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January 25, 2022

VIA TRUE FILING

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

**Re: Request for Publication: *Bankers Hill 150 v. City of San Diego*,
Case No. D077963**

Dear Justices Haller, O'Rourke, and Guerrero:

Pursuant to California Rules of Court, rule 8.1120(a), we respectfully request publication of the opinion issued by this Court in *Bankers Hill 150 v. City of San Diego*, Case No. D077963, filed on January 7, 2022 ("Opinion"). We submit this letter on behalf of the California Building Industry Association ("CBIA") and the Building Industry Association – Bay Area ("BIABA") (collectively, "Building Industry").

This letter explains the Building Industry's interest in publication and the reasons the Building Industry believes the Opinion meets the standards for publication set forth in California Rules of Court, Rule 8.1105(c). The parties to the appeal have not authored this letter in whole or in part nor have they made a monetary contribution for the preparation of this letter.

The Opinion addresses the scope of a city's discretion—in this case, San Diego's—under the Density Bonus Law (Gov. Code §§ 65915-65918; "DBL"), which was enacted in 1979 to address the shortage of affordable housing in this state.¹ In

¹ The California Legislature has extensively described the scope of California's housing crisis throughout numerous statutes designed to remedy this interminable public policy problem. In the Housing Accountability Act (Gov. Code § 65589.5), for example, the Legislature found and declared as follows:

California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California

essence, the Density Bonus Law incentivizes the construction of affordable housing by allowing a developer to add additional market-rate housing units to a project beyond the planned and zoned capacity and secure other “incentives and concessions” and “waivers of development standards” in exchange for the developer’s commitment to deed-restrict a specified percentage of affordable units in the project. When a developer meets the requirements of the Density Bonus Law, a local government is obligated to permit increased building density, grant incentives, and waive any conflicting local development standards unless certain limited exceptions apply. The Density Bonus Law applies to every city and county in California and is required to be interpreted liberally in favor of producing the maximum number of total housing units. (Gov. Code §§ 65915(r) and 65918).

The Opinion warrants publication because it (1) applies an existing rule of law—the Density Bonus Law—to a set of facts significantly different from those stated in published opinions, (2) explains, with reasons, the requirements of an existing rule of law, and (3) involves a legal issue of continuing public interest. California Rules of Court, Rule 8.1105(c)(2), (3), and (6).

**A. The Building Industry’s Interest in Publication of the Opinion
(California Rules of Court, Rule 8.1120(a)(2))**

The CBIA is a statewide non-profit trade association comprising approximately 3,000 member companies in the homebuilding, multi-family and mixed-use development including homebuilders, trade contractors, architects, engineers, designers, suppliers, and other industry professionals. CBIA and member companies directly employ over one hundred thousand people. CBIA is the premier advocate for California’s homebuilding industry.

The BIABA is a non-profit association representing developers and others involved in the residential construction industry in the San Francisco Bay Area. BIABA’s 400-plus members are home builders, trade contractors, suppliers and residential development industry professionals.

The Opinion’s holding is directly relevant to the Building Industry’s members. These members, as applicants and advocates for residential development approvals, are directly affected by the interpretation and application of the Density Bonus Law and have a strong interest in ensuring that the law is applied fairly, uniformly, and predictably statewide.

home, stifling economic opportunities for workers and businesses, worsening poverty and homelessness, and undermining the state’s environmental and climate objectives. (Gov. Code § 65589.5(a)(2)(A)).

**B. The Opinion Explains, With Reasons, an Existing Rule of Law and Involves a Legal issue of Continuing Public Interest
(California Rules of Court, Rules 8.1105(c)(3) and (6))**

The DBL is a 1979 housing production statute that shapes and limits the scope of a city's discretion in reviewing a housing development project that includes a specified percentage of affordable housing in a project. Here, in a case addressing the most fundamental provisions of the Density Bonus Law, the Opinion makes clear that a city's discretion in reviewing a housing project that includes a specified percentage of affordable housing is shaped and limited by the DBL even if the project as *designed* is inconsistent with a city's development standards and regardless of whether the standards are objective or subjective.

While the applicable San Diego zoning allowed a building on the project site to include 147 by-right dwelling units, by including 12 percent of the units as affordable to very low-income residents, the project was entitled to a 38.75 percent (or 57-unit) density bonus, which allowed the project to be built at an increased density of 204 dwelling units. This also entitled the project to incentives and concessions and waivers of development standards, which allowed the project to avoid certain objective City development standards, including standards regarding setbacks and building size. It also allowed the project to avoid certain subjective City standards regarding views, transitions, and architectural design standards.

Despite opposition alleging that the project violated those objective and subjective standards, the Court confirmed that the Density Bonus Law prevented the City from denying the project if it could not make specific findings that certain exceptions applied. (Slip op. at 17). Moreover, the Court confirmed that the developer was "entitled . . . to a waiver of *any* development standard that would have the effect of physically precluding the construction of the Project at the permitted density and with the requested incentive *unless* the City could make the specified findings to warrant an exception from the Density Bonus Law"—which the City found it could not do. (Slip op. at 19, emphasis added). In addition, the Court agreed that if the City had denied the requested incentives or failed to waive any inconsistent subjective design standards, "it would have physically precluded construction of the Project, including the affordable units, and defeated the Density Bonus Law's goal of increasing affordable housing." (Slip op. at 20).

The Opinion also briefly discusses the Housing Accountability Act (Gov. Code § 65589.5; "HAA") and its "reasonable person" standard and explains that under the HAA cities that wish to enforce limitations on housing development projects must proactively adopt clear, "objective" rules in advance rather than proceed by ad hoc decisions. (Slip op. at 25).

These issues arise frequently in jurisdictions throughout California as cities and counties fight to retain the land use control that key housing production laws are surgically designed to constrain. Despite the ongoing state housing supply crisis,

Judith L. Haller, Acting Presiding Justice
Terry B. O'Rourke, Associate Justice
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January 25, 2022
Page 4

these issues will continue to arise until there is a sufficient body of case law interpreting and applying housing production statutes such as the DBL and making clear the intended, preemptive power of those laws over ad hoc decisions to accept or reject new housing.

C. Conclusion

For the reasons stated above, on behalf of the Building Industry, we respectfully request that the Court certify the Opinion for publication. The Opinion meets several of the standards for publication set forth in California Rules of Court, Rule 8.1105(c) and would be a valuable addition to the limited case law on the applicability of the DBL in the context of a specific housing development project.

Sincerely,

MILLER STARR REGALIA

Bryan W. Wenter

Bryan W. Wenter, AICP

BWW/kli

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

PROOF OF SERVICE AND CERTIFICATION

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

Fourth Appellate District - Division 1

Case No. D077963

I am employed in the County of Contra Costa, State of California. I am over the age of 18. My business address is 1331 N. California Street, Fifth Floor, Walnut Creek, California 94596, and my email is ralph.etheart@msrlegal.com.

On January 25, 2022, I electronically filed the forgoing Request for Publication using the TrueFiling system, which automatically served all of the parties to this action.

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I certify under penalty of perjury that the foregoing is true and correct.

Executed on January 25, 2022, in Walnut Creek, California.

A handwritten signature in blue ink that reads "Ralph Etheart". The signature is written in a cursive, flowing style.

Ralph Etheart

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| Lower Court Case Number: 37-2019-00020725-CU-WM-CTL | |

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1/25/2022

Date

/s/Bryan Wenter

Signature

Wenter, Bryan (236257)

Last Name, First Name (PNum)

Miller Starr Regalia

Law Firm