

## **Incentive Strategies: Density Bonuses, Fee Waivers & Expedited Approvals**

### I. Nature of the Tool

Density bonuses, fee waivers and expedited approval processes are incentives used in growth management to promote infill on vacant or underutilized urban land and inclusion of affordable housing. Inclusionary zoning is intended to ensure that sufficient low and moderate income housing exists in the community.<sup>1</sup> Incentive strategies relax zoning restrictions (such as density limits, fees, or procedures) that offer an incentive to a developer to provide certain public benefits.

Density bonuses create incentives for developers to provide public amenities in exchange for greater density level than allowed under existing zoning. They developer may build public amenities or, in some instances, low-income housing. Density bonuses may also be provided for extending public access; for instance, Jupiter County Florida provides density bonuses in certain zones for developers who provide vistas or public access to the Intracoastal Waterway.<sup>2</sup> Other waterfront communities may provide incentives for environmental protection which can also benefit the public's access, physical or visual, to the waterfront. An example of a dual purpose incentive is Minnesota's. Minnesota authorizes density bonuses for developers who at least double the setbacks of buildings from the water's edge<sup>3</sup>, thereby protecting the environment and provided greater access and views to the public.

The substantial time and money that developers dedicate to development activities make developers seek ways to avoid delays in the approval of their development plans. This risk-averse stance taken by developers can be leveraged by local governments that offer greater certainty and expedited approvals to developers. In exchange, these developers design building projects that go beyond regulatory requirements in creating public benefits. Securing expeditious decisions can be a good trade-off for steering developers to build in the areas the community would prefer to see built up. In this instance, areas away from the coast or designated waterfront areas would be the preferred building zones. Expedited approvals and fee waivers have been somewhat successful in wetlands protection programs where the public

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<sup>1</sup> It is not uncommon for state courts to invalidate ordinances that exclude lower income housing, often by virtue of lot size. See *In re Appeal of Kit Mar Builders*, 439 Pa. 466 (1970). Some activist jurisdictions require that a community provide its "fair share" of lower income housing needs. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 336 A.2d 713 (NJ 1974) ("Mt. Laurel I"); *Township of Willistown v. Chesterdale Farms, Inc.*, 341 A.2d 466 (1975); *Zurrick v. Zoning Hearing Board*, 382 A.2d 105 (1977). The most significant case supporting the proposition that courts can and should affirmatively intervene when communities fail to provide adequate low and moderate income housing is *Southern Burlington County NAACP v. Town of Mount Laurel*, 456 A.2d 390 (NJ 1983) ("Mt. Laurel II"). California has a fair share requirement established by statute. See Cal Gov't Code § 65584.

<sup>2</sup> See Jupiter County Florida Code of Ordinances, Division 19, U.S. One/Intracoastal Waterway Corridor Zoning District, section 27.860-2 Bonus Program.

<sup>3</sup> See Minnesota Department of Natural Resources, Conserving Natural Resources through Density Bonuses, available at <http://files.dnr.state.mn.us/assistance/nrplanning/community>.

agencies or developers permanently protect wetlands through wetland banking in exchange for waivers or expedited review.<sup>4</sup>

## II. Relationship to Waterfronts

These techniques can be useful for varying strategies; however, in the context of waterfront property, they are most useful as incentives. Incentive strategies are generally part of an overall development plan, and, as such, are useful in the planning and maintenance of coastal and waterfront areas. Communities seeking to create or preserve public access and communities interested in preserving working and recreational waterfronts can use these tools to control development. The techniques may also be used for restoration of waterfront properties and attributes.

## III. Legal Issues

Because density bonuses are included in zoning ordinances, they are often challenged. Typically, opponents challenge the bonuses as: 1) unconstitutional “takings”<sup>5</sup> of property; 2) having no rational relationship to the exercise of police powers;<sup>6</sup> and 3) a denial of equal protection. The United States Supreme Court has established a test to determine the constitutionality of zoning ordinances.<sup>7</sup> Under the test, a zoning ordinance must not be arbitrary and unreasonable and it must have a substantial relationship to the public health, safety, morals or general welfare.<sup>8</sup> Density bonuses as an incentive zoning technique can be used to provide public amenities not otherwise provided because of the high cost of public acquisition through eminent domain. The problem arises when the underlying lower density looks arbitrary or discriminatory. However, in most instances, courts have upheld density bonuses as rationally related to the public welfare of the community.<sup>9</sup>

## IV. Pros and Cons

Density bonuses, fee waivers and expedited approval processes provide incentives for developers to build in the areas preferred by the community. Incentives that are of “of right,” meaning if a development provides “x” quantity of “y” public amenity, the development automatically qualifies for the incentive are the most common density bonuses. They have the advantage of being predictable but may produce monotonous design. To avoid this problem, communities may award density bonuses on a case-by-case basis. Optional bonuses have drawbacks as well,

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<sup>4</sup> See Massachusetts Wetlands Protection Act, 310 CMR 10.0; see Kitsap County, Washington.

<sup>5</sup> The Fifth Amendment of the Constitution provides that government may not take private property for public use without fairly compensating the owner. U.S. CONST. Amend. 5.

<sup>6</sup> The police powers of a state relate to the safety, health and welfare of the citizenry.

<sup>7</sup> *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

<sup>8</sup> *Id.* at 394.

<sup>9</sup> See *Montgomery County v. Woodward & Lothrop, Inc.*, 376 A.2d 483 (Md. 1977); see also *Blagden Alley Assoc. v. District of Columbia Zoning Comm’n*, 590 A.2d 139 (D.C. App. 1991) (implicitly upholding the District of Columbia’s incentive zoning program).

particularly administrative issues and possible takings problems. In an optional program, the density bonus must be attractive enough that developers will want to take advantage of the program. To achieve this, a city may adopt restrictive underlying densities that make development unattractive. In *Montgomery County v. Woodward & Lothrop, Inc.*, the Maryland Supreme Court found that a taking had not occurred because nothing in the record established that the developer could not make reasonable use of the land without applying for a density bonus.<sup>10</sup>

In *Home Builders Association of Northern California v. City of Napa*, the City adopted an inclusionary ordinance where developers could construct affordable housing or pay an in-lieu fee.<sup>11</sup> In return, the developer would be qualified for expedited approval, fee waivers, and density bonuses.<sup>12</sup> The court upheld the facial validity of the ordinance and dismissed the developer's challenge.<sup>13</sup>

## V. Best Policy Practices

The City of Ft. Myers, Florida, provides for density bonuses in its Code of Ordinances. Specifically, the city provides for density bonuses on the waterfront based on criteria and percentages listed in the ordinance.<sup>14</sup> The ordinance mandates that to be eligible for any density bonus, the open space criteria must be met. Of the seven criteria, the two most pertinent to the preservation of waterfront property and access are: (1) Mandatory Public Open Space – specifically, on riverfront property, buildings must include view corridors, be built with sensitivity to and compatibility with the surrounding area, and allow an unobstructed view of the river; (2) Water-dependent Uses Open to the Public – marinas, commercial fishing, yacht clubs, boat ramps, and parks must be open to the public.

Via its Greenways ordinance Walton County, Florida seeks to provide environmental protection, open space and recreation space.<sup>15</sup> One of the purposes of the ordinance is to enhance public access to recreational use of the county's natural resources, including the water.<sup>16</sup> In order to do this, the County has allowed the use of density bonuses. The site design requirements related to the greenway allow density bonuses for all private greenway systems that link up with public

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<sup>10</sup> 376 A.2d 483, 503 (Md. 1977)

<sup>11</sup> 90 Cal. App. 4th 188, 189 (1st Dist. 2001).

<sup>12</sup> *Id.* at 190.

<sup>13</sup> *Id.* at 192. The court rejected the application of intermediate scrutiny. The court also dismissed the city's restrictive use policies as a basis for the challenge. *Id.*

<sup>14</sup> City of Ft. Myers Florida, Code of Ordinances, Division 3: Land Use District Regulations, §118-721.

<sup>15</sup> Walton County, Florida, Code of Ordinances, 5.03.00. Greenways System

<sup>16</sup> *Id.*

lands.<sup>17</sup> To qualify for the density bonus, the pedestrian or bike facilities must be dedicated to the County for public use.<sup>18</sup>

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<sup>17</sup> Walton County, Florida, Code of Ordinances, 5.03.04. Site Design Requirements Related to Greenways System.

<sup>18</sup> *Id.*