law further
27 requires that: "Where the density allowed under the zoning ordinance is inconsistent with the
28

1 density allowed under the land use element of the general plan, the general plan density shall
2 prevail. Gov. Code §65915(o)(2).

3 67. With regard to the requirement of a “pro forma”, which is a term of art in the
4 real estate development industry, the Agenda Report (#10A) (**Exhibit 13**) noted that the
5 revised Draft Density Bonus Ordinance, dropped that specific language but instead was
6 modified to “...require the applicant to demonstrate that any requested incentive results in
7 identifiable, financially sufficient, and actual cost reductions and is required to provide for
8 affordable housing.” As noted above, this language introduces major issues of “discretion” into
9 the process which can all too easily be utilized by the City to advance its “strong opposition” to
10 the Density Bonus Law. Rather than granting the mandated concessions and incentives upon
11 request, the proposed ordinance was intended to shift the burden to the applicant to prove that
12 the project was entitled to the requested concessions and incentives. This represents a
13 fundamental challenge to the Density Bonus Law, as desired by the City Council. It is clearly
14 inappropriate.

15 68. In light of the City’s continued attempts to subvert the Density Bonus Law with
16 the provisions of the revised Draft Density Bonus Ordinance, DCM Properties, Inc., through
17 its’ President, met on two separate occasions (September 19, 2015 and September 28, 2015)
18 with a subcommittee of the City Council to attempt to find a resolution to the issues. Through
19 this process, the City made some additional changes but ultimately the efforts were not
20 successful. As a result, DCM Properties, Inc. submitted a second letter to the City Council
21 dated October 14, 2015, a copy of which is lodged herewith as **Exhibit 14** (the Second DCM
22 Letter). The Second DCM Letter expressed despair at attempting further negotiations on the
23 issue and noted that the revised Draft Density Bonus Ordinance continued to contain numerous
24 provisions which were contrary to the Density Bonus Law. The Second DCM Letter stated that
25 absent significant further revisions to the Draft Density Bonus Ordinance, the dispute would
26 have to be addressed to the court system.

27 69. On October 28, 2015, Special Counsel Barbara Kautz submitted to the Planning
28 and Building Department another Agenda Report, a copy of which is lodged herewith as

1 **Exhibit 15** and incorporated herein by this reference. This Agenda Report noted that the
2 proposed Draft Density Bonus Ordinance had been introduced at the City Council meeting of
3 October 14, 2015 and that it was scheduled for adoption at the next meeting of the City
4 Council. The Agenda Report contained the revised Draft Density Bonus Ordinance (No. 2015-
5 05) as Attachment A. The Draft Density Bonus Ordinance did not contain a provision requiring
6 the Base Density Calculation to be rounded up. The Draft Density Bonus continued to require
7 all applicants for density bonus projects to submit a density bonus report, justifying and
8 demonstrating the need for any requested incentives and concessions.

9 70. At the October 28, 2015 meeting of the City Council, the Draft Density Bonus
10 Ordinance was adopted on the consent calendar by unanimous vote. A copy of the adopted
11 ordinance, now designated as Encinitas Municipal Code §30.16.020 is attached hereto as
12 **Exhibit 1**. The Court is respectfully requested to take judicial notice of this municipal code
13 section pursuant to Evidence Code §452(b).

14 71. A clear and significant benefit will be conferred upon the general public by the
15 City's full compliance with the Density Bonus Law, the Housing Accountability Act, and the
16 California Constitution. The public, including DCM and its members, is vitally and
17 beneficially interested in assuring that the mandate of law is fully met. Granting the relief
18 requested by DCM would confer a significant benefit on a large class of persons, in that
19 fundamental rules of law would be enforced and significant public policies would be
20 implemented.

21 **Base Density Calculations Must Be Rounded Up**

22 72. As noted above, since 2014, the City has taken an adversarial approach to the
23 Density Bonus Law. The newly adopted Density Bonus Ordinance must be seen through that
24 prism.

25 73. The first action directed by the City Council on this issue in July 2014 was
26 described in the July 25 Memorandum as follows:

27 The base (maximum allowable) density calculation for density bonus projects,
28 as defined under Government Code Section 65915, shall be rounded down,

1 when it results in a fractional unit, pursuant to Encinitas Municipal Code
2 Section 30.16.010(B)(1).

3 74. Over the series of City Council and Planning Commission meetings where the
4 density bonus policies were discussed in 2014, some residents argued that the existing
5 Encinitas Municipal Code, section 30.16.010(B)(1), must be applied by the Planning
6 Department. That provision, in essence, provides that density calculations resulting in
7 fractional units should be rounded down. Planning Director Murphy and his staff were accused
8 by several members of the public of being too friendly to developers because of the continuing
9 use of the 2009 policy change to follow section 65915 by rounding fractional units up, rather
10 than rounding down as contemplated by Encinitas Municipal Code section 30.16.010(B)(1).
11 Murphy reminded the City Council that many provisions of the Encinitas Municipal Code have
12 fallen out of compliance with the Density Bonus Law, and that the City and staff are required
13 to follow California law notwithstanding outdated and contrary local ordinances. Feeling
14 political pressure from constituents, and with an election approaching, the City Council
15 directed staff immediately and henceforth to round down fractional numbers when calculating
16 base density for density bonus projects, irrespective of the Density Bonus Law.

17 75. Current Councilmember Catherine Blakespear, who at the time was an
18 announced candidate for the Council, spoke during public comment and thanked
19 Councilmember Barth for bringing the Density Bonus item forward. Ms. Blakespear confirmed
20 her agreement with “all the prior speakers opposing density bonus, and advising the Council
21 that they can ignore the City Attorney’s direction that the density bonus ordinance must first go
22 through the Planning Commission before Council can take action.” Ms. Blakespear was elected
23 to the Council in November 2014 and has continued her opposition to Density Bonus Law.

24 76. The City’s own publicly announced Legislative Priorities for both 2014 and
25 2015 have included the goal of “[Seeking] opportunities to regain local control over state-
26 imposed density bonus law.” A copy of the September 10, 2014 Agenda Report setting forth
27 “Legislative Position Letters” is lodged herewith as Exhibit 16. A copy of the August 19, 2015
28 Agenda Report setting forth Legislative Position Letters is lodged herewith as Exhibit 17.

1 77. Even after the BIA Lawsuit, the City continued its hostility toward the Density
2 Bonus Law, notably by continuing its practice of rounding down the Base Density Calculation.
3 But the City knew that it was treading on thin ice. The City had its lobbyist, Jonathan Clay
4 inquire about the “rounding up” versus “rounding down” issue. Mr. Clay responded with an
5 email dated May 14, 2015 to Bob McSeveney, Management Analyst for the City of Encinitas,
6 reporting on his conversation with the Assembly Housing & Community Development
7 Committee staff. Their chief policy consultant stated that “only Encinitas” has raised the issue
8 of rounding down vs. rounding up. She also mentioned that: “the committee’s interpretation of
9 state law that rounding up is the correct method of calculation.” A copy of that email is lodged
10 herewith as **Exhibit 18**.

11 78. Additionally, in an email dated July 16, 2015, Mr. McSeveney forwarded to all
12 City Council Members and email from the City’s lobbyist, Mr. Clay, stating that a request
13 through Senator Bates’ office was made of Legislative Counsel on the rounding issue. Due to
14 the pendency of the BIA Lawsuit, the Legislative Counsel would only provide an oral opinion.
15 On the rounding issue, Mr. Clay reported that:

16
17 “In short, Legislative Counsel doesn’t see any ambiguity in the law related
18 to how density is calculated. Base density is determined by the underlying
19 (sic) General Plan and its associated elements-land use and housing elements.
20 When a project proposes to use a “density bonus”, then all associated density
21 calculations are rounded up (emphasis added). If there is no “density
22 bonus”, then base density is based off the local general plan / ordinance.
23 I asked Legislative Counsel if there was ambiguity in the way the law is
24 Applied...they felt no.

25 I also asked if the original language in AB 744 related to rounding up was
26 simply clarifying existing law....Legislative Counsel felt that the language
27 that was in the bill and then removed was simply restating existing law.”
28

1 A copy of this email is lodged herewith as Exhibit 19.

2 79. In a series of letters dated between April 28, 2015 and August 18, 2015 to all
3 relevant members of the California Legislature, including Assemblyman Ed Chau, who was the
4 sponsor of a density bonus bill (AB 744) during the current session of the Legislature, the City
5 urged the Legislature to amend the Density Bonus Law to “[clarify] that all rounding
6 calculations, both on base density and density bonus are determined based upon local
7 ordinance, not on state law. The letters took the position that existing Government Code
8 §65915(f)(5) requiring all density calculations to be rounded up was “ambiguous”. A copy of
9 the letter sent to Assemblyman Chau dated June 25, 2015 is lodged herewith as Exhibit 20.

10 80. Assemblyman Chau subsequently sought clarification on the rounding issue by
11 requesting a written Opinion from the Legislative Counsel. He obtained a written opinion from
12 the California Legislative Counsel dated December 29, 2015. (the Legislative Counsel
13 Opinion). A copy of the Legislative Counsel Opinion is lodged herewith as Exhibit 21.

14 81. At Assemblyman Chau’s request, the Legislative Counsel’s Opinion addressed
15 the exact issue raised by the City’s Draft Density Bonus Ordinance and Ms. Kautz’ Agenda
16 Report of October 14, 2015:

17 “You asked whether Government Code section 65915(f)(5) requires
18 a City to round up to the next whole number all fractional density calculations,
19 including base density calculations, that are necessary for a city to arrive at the
20 total allowable density of a development project under the Density Bonus Law.”
21 (emphasis added)

22 82. The Legislative Counsel carefully analyzed the framework of Planning and
23 Zoning Law as impacted by the Density Bonus Law. It noted the basic purpose of the Density
24 Bonus Law to reward a developer who agrees to build affordable housing with the opportunity
25 to build more houses than would otherwise be allowed. The Legislative Counsel Opinion
26 acknowledged the obvious: Gov. Code §65915(f)(5) requires all density calculations to be
27 rounded up and specifically tied that in to the inquiry it was addressing. One such calculation is
28

1 the base density calculation, which has a well understood meaning, citing *PR/JSM Rivara LLC*
2 *v. Community Redevelopment Agency* (2009) 180 Cal. App. 4th 1475, 1486.

3 83. The Legislative Counsel then stated: "...the base density is necessary in order to
4 calculate the total allowable density...under the Density Bonus Law. Further, the Legislative
5 Counsel held that interpreting section 65915(f)(5) in this fashion furthers the purpose of the
6 Density Bonus Law of encouraging the development of affordable housing, as rounding up will
7 result in a higher total allowable density. Importantly, the Legislative Counsel Opinion noted
8 that "...it would be contrary to the purpose of the Density Bonus Law [to conclude otherwise]
9 because it would reduce the incentive for a developer to construct affordable housing.

10 84. The Legislative Counsel Opinion concludes with the following language:
11 "Therefore, it is our opinion that Government Code section 65915, subdivision (f)(5)
12 requires a City to round up to the next whole number all fractional density calculations,
13 including fractional base density calculations, that are necessary for a city to arrive at
14 the total allowable density of a development project under the Density Bonus Law."
15 (emphasis added) .

16 It should be noted that opinions from the Legislative Counsel are admissible on the
17 issue of interpreting a statute. *Zipton v. W.C.A.B.* (1990) 218 Cal. App. 3d 980, 988.

18 85. Further support in the legislative record for Petitioner's position is found in the
19 February 27, 2008 letter from former Assemblyman Roderick D. Wright, who sponsored the
20 amendment to Gov. Code §65915 to strengthen and enhance the incentives in the density bonus
21 law. Mr. Wright confirmed that the purpose of the language in the amendment was "...to
22 eliminate the practice of rounding down density calculations that necessarily result in the
23 development of fewer homes. This new language made it clear that all density calculations for
24 the calculation of base density and the density bonus component would be rounded up." A
25 copy of that letter is lodged herewith as Exhibit 22.

26 86. In order to confirm the legislative intent on the rounding issue, in October 2005,
27 DCM sought additional clarification on the rounding language in §65915(f)(5) [formerly
28 section (g)(1)] from the California Rural Legal Assistance Foundation (CRLAF) as it was a

1 cosponsor of Assembly Bill 1866, which inserted the subject rounding language into the
2 statute. In a letter dated October 25, 2005, Mr. Marc Brown, staff attorney for the CRLAF
3 replied stating in answer to the question of interpreting the intent of the subject rounding
4 language:

5 “This language was inserted as part of an overall effort to protect
6 applicants from local agencies imposing ordinances or development
7 standards to reduce the effectiveness of the density bonus law. Just
8 as the language in the in the same subsection requiring the use of
9 “maximum allowable residential density” does away with range and
10 mid-range zoning, a clear reading of the language precludes the use
11 of rounding down standards during the calculation of the base density
12 and subsequently the bonus density for a project. While redundant,
13 the use of the words “all” and the plural “calculations” make it clear
14 that allowing round down standards would reduce the effectiveness
15 of the density bonus law, contrary to the Legislature’s stated goal
16 to maximize the production of affordable housing in California.”

17 In concluding his letter, Mr. Brown states: “In this time of housing affordability crisis,
18 it is very unfortunate that a local government is openly attempting to subvert a state law
19 enacted to increase the use of density bonuses in California.” A copy of that letter is lodged
20 herewith as Exhibit 23.

21
22 **The City’s Density Bonus Ordinance unlawfully requires the Applicant to justify and**
23 **substantiate concessions and incentives which are mandated by the Density Bonus Law**

24 87. As alleged above, the City’s Density Bonus Ordinance (Exhibit 1) at Section
25 30. 16.020.C.4 requires an applicant for a density bonus project to submit a “density bonus
26 report”; a document not required by the Density Bonus Law. Further, the stated purpose of the
27 requirement for a “density bonus report” is to force the applicant to supply detailed information
28 about the project in relation to requested incentives and requested waivers.

1 88. With regard to any requested incentives, the applicant's density bonus report is
2 required to:

3 "...demonstrate that any requested incentive results in identifiable, financially
4 sufficient and actual cost reductions to the housing development and is required in
5 order to provide for affordable rents or affordable sales prices; and

6 "...provide evidence that nonresidential land uses will reduce the cost of the housing
7 development, that the nonresidential land uses are compatible with the housing
8 development and the existing or planned development in the area where the proposed
9 housing development will be located, and that mixed use zoning is required in order to
10 provide for affordable rents or affordable sales prices." Section 30.16.020.c.4(b)(ii)(B)
11 and Section 30.16.020.C.4(b)(ii)(C).

12 89. With regard to any requested waivers, the applicant's density bonus report is
13 required to provide:

14 "Evidence that each development standard for which a waiver is requested will have the
15 effect of physically precluding the construction of the housing development with the
16 density and incentives that the applicant is entitled to."

17 Section 30.16.020.4(b)(iii)(B).

18 90. The purpose of this required information is made clear in Section
19 30.16.020.C.8(a)(ii) and (iii) which specify that the Review Procedures the City will employ
20 include a mandatory staff report which must state whether the application conforms to the
21 following requirements of state law:

22 "ii. Any requested incentive would result in identifiable, financially sufficient, and
23 actual cost reductions based upon the documentation provided; except that, if a mixed-
24 use development is requested, the application must instead meet all of the requirements
25 of Government Code §65915(k)(2).

26 iii. The development standards for which a waiver is requested would have
27 the effect of physically precluding the construction of the housing development with
28 the density bonus and incentives(s) that the housing developments is eligible for."

1 93. The Density Bonus Law has been amended periodically to address problems
2 arising from its implementation. One such amendment in 2004 was contained in SB 1818. That
3 bill, among other things, amended Section 65915(k)(1) to add language required that the
4 concessions or incentives awarded to an applicant result in "...identifiable, financially
5 sufficient, and actual cost reductions". The City's Density Bonus Ordinance attempts to seize
6 upon that language to require the applicant to show these identifiable, financially sufficient and
7 actual cost reductions through the Density Bonus Report.

8 94. However, the legislative history of this amendment demonstrates that the City's
9 position is unfounded. The Senate Housing and Community Development Committee's bill
10 analysis, dated April 19, 2004, at comment No. 4 refers to the term "financially sufficient" and
11 stated the following intent behind that language:

12 "Financially sufficient. The bill requires that incentives or concession offered
13 by the local government result in identifiable, financially sufficient, and actual
14 cost reductions. The references to identifiable and actual cost reductions ensure
15 that the incentives have some value. The intent of adding "financially sufficient"
16 is to ensure that the value is more than nominal and actually of benefit to the
17 developer...." (emphasis added)

18 95. Further, the summary of the Assembly and Senate's Floor Analysis, dated
19 August 23, 2004 and August 25, 2004 respectively, noted that one of the arguments in
20 opposition to the bill addressed the mandated concessions language as follows:

21 "Mandated concessions. The opponents note that the bill includes a new mandate
22 requiring the city and county to grant one, two or three concessions, depending on
23 the amount of affordable housing provided or risk being sued by the developer.
24 It also removes a provision of existing law that allows a city or county to make
25 a written finding, based on substantial evidence that the concession is not necessary.
26 This will require, according to the opposition, local governments to give the developer
27 whatever the developer wants." (emphasis added)
28

1 The Analysis additionally confirms the intent of the subject language is to ensure that
2 the incentives and concessions granted by the City are of value to the developer. In Summary
3 item 11, the following is stated:

4 “Requires that incentives or concessions offered by the local government
5 Result in identifiable, financially sufficient, and actual cost reductions.”

6 The Analysis continues in the “Arguments in Support” section at item 2:

7 “Cost reductions. Current law requires local governments to provide applicants
8 for density bonuses with incentives and concessions in addition to a density
9 bonus, but the law does not quantify the value of the incentives and concessions
10 that must be offered. SB 1818 requires that the incentives and concessions “result’
11 in identifiable, financially sufficient and actual cost reductions.”

12 96. With regard to waivers, the City’s direction to staff conflicts with subsection
13 65915(e) of the Density Bonus Law, which states that “in no case may a [public agency] apply
14 any development standard that will have the effect of physically precluding the construction of
15 a development meeting the criteria of subdivision (b) at the densities or with the concessions or
16 incentives provided by this section.” If a project satisfies the density bonus criteria, but requires
17 a waiver of development standards, that waiver must be granted by the public agency.

18 97. It is instructive to examine these new requirements in the context of section
19 65589.5 (the “Housing Accountability Act”). Pursuant to 65589.5(d), local agencies may not
20 disapprove or conditionally approve an affordable housing project in a manner that renders it
21 infeasible unless it makes one of five specified written findings based upon substantial
22 evidence in the record. The specified grounds are not easily met and are intended to restrict
23 local agencies’ ability to hinder the important goal of providing affordable housing.
24 Additionally, section 65008 generally prohibits and declares as null and void various forms of
25 discrimination against housing by cities, counties and local agencies, including discrimination
26 based upon the intended occupancy of any residential development of persons or families of
27 low, moderate or middle income §65008(a)(3). Conditions of approval different than those
28 imposed on market rate housing cannot be imposed on a project simply because the future

1 occupants are low, moderate or middle income. §65008(d)(2). Except, cities and counties are
2 expressly authorized to enact and apply more favorable land use requirements for projects
3 serving low, moderate and middle income, including but not limited to, reduction or waiver of
4 fees or changes in architectural requirements, site development and property line requirements,
5 building setback requirements, or vehicle parking requirements that reduce development costs
6 of these developments. §65008(e)(2). Similar to the incentives, concessions, waivers and
7 reductions set forth in Density Bonus Law.

8 98. The City's decision to impose these justification requirements on density bonus
9 projects, conflicts with the Density Bonus Law, the Housing Accountability Act and section
10 65008 of the Government Code.

11 99. The City's new ordinance is in clear and direct conflict with California law, as
12 expressed in *Wollmer v. City of Berkeley* (2011) 193 Cal.App.4th 1329, which held that
13 development " [s]tandards may be waived that physically preclude construction of a housing
14 development meeting the requirements for a density bonus, period. The statute does not say
15 that what must be precluded is a project with no amenities, or that amenities may not be the
16 reason a waiver is needed." (*Wollmer*, 193 Cal.App.4th at 1346-1347.)

17
18 **FIRST CAUSE OF ACTION**

19 **(Petition for Writ of Mandate)**

20
21 100. DCM realleges and incorporates by reference paragraphs 1 through 99 of this
22 Petition as though fully set forth herein.

23 101. DCM is beneficially interested in the outcome of this Petition. In addition, the
24 issues presented by the Petition are matters of public rights and the object of the mandamus is
25 to procure the enforcement of a public duty. DCM, together with all citizens of the state of
26 California, has an interest in having the laws properly executed and the duty in question
27 enforced.

1 102. At all times herein mentioned, the City had and now has, a mandatory and
2 ministerial duty to maintain and enact policies and ordinances regarding its approval of new
3 residential development projects in a manner that complies with controlling law, including the
4 Density Bonus Law, the Housing Accountability Act, and the California Constitution.

5 103. As set forth above, the actions of the City in adopting the Density Bonus
6 Ordinance (Encinitas Municipal Code §30.16.020.C), and refusing to update its Housing
7 Element component of the General Plan, were arbitrary, capricious, without supporting
8 substantial evidence, contrary to, and preempted by state law, in excess of the City's
9 jurisdiction and authority, and thus contrary to controlling law. In fact, the Density Bonus
10 Ordinance has been enacted to advance the current City Council's stated desire to "strongly
11 oppose" the state Density Bonus Law.

12 104. DCM has no plain, speedy, or adequate remedy at law to compel the City to
13 refrain from implementing or enforcing the Density Bonus Ordinance, or to otherwise restrain
14 City from acting contrary to governing law.

15 105. DCM is therefore entitled to extraordinary relief, by means of writ of mandate
16 pursuant to Code of Civil Procedure §§ 1085 et seq., directing and commanding the City to
17 perform its mandatory duty as set forth herein, by rescinding the Density Bonus Ordinance
18 (Section 30.16.020.C), and commanding the City to conform its actions to the requirements
19 and limits of state law.

20 106. DCM respectfully submits that the requested Writ of Mandate should require at
21 least the following:

- 22 a) rescind the newly enacted Density Bonus Ordinance;
- 23 b) adopt an ordinance and attendant policies which require all density calculations
24 applied to a density bonus project to round any fractional units up to the next whole
25 number, including both the base density calculation and the bonus density calculation;
- 26 c) adopt an ordinance and attendant policies which do not require the applicant for a
27 density bonus project to establish the necessity or propriety of requested incentive or
28 waivers associated with the project; and

- 1 d) adopt a Housing Element for the City's General Plan which conforms to all
2 applicable state law; and
3 e) such other and further relief as the Court may deem proper.
4

5 **SECOND CAUSE OF ACTION**

6 **(Declaratory and Injunctive Relief)**
7

8 107. DCM realleges and incorporates by reference paragraphs 1 through 99 of this
9 Petition as though fully set forth herein.

10 108. An actual controversy has arisen, and now exists, between DCM and the City,
11 concerning the respective rights, duties, and obligations of the parties with respect to the
12 above- described actions of the City adopting the Density Bonus Ordinance and failure to
13 adopt a Housing Element for the City's General Plan.

14 109. DCM contends that the Density Bonus Ordinance (Section 30.16.020.C) is
15 invalid, illegal, and not enforceable on its face, and that any City actions purporting to enforce
16 it are contrary to and preempted by state law.

17 110. DCM is informed and believes, and hereon alleges, that the City disputes the
18 foregoing contentions, and to the contrary, the City contends that the Density Bonus Ordinance
19 is lawful, valid and may be properly enforced as adopted and interpreted, including the
20 rounding down of the base density calculation and requiring the applicant to substantiate and
21 justify any requested concessions or waivers in relation to a proposed density bonus project.

22 111. DCM is informed and believes, and thereon alleges, that unless restrained and
23 prohibited by an order of the Court, the City will apply the Density Bonus Ordinance and the
24 City's proposed procedures to project applicants as they apply for residential development
25 approvals and building permits within and from the City.

26 112. DCM has no plain, speedy, or adequate remedy at law, as the City provides no
27 opportunity for further objection or administrative appeal of these demands, and DCM and all
28 persons interested in the proper application of the state Density Bonus Law will suffer grave

1 and irreparable harm as a result of City's conduct, unless the City is enjoined and restrained
2 from imposing the Density Bonus Ordinance.

3 113. DCM respectfully requests a judicial determination of the respective rights and
4 duties of the parties, as provided by Code of Civil Procedure § 1060, and a declaration and
5 judgment that the above-described Density Bonus Ordinance and the City's announced policies
6 for its implementation are unlawful, unenforceable and invalid.

7 114. DCM is entitled to preliminary and permanent injunctive relief against the City,
8 as set forth herein.

9
10 **THIRD CAUSE OF ACTION**

11 **(Violation of Zoning and Planning Laws, Gov. Code § 65000 et seq.)**

12
13 115. DCM realleges and incorporates by reference paragraphs 1 through 99 of this
14 Petition as though fully set forth herein.

15 116. The City's actions with regard to the Density Bonus Law evidence a clear intent
16 to frustrate the purposes set forth in sections 65580 et seq., and particularly the Housing
17 Accountability Act, found at section 65589.5, in which the California Legislature found and
18 declared that "the lack of housing... is a critical problem that threatens the economic,
19 environmental, and social quality of life in California." As noted in subsection 65589.5(a)(4),
20 California's statewide housing shortage is exacerbated by the tendency of some local
21 governments to adopt a "not in my backyard" or "NIMBY" attitude toward the development of
22 new housing. In particular, this attitude is prevalent with respect to low and very-low income
23 housing.

24 117. To combat the statewide shortage of housing, the California Legislature enacted
25 sections 65580 through 65589.8, which require the adoption of and updates to local housing
26 elements as part of local agencies' general plans.

27 118. As set forth in section 65588, local governments within the regional jurisdiction
28 of the San Diego Association of Governments ("SANDAG") were required to revise their

1 housing elements for the fourth revision cycle by June 30, 2005. A fifth revision was required
2 by April 30, 2013, with a grace period until the end of August 2013. The purpose of these
3 revisions is to allow local governments to work together within a region to ensure that the area
4 is on track to meet the overall Regional Housing Needs Assessment ("RHNA"), and that each
5 local government is contributing its fair share of affordable housing.

6 119. As acknowledged in a January 15, 2014, agenda report, the City has not updated
7 its housing element since 1992. In that same report, Planning Director Murphy advised the City
8 Council that the housing element could not be placed on the November 2014 ballot, and that
9 the November 2016 general election is "more realistic." 120. Even earlier, in a July 17,

10 2013, agenda report, Murphy advised the City Council that the City was on pace to fall
11 woefully short of its RHNA allocation for low and very-low income housing sites. Indeed, the
12 data at that time showed an RHNA allocation of sites to accommodate 1,283 low and very-low
13 income housing units for Encinitas for the period from 2010 through 2020. As of July 17,
14 2013, the City's general plan was on track to provide 345 units. New construction from 2010
15 through 2013 provided just 55 additional units, and Murphy was hopeful that the City would
16 receive credit for 30 more units that are treated as "secondary units." In total, the City was
17 projected to provide just 33.5% of its low and very-low income allocation, a shortfall of 853
18 units.

19

20 2010-2020 Requirement	21 Available Units (Current GP)	22 New Construction (2010-2013)	Possible Additional Credit	Projected Shortfall
1,283	345	55	30	853

23

24 120. Moreover, the City's ability to satisfy the moderate income level housing
25 allocation is in jeopardy according to the July 2013 agenda report. Indeed, the City's passage of
26 Proposition A in June 2013, limiting densities and imposing height limits on development, was
27 "likely to impact our ability to take credit for the low/very low (345) and a portion of the
28 moderate (497) units that are available under our current General Plan," according to Murphy.

1 conflict with the express language of the Density Bonus Law and thereby conflict with the
2 requirements of Article XI, Section 7 of the California Constitution.

3 127. For these and such other reasons as may be shown by the evidence developed in
4 discovery and produced at trial, DCM contends that the City's actions are unlawful,
5 unenforceable, and invalid.

6 WHEREFORE, DCM prays for relief against Respondents/Defendants and each of them as
7 follows:

8 1. For a writ of mandate compelling the City and Does 1 through 20 to perform its
9 mandatory duty by rescinding the Density Bonus Ordinance (Section 30.16.020.C), and
10 commanding the City to conform its actions to the requirements and limits of state law;

11 2. For a temporary restraining order, preliminary injunction, and/or permanent
12 injunction prohibiting the City from implementing the Density Bonus Ordinance in violation of
13 state law;

14 3. For a judicial declaration that the above-described Density Bonus Ordinance
15 and the City's intended method of calculating the base density calculation; as well as the
16 provisions in the Density Bonus Ordinance purporting to require applicants to justify and
17 substantiate proposed incentives and waivers, are unlawful, unenforceable and invalid;

18 4. For recovery of attorneys' fees and costs of suit incurred herein, pursuant to
19 Government Code section 65915, Code of Civil Procedure section 1021.5, and any other
20 applicable law; and

21 5. For such other and further relief as the Court may deem just and proper under
22 the circumstances

23
24 Dated: January 25, 2016

LAW OFFICES OF GREGORY S. DAY

25
26 By: 

27 Gregory S. Day, Attorney for Petitioner and
28 Plaintiff DCM Properties, Inc.

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VERIFICATION

I have read the foregoing VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT and know its contents.

I am an officer of DCM PROPERTIES, INC., a party to this action and am authorized to make this verification for and on its behalf, and I make this verification for that reason.

I am informed and believe the matters alleged in said pleading are true and on that ground, allege the matters state therein are true.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct

Executed on January 25, 2016, at EVANHANS, California



David C. Meyer, President of
DCM Properties, Inc.