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April 4, 2022

via electronic filing
(TrueFiling)

Chief Justice Tani G. Cantil-Sakauye
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Bankers Hill 150 v. City of San Diego*
California Supreme Court Case No. S273718
Fourth District Court of Appeal Case No. D077963
Request for Depublication (Cal. Rules of Court 8.1105(e)(2) & 8.1125)

Dear Chief Justice Cantil-Sukauye and Honorable Associate Justices:

The League of California Cities (Cal Cities) and the California State Association of Counties (CSAC) respectfully request depublication of Part (B) of the Fourth District Court of Appeal's opinion in *Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755 (*Bankers Hill*).

Cal Cities and CSAC make this request for two primary reasons. First, the opinion, which originally was not certified for publication, contains confusing and contradictory statements on a key issue under the Density Bonus Law (Gov. Code § 65915): under what circumstances waivers of local development standards are available. Resolution of that issue has deep and far-reaching implications for development throughout the state. Second, the parties never briefed or argued the Density Bonus Law issues decided by the Court, in either the trial court or the Court of Appeal. In spite of this, in the opinion, the Court of Appeal extensively, and inconsistently, analyzed the Density Bonus Law, without the benefit of any briefing or argument by any party, or any amici.

For these reasons, Cal Cities and CSAC respectfully request that this Court order that Part (B) of the *Bankers Hill* opinion be decertified for publication. Allowing that portion of the opinion to remain published has the potential to overturn much of settled planning law and, for housing developments, make a nullity of zoning standards affecting housing.

Interest of *Amicus Curiae* League of California Cities (Cal Cities)

Cal Cities is an association of 479 California cities dedicated to providing for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of

concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

Cal Cities has a substantial interest in the resolution of Density Bonus Law issues because the cities it represents are land use regulators, charged by State law with planning and zoning for housing, commercial, and other land uses across California, within legal bounds, to promote and maintain the health, safety, and welfare of their constituents.

Interest of *Amicus Curiae* California Association of Counties (CSAC)

CSAC is a non-profit corporation. The membership consists of the 58 counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties. Like California's cities, CSAC's members are also land use regulators, with a critically important stake in the resolution of issues involving the correct interpretation of state Density Bonus Law.

Part (B), the Density Bonus Law Portion of the *Bankers Hill* Opinion, Should Be Depublished Because It Contains Confusing and Contradictory Interpretations of the Density Bonus Law.

In *Bankers Hill*, two community associations filed an action challenging the City of San Diego (the City)'s approval of a 20-story, 204-residential unit mixed use building, to be located in the Bankers Hill neighborhood of the City. The Court of Appeal affirmed the trial court's decision upholding the City's approval of the project. The project was eligible for a density bonus and incentives and waivers of development standards, due to the inclusion of affordable units, as provided by Density Bonus Law (Gov. Code § 65915). As the Court explained, incentives "are intended to assist in lowering the cost to build a project that includes affordable housing" (74 Cal.App.5th at p. 770), while waivers modify "development standards that would have the effect of physically precluding" a development at the density, or with the incentives, permitted by Density Bonus Law. (*Ibid.*) Incentives and waivers may be denied only on very limited grounds. (Gov. Code §§ 65915(d)(1), (e)(1).)

It appears from the Court's opinion that the developer only applied for incentives and never applied for any waivers of local standards under the Density Bonus Law. (*See id.* at p. 772.) Nonetheless, the Court reached sweeping conclusions regarding the meaning of the waiver provision.

A project may be eligible for a density bonus with as little as five percent affordable housing. (Gov. Code § 65915(f)(2).) The Density Bonus Law provides that a local government may not apply any development standard to a project eligible for a density

bonus "that will have the effect of physically precluding the construction of a development…at the densities or with the incentives or concessions permitted by this section." (Gov. Code § 65915(e)(1); emphasis added.) No Court had squarely addressed the issue of whether an applicant need only show that a development standard would physically preclude construction of a project as designed by the applicant, or whether a waiver request may be denied if a project could be built at the same density, same number of affordable units and with the same amenities, while complying with the development standard at issue. The issue is critically important for cities and counties, with far-reaching ramifications for the built environment throughout the state. If all requested waivers must be granted for a project as designed, then no local development standards – for height, setbacks, open space, or design – can be applied to any development eligible for a density bonus, except health and safety standards.

The *Bankers Hill* opinion should be depublished because it contains confusing and contradictory language on this key point, yet may be interpreted to support just such a far-reaching result. In one place, in sweeping language, the Court of Appeal seems to say that, to obtain a waiver, the applicant need only show that the project as designed would be physically precluded, regardless of whether the project could be built with the same number of affordable units and same amenities, while complying with local standards:

> Thus, unless one of the statutory exceptions applies, so long as a proposed housing development project meets the criteria of the Density Bonus Law by including the necessary affordable units, a city may not apply any development standard that would physically preclude construction of **that project as designed**, even if the building includes "amenities" beyond the bare minimum of building components.

(74 Cal.App.5th at p. 775; emphasis added.)

In contradictory language, however, the *Bankers Hill* Court also states that a waiver of a local standard would have been appropriate only because there was evidence in the record that no project could be built with the same number of affordable units and same amenities, without granting a waiver of height and setback requirements:

> Indeed, while the Density Bonus Law does not require a developer to establish that the requested incentives and waivers are necessary to ensure financial feasibility, the record demonstrates that including the affordable 20 units in the Project was possible only if the building was designed as proposed. In other words, imposing the setback requirement, decreasing the height, or redistributing the units would preclude construction of the Project.

(74 Cal.App.5th at p. 774.)

Despite this contradictory language, developers are already seizing on the *Bankers Hill* opinion as standing for the proposition that any development standard requested must be waived for any housing project that qualifies for a density bonus, without any showing that applying the local standard would prevent the inclusion of the same number of affordable units and same amenities. Taken to its logical extreme, this means that local government would be precluded from applying any objective local development standard to any density bonus project and must approve the project "as designed." To give just one example, under this interpretation, a city would be forced to allow a building that exceeded a local height limit by hundreds of feet, so long as the developer demonstrated that the local standard physically precluded construction of the project "as designed."

Allowing the Density Bonus Law portion of the Opinion to remain published will only lead to endless rounds of future litigation, about whether and under what circumstances waivers of local standards are permissible under the Density Bonus Law.

The Parties Never Briefed nor Argued the Density Bonus Law Issues. The City of San Diego, the Prevailing Respondent, Requested that the Density Bonus Portion of the Opinion Remain Unpublished.

Even the City of San Diego, the prevailing Respondent in this case, requested that the Court of Appeal deny the requests to publish the Density Bonus portion of the Opinion, on the ground that the Density Bonus issues were never briefed by the parties. To assist the Court in resolving land use issues that have far-reaching implications not only for local government, but also for the public at large, these issues should be thoroughly analyzed before resolution. A review of the *Bankers Hill* appellate briefs reveals that the State Density Bonus Law, Government Code Section 65915 et seq., was not discussed in any of the briefs, and in fact was not even cited. The parties' briefs primarily addressed general plan consistency. This Court also requested subsequent letter briefs from the parties on the effect of the First District's decision in *California Renters Legal Advocacy and Education Fund v. City of San Mateo* (2021) 68 Cal. 5th 820. The *San Mateo* case is not a density bonus case, and the parties' letter briefs, like the previous briefs, did not touch on State Density Bonus Law at all.

Because the correct application of the Density Bonus Law is crucially important to local government, the development community, and the public at large, and will have far-reaching consequences on the built environment throughout the State, Cal Cities and CSAC respectfully request that publication of an opinion addressing and resolving key

Density Bonus Law questions should wait for a case in which the parties and amici have extensively briefed the issues.

Thank you for your consideration.

Sincerely,

Dolores Bastian Dalton

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

PROOF OF SERVICE

Bankers Hill 150, et al. v. City of San Diego, et al.
Supreme Court Case No. S273718
Court of Appeal Case No. D077963
San Diego Superior Case No. 37-2019-00020725-CU-WM-CTL

I, Laura L. Luz, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 1300 Clay Street, Eleventh Floor, City Center Plaza, Oakland, California 94612. My business email address is lluz@goldfarblipman.com. On April 4, 2022, I served the document described as:

LETTER REQUESTING DEPUBLICATION

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I caused the above-listed document to be served electronically by:

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☒ BY MAIL: I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

☒ By placing ☐ the original ☒ a true copy thereof enclosed in a sealed envelope addressed using the addresses on the attached Service List.

☒ [State] I certify and declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on April 4, 2022, at Kentfield, California.

Laura L. Luz

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