LARA WEISIGER

From: Janet Kern <jkern@AlamedaCityAttorney.org>
Sent: Monday, March 09, 2015 12:16 PM
To: Trish Spencer; Frank Matarrese; Marilyn Ezzy Ashcraft; Tony Daysog; Jim Oddie
Cc: LARA WEISIGER; John Russo; Liz Warmerdam; Alex Nguyen; DEBBIE POTTER; ANDREW THOMAS; Jennifer Ott
Subject: Legislative History of Alameda Density Bonus Ordinance and How it is Reconciled with Measure A
Attachments: Measure A and Density Bonus.pdf

Mayor and Council members,

For you information, attached is a legislative history summary prepared by the City Attorney's Office to assist with the discussion of Item 3-A on the City Council agenda for tomorrow night, March 10. This summary will be attached to the public agenda and posted on the City's website. The information is general and explanatory. It is not legal advice on a particular matter which thus allows for its public distribution.

Janet C. Kern
City Attorney
City of Alameda
2263 Santa Clara Avenue, Room #280
Alameda, CA 94501
(510) 747-4752
jkern@alamedacityattorney.org

City of Alameda – City Attorney's Office

Interdepartmental Memorandum

Date: March 9, 2015

To: Honorable Mayor and Members of the City Council

From: Janet Kern, City Attorney
Farimah Brown, Sr. Assistant City Attorney

Re: Legislative History of Alameda Density Bonus Ordinance and How it is Reconciled with Measure A.

In connection with the March 10 City Council workshop on housing and density bonus issues the City Attorney's Office has prepared the following information to assist in the public discussions.

Charter v. General Law City Status

In California, there are two types of cities: General law cities and Charter cities.

General law cities draw their authority from the State Constitution and the State Legislature. School Districts, counties and other special districts generally are governed by state law.

Charter cities are authorized by the California Constitution to enable residents to have greater control over their "municipal affairs." Article XI, section 5(a) of the California Constitution states:

> It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and with respect to municipal affairs shall supersede all laws inconsistent therewith.

The City charter provisions of the California Constitution, commonly referred to as the "home-rule" doctrine, are based on the principle that a city, rather than the state, is in the best position to know its needs and control its municipal affairs. Municipal affairs are typically things such as regulation of the city's police force, local governance, local elections, dealings with municipal officers and employees and similar matters within the purview of an incorporated city. The City of Alameda adopted its present charter in 1937. There are approximately 120 charter cities in California including the state's largest cities, such as Los Angeles, San Diego, San Jose, and San Francisco, and many Bay Area cities, such as Oakland, Albany, Berkeley, Mountain View, Palo Alto, Piedmont, Redwood City, San Leandro, San Mateo, San Rafael, and Santa Clara.

Although charter cities exercise local control over municipal affairs, when it comes to matters which are of "statewide concern," charter cities remain subject to and controlled by applicable state law regardless of their charters. The State Legislature often includes in passage of new laws that a particular subject matter is found to be of statewide concern, as it has with housing matters, so the law will have application to general law and charter cities. Additionally, California courts have consistently found the need to provide adequate housing to be a matter of statewide concern, rather than a municipal affair. See *Marina Point, Ltd. v. Wolfson*, 30 Cal.3d 721, 743 (1982); *Bruce v. City of Alameda*, 166 Cal. App. 3d 18, 21–22 (1985). The court noted in *Bruce v. City of Alameda* that: "These high pronouncements [of statewide need for adequate housing] do no more than iterate what is the common knowledge of all."

Measure A

Article 26 of the Alameda City Charter adopted by the voters of the City in 1973 and referred to as "Measure A", states that: "There shall be no multiple dwelling units built in the City of Alameda." Charter Section 26-2 goes on to provide for some limited exceptions to this rule for replacement of existing low cost housing or for new senior low cost housing by the Alameda Housing Authority. Section 26-3 of the Charter also provides that the maximum density for any residential development within the City of Alameda shall be one housing unit per 2,000 square feet of land.

Pursuant to Article 26, Alameda Municipal Code section 30-50.1 further provides: "The proliferation throughout the City of residential dwellings in attached groups of more than two (2) units has created and, if continued, will further create, land use densities and other undesirable effects to a degree which affects adversely the environment and the quality of living conditions necessary to and desirable by the people. For this and other reasons the Charter amendment should be interpreted in accordance with the intent of the framers thereof, which intent is hereby found to be a prohibition against the construction of dwelling units of more than two (2) attached in the same structure as herein below set forth." Thus, the City has clearly declared that Measure A prohibits multifamily housing in the City of Alameda.

Density Bonus Law Is Required to Be Implemented by Charter Cities Like Alameda

Adopted in 1979, the State's density bonus laws require a city to provide a density bonus and other regulatory concessions, incentives and waivers to developers who propose to build affordable housing that meets the statutory criteria. The intent of these laws is to address the significant shortage of affordable housing in California. In their most basic terms, density bonus laws provide that when a developer proposes to build a residential development that reserves a specific percentage of units for affordable housing, the developer is to receive a density bonus and incentives, concessions, and waivers from development standards.

Every city in California, including every charter city, is required to implement the State's density bonus laws. It is well established that local implementing ordinances cannot conflict with state law, and to the extent that they do, the local laws are preempted. This was reiterated recently in a case called *Latinos Unidos Del Valle De Napa Y Solano et al., v. County of Napa*, 217 Cal.App.4th 1160, 1169 (2013).

In Alameda, after many years of promising the State that the City would adopt a local density bonus ordinance, it finally did so in 2009. With respect to Measure A, the ordinance and the accompanying staff report specifically stated that there may be instances when provisions of Measure A, and more specifically its prohibition on multifamily housing, may need to be waived in the form of a waiver from development standards. Section 30-17.12 of the density bonus ordinance specifically states:

> 30-17.12 - Waivers of Development Standards that Physically Preclude Construction.
>
> a. An Applicant may submit a proposal for the waiver of development standards that would have the effect of physically precluding the construction of a Development meeting the criteria of subsection 30-17.7, at the densities or with the concessions or incentives permitted. The City shall grant the waiver requested by the Applicant unless the City makes any of the following written findings, based upon substantial evidence:
>
> 1. The development standard does not physically preclude the construction of the development at the densities or with the concessions or incentives permitted.
>
> 2. The requested development standard waiver would have a specific, adverse impact, as defined in paragraph (2) of subdivision (d) of section 65589.5, upon health, safety, or physical environment, and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact.

3. The requested development standard waiver would have an adverse impact on any real property that is listed in the California Register of Historical Resources or designated a City of Alameda Historical Monument or included in the City of Alameda's Historical Building Study List and for which there is no feasible method to satisfactorily mitigate or avoid the specific adverse impact without rendering the development unaffordable to Low- and Moderate-Income households.

4. The requested development standard waiver would be contrary to state or federal law.

b. Allowance for three (3) or more dwelling units in a building, shall be considered a waiver of the development standards found at article XXVI of the Alameda City Charter and Alameda Municipal Code sections 30-50 through 30-53.4, if shown to be necessary to make construction of the project physically feasible.

c. A proposal for the waiver or reduction of development standards pursuant to this subsection shall neither reduce nor increase the number of incentives or concessions to which the Applicant is entitled.

From time to time, the City Attorney's Office is asked how it is possible to waive a Charter provision and why it is that the City put a provision in its density bonus ordinance allowing for a waiver of the ban on multifamily housing.

The answer has consistently been that to the extent Measure A, and more specifically its prohibition on multifamily housing, conflicts with state density bonus laws, the application of Measure A will likely be preempted. Knowing this, in 2009, in a very transparent fashion, the City Council decided to include a provision that allowed developers to ask for a waiver of Measure A's multifamily prohibitions in certain circumstances. The thinking was that even if the City does not include this specific provision, a developer is not prevented from requesting it under state law, and unless the findings mentioned above can be made, the City would have to grant the waiver. However, to be transparent with the community and the various stakeholders, in 2009, the City Council decided to address the issue head on and state very clearly in the staff report and the accompanying ordinance that Measure A may need to be waived as a result of a density bonus application.

As indicated earlier, since the late 1970's the State's density bonus laws have required cities to provide a density bonus or other regulatory concessions to developers who propose to build affordable housing projects that meet certain statutory criteria. Government Code Section 65915(o) specifically states that for the purposes of density bonus laws waiver of development standards may include site or construction conditions, including but not limited to a height limitation, a setback requirement, a floor area ratio, an onsite open-space requirement, or a parking ratio that applies to a

residential development pursuant to any ordinance, general plan element, specific plan, **charter**, or other local condition, law, policy, resolution, or regulation. Hence, state law clearly envisions waiving a "charter" provision, such as Measure A's ban on multifamily housing.

In addition, state density bonus laws (specifically, Government Code section 65915 (e)(1)) clarify that in no case may a city apply any development standard that will have the effect of physically precluding the construction of a development meeting the criteria of the State's density bonus laws at the densities or with the concessions or incentives permitted by those laws. The law goes on to say that an applicant may submit to a city a proposal for the waiver or reduction of development standards that will have the effect of physically precluding the construction of a development meeting the required criteria at the densities or with the concessions or incentives permitted under the law. If a court finds that the city refused to grant such a waiver or reduction of development standards, it will be in violation of the law, resulting in the court ordering the city to comply and awarding the plaintiff reasonable attorney's fees and costs of suit. Generally, in the American legal system, each party bears its own cost for attorney's fees. The fact that state law allows for recovery of attorney's fees is an indication of how powerful the Legislature intended this law to be.

It is worth noting that the City of Alameda has some experience with preemption issues when it comes to a voter initiated measure having to do with housing and more specifically affordable housing. In 1982, the voters of Alameda passed a measure (Measure I) to require voter approval of any development of government-subsidized rental housing units for a period of five years. The City was subsequently challenged on Measure I, and the Court of Appeals concluded that Measure I was preempted by Government Code Section 65008, which prohibits a city from discriminating against low and moderate-income housing development notwithstanding that Alameda is a charter city.

Although *Bruce v. City of Alameda* was concerned with Measure I, and not Measure A, the case demonstrates the broader issue of how a charter provision may be found to be preempted by state law given that the state has found there to be a scarcity of adequate low income housing throughout California and has declared housing to be a matter of statewide concern, rather than a municipal affair. Density bonus laws relate to housing, and specifically affordable housing, and will have a preemptive effect if the City's local laws are found to be in conflict with them.

Conclusion

Starting in 2009, the City has implemented the state's density bonus laws in its density bonus ordinance and established a method to harmonize it with Measure A by providing a safety valve that allows a developer to seek a waiver from the development restriction.