LOUNSBERY FERGUSON ALTONA & PEAK LLP

ESCONDIDO AND SAN DIEGO

402 W. Broadway, Suite 400
San Diego, CA 92101
Telephone (619) 236-1201
Facsimile (619) 236-0944
www.LFAP.com

SPECIAL COUNSEL
JOHN W. WITT

Felix Tinkov
Partner

Direct: (619) 887-6471
Email: FMT@LFAP.com

VIA FIRST CLASS MAIL & E-MAIL

April 28, 2014

Mayor Teresa Barth
City of Encinitas
505 S. Vulcan Avenue
Encinitas, CA 92024

Subject: Misapplication of the California Density Bonus Law re: Hymettus Estates Project

Honorable Mayor Barth:

This firm represents the interests of Fulvia, Hymettus, and other neighboring stakeholders in the City of Encinitas in relation to a proposed development known as Hymettus Estates (the "Project"). The Project, as most recently put forward by CityMark Development, seeks to develop nine homes on 2.25 acres in an R-3 zone, though previously the proposal was for 10 homes. This property would normally be limited five, but CityMark has invoked the California Density Bonus Law (Government Code §65915 *et seq.*) to secure additional density into the constrained space by designating one unit for low income housing. This correspondence shall serve to document the shortcomings in the Project as well as the misapplication of the Density Bonus Law ("DBL") by the proponent and the City staff.

CALCULATING THE PROJECT'S BASE DENSITY

Encinitas Municipal Code ("EMC") section 30.16.010(B) lays out the City's methodology for determining the permissible density on a residential parcel. Three factors are involved – (1) a calculation of a project's net acreage for development; (2) a determination of whether the mid-range density (2.5 units/net acre) or maximum density (3 units/net acre) will be utilized for the project and the multiplication of this density against the net acreage; and (3) a rounding down of any fractional density calculation.

Net acreage is defined at EMC section 30.16.010(B)(2) as the property's gross acreage less deductions for slopes, "flood plains, beaches, permanent bodies of water, significant wetlands, major power transmission, easements, railroad track beds, existing and future rights-of-way and easements for public or private streets/roads," and "…environmental constraints." The Project consists of 2.25 gross acres and has approximately 0.05 acres of proposed land to be dedicated to the City, 0.01 acres of land with slopes ranging between 25% and 40% (per EMC §30.16.010(B)(2)(a)(2) this sloped land must be adjusted by a 50% reduction for net acreage calculations), and 0.04 acres of private streets. Thus CityMark and the City staff have determined the Project has 2.155 net acres. This is inaccurate.

Both CityMark and the City staff have failed to account for a further reduction in net acreage arising from an approximately 0.3 acre water detention basin required to alleviate environmental concerns relating to stormwater runoff. The subject property's sloping character and the additional of impervious surfaces (i.e. roofs, driveways and hardscapes) limit the land available for development and demand a detention basin to avoid augmenting stormwater flows onto the neighboring streets and adjacent residential parcels. As such, the detention basin required of CityMark is an environmental constraint requiring a further downward adjustment of net acreage pursuant to EMC sections 30.16.010(B)(2) and 30.08.010(G) – the latter of which defines environmental constraints as those limitations to development determined by a site-specific environmental analysis, as was the case for the Project's detention basin requirement. CityMark acknowledged this loss of net developable acreage when it was forced to reduce its original development proposal by one residential unit, from 10 homes, to accommodate the basin.

Moreover, EMC section 24.28.010(A) requires the developer to offer to the City additional acreage for right-of-way to accommodate the basin. This additional reduction in the net acreage is unknown as the City staff and CityMark have failed to define the boundaries. Notwithstanding this, the Project's total net acreage is 1.855 acres, not 2.25 acres as calculated by the City and the developer.

The next step requires a determination of whether mid-range or maximum density must be afforded to the Project. Under standard development circumstances, EMC section 30.16.010(B)(2)(b) would apply to this Project entitling the developer to a mid-range density of 2.5 units/net acre. Because CityMark proposes a density bonus development, EMC section 30.16.020(C)(4) and Government Code section 65915(f) provide that the City must grant the maximum permissible density at the time the Project's application was submitted. Thus, the Project is entitled to a density of 3 units/net acre. Multiplying 1.855 net acres by 3 units/net acre provides a total of 5.565 units.[1]

[1] Under CityMark's calculations, the Project should be given an unconformed base density of 6.47 units (i.e. 2.155 net acres multiplied by 3 units/net acre), rather than the 5.565 units required under the zoning ordinance.

The final step in determining the Project's base density requires application of EMC section 30.16.010(B)(1), which states that "Any fraction of a dwelling unit shall be reduced to the next lower whole unit not less than one." The staff and the developer have illegitimately concluded that this provision of the City's Zoning Ordinance does not apply and that instead reliance should be made upon Government Code section 65915(f)(5) which states, in pertinent part, "All density calculations resulting in fractional units shall be rounded up to the next whole number." Because State law pre-empts the Zoning Ordinance where the State's intent was to occupy the field this interpretation could almost be forgiven. Almost.

In truth, the Zoning Ordinance's requirement to round down is applicable. Government Code section 65915(f)(5) refers solely to the density calculations made for bonus units under the DBL. This is readily apparent from the placement of this directly after the DBL's tables calculating the density bonus to be afforded to a development with very low, low or moderate income units. A similar provision parrots this rounding up requirement at Government Code section 65915(g)(2) and comes after a table which shows the density bonus to be given for dedicating land for very low income housing (as opposed to developing the units). If the City's and developer's interpretation of the law were correct, the DBL would only need to provide one global requirement to round up. Both the placement and the repetition of the requirement, make it clear that the State's intent was to apply this measure solely to the density bonus calculation.

What is more, Government Code 65915(f), a stand-alone provision, states "For the purposes of this chapter, "density bonus" means a density increase over the otherwise *maximum allowable residential density* as of the date of application by the applicant to the city, county, or city and county." [*Emphasis added.*] This is further clarified by Government Code 65915(o)(2) which defines "maximum allowable residential density" as "the density allowed under the zoning ordinance and land use element of the general plan… applicable to the project." Thus, the DBL provides that the City must first calculate the Project's base density under its Zoning Ordinance and general plan before calculating the density bonus. This, in turn, means the State has not occupied the field of base density calculation and leaves the methodology to the City – this, of course, is sensible as the State could not dictate how each jurisdiction should apply their own myriad zoning ordinance provisions necessary to determine base density. Nor does the DBL make an effort or show any intent to do so. Rather, the DBL clearly provides that the City must first determine a base density *under its own* zoning ordinance and general plan without looking to the State for guidance until a density bonus calculation is to be made. Therefore, the City's zoning ordinance with its rounding down requirement is applicable and the Project should be afforded a base density of not more than five residential units.[2]

[2] CityMark and the City staff calculate the base density to be seven residential units based upon an illegitimate rounding up of the erroneous 6.47 base unit computation.

RECTIFYING THE PROJECT'S SUBSTANTIVE INEQUALITY BETWEEN AFFORDABLE AND MARKET RATE UNITS

CityMark proposes to designate one unit in the Project as affordable housing under the low income category. This designated unit comprises 20% of the Project's base density (i.e. one out of five total homes). Under Government Code section 65915(f)(1) the City must grant a market rate density bonus of 35% amounting to an additional 1.75 units. This fraction must be rounded up to two additional units per Government Code section 65915(f)(5) as discussed above. Thus, the Project should be permitted a maximum of seven residential units, not the nine homes currently sought by CityMark and recommended by the City staff.

Notwithstanding this, the Project should not be afforded a density bonus until it complies with the basic principles and intent of the EMC and the City's General Plan. A close review of the Project finds that the developer has taken great pains to maximize the market rate density unit bonus at the expense of the designated affordable unit. Namely, CityMark seeks to reduce its expense on the affordable unit by making the lot and home less than half the size of its market rate counterparts in the development. The affordable lot is to be approximately 5,500 sq.ft. with an 1,800 sq. ft. single story home, while the market rate lots will be as large as 13,750 sq.ft. with a two story 4,150 sq.ft. home. Thus, the affordable portion of the development will be substandard and out of character with the neighboring community as well as the rest of the Project. Such disparate development will lend itself to unequal treatment of the affordable unit's residents and is likely to lead to wide variations in the maintenance and appearance of the designated home in contradiction to the City's policies.

Devising a development under the DBL initially mirrors the process required of any other development. As described in the preceding section, the base density is calculated just as a standard market rate project requiring the application of local zoning law and the general plan – the DBL only comes into play when the minimum number of lots are set aside for affordable housing pursuant to Government Code section 65915 *et seq*. Thus, where this Project should be afforded a base unit density of five homes spread over 1.855 net developable acres (just over 80,800 sq.ft.) each lot should average approximately 16,160 sq.ft, sufficient to meet the R-3 zone's minimum requirement of 14,500 sq.ft.

The City may permit substandard lot sizes through a practice known as lot area averaging pursuant to EMC section 30.16.020(A). But this provision can only be activated "to allow flexibility in lot design so as to minimize grading and preserve steep natural slopes and other environmental resources." There is no such need for flexibility in the Project, as the reduction of the affordable designated lot is solely tied to CityMark's economic interests, not the topography of the property. Substandard lot sizes are also permitted under the DBL to accommodate the bonus density units, but as a matter of policy the City should not allow a developer to do so primarily at the expense of the affordable units, their residents, and the adjoining community. CityMark has

done this very thing – rather than reduce each of the base density lots equivalently (or nearly so), the lot designated for low income housing has been slashed to approximately half the size of the Project's other lots, and the affordable home proposed to be built will be about one half the square footage of the market rate units. This runs counter to the City's General Plan Housing Element Policy 1.4 dictating that affordable housing be of high quality in design and construction.

Other municipalities make this requirement more explicit. For instance, the City of San Diego at Municipal Code section §143.0720(d)(5) provides that in a density bonus project "[t]he affordable units shall be designated units, be comparable in bedroom mix and amenities to the market-rate units in the development, and be dispersed throughout the development." The County of San Diego, in its zoning ordinance at section 6375(d), is more explicit in requiring the same bedroom mix, architectural features and materials, exterior appearance, and construction phasing for market and affordable units. Because the DBL is silent on this issue the City has the authority to manage this aspect of local planning. Moreover, the City has an obligation to limit end-runs around the development process which will encourage other projects to devise means which further stratify affordable housing and single out such units for unequal treatment under the law.

Given the intent provided by the City's General Plan, and this Council's interest in ensuring the harmonious development of new projects with existing communities, the City staff should demand the Project be revised so that the designated affordable lot and the home to be built on it are comparable in size, amenities and quality to that of the market rate units. For instance, if the seven lots permitted to this Project under the DBL were equally distributed across the subject property each would be over 11,500 sq.ft., a much closer fit in dimension and character to the neighboring community. Concomitantly, the City staff must remain vigilant to ensure that the Project's affordable unit is a for sale product, like its market rate neighbors in this development, and that the developer only be permitted to sell the affordable unit in an arms-length transaction to avoid self-dealing to a related party. Anything less would game the system solely for the benefit of the developer.

DEVELOPMENT STANDARDS, CONCESSIONS, INCENTIVES AND WAIVERS

A project developed pursuant to the DBL is required to meet the development standards of the local permitting agency. Nevertheless, the DBL provides that incentives or concessions (the terms are used interchangeably) which allow deviations from development standards are to be granted on a sliding scale based upon the amount and type of affordable housing proposed. The Project's single low income unit affords CityMark a maximum of two incentives pursuant to Government Code section 65915(c)(2)(B).

The DBL provides an informative description of how such deviations may be used at Government Code section 65915(k)(1):

> For the purposes of this chapter, concession or incentive means any of the following:
> A reduction in site development standards or a modification of zoning code requirements or architectural design requirements that exceed the minimum building standards approved by the California Building Standards Commission as provided in Part 2.5 (commencing with Section 18901) of Division 13 of the Health and Safety Code, including, but not limited to, a reduction in setback and square footage requirements and in the ratio of vehicular parking spaces that would otherwise be required that results in identifiable, financially sufficient, and actual cost reductions.

It is worth noting that the DBL calls out individual incentives as singular reductions in discrete development standards. For instance, an incentive may be used to reduce setbacks. Or square footage requirements. Or parking requirements. We highlight this point because the Project seeks to use its two incentives to deviate from the entirety of EMC section 30.16.010. This includes reductions in "minimum lot size, lot dimensions, lot coverage, setbacks, and maximum floor area ratios" according to CityMark's own notice, dated November 15, 2013, sent to neighboring property owners under Citizen Participation Program (EMC section 23.06). While the City staff have explicitly asked for more detail regarding the incentives sought, they have failed to point out two vital facts: first, that each incentive may only reduce one requirement under EMC section 30.16.010, and second, that the approval of such an incentive requires justification in the form of "identifiable, financially sufficient, and actual cost reductions" necessary to provide for affordable housing. (*See* Government Code §§65915(d)(1)(A) and 65915(k)(1),(3).)

The DBL also provides a developer with the right to seek an unlimited number of waivers from the local agency's zoning code, none of which are counted against the incentives granted. But it should be clear that these waivers are different from the incentives and the City staff should not treat them as one and the same. A waiver, pursuant to Government Code section 65915(e)(1), is a "…reduction of development standards that will have the *effect of physically precluding the construction* of a development… at the densities or with the concessions or incentives permitted…." [*Emphasis added*.] Thus, a waiver differs from an incentive in that it must preclude the onsite construction of a density bonus project due to physical constraints, whereas an incentive provides a reduction in any single development standard. As an example, an incentive may be used to augment the maximum floor area ratio, such that a larger home may be built than would otherwise be permitted, whereas a waiver could not be used in such a manner as the construction of a larger home in no way precludes the physical construction of a project.

To date, the Project has provided no information regarding either the financial need for the use of its incentives, nor has any evidence been provided to the City which shows physical

preclusion from construction demanding a waiver of development standards. Nevertheless, the City staff have not rejected CityMark's requests on either point.

CONCLUSION

The Hymettus Estates development is reflective of the City's poor handling of the basic requirements of the California Density Bonus Law. While a complete audit and overhaul of the City's density bonus regulations are in order, the Council should direct staff to more closely observe the requirements and limitations of the DBL as they relate to local planning authority. The Project provides a good case in which to hone the City staff's understanding of the Council's and the greater Encinitas community's expectations.

To that end, we hope the City will re-analyze the Project to bring it into conformance with the law. Specifically, the Project cannot be permitted to have more than seven homes, of which the market rate and affordable units should be roughly equivalent in size and amenities, and CityMark should be directed to limit the concessions and waivers sought to the limits prescribed by the DBL.

Should you or any of the Council have any further questions on this correspondence or the Project in general please contact us at your convenience.

Sincerely,

Felix Tinkov, Partner
LOUNSBERY FERGUSON ALTONA & PEAK, LLP

cc: Mark Muir, Encinitas Deputy Mayor
Kristin Gaspar, Encinitas Councilmember
Tony Kranz, Encinitas Councilmember
Lisa Shaffer, Encinitas Councilmember