Farewell to Fear

By Mark A. Neubauer

Each year has its own special legacy. For 2008, that legacy is fear. Fear of losing our jobs. Our homes. Our life savings.

In 2008, we saw institution after institution shut its doors, disappear into merger or desperately seek a federal bailout. Icons of American business such as Lehman Brothers, Washington Mutual, Citibank, Merrill Lynch and AIG all fell from lofty heights this past year. Pillars of American industry, such as General Motors, Ford and Chrysler, still dance on the precipice of destruction. Even mighty Toyota suffered its first loss in over 60 years.

Law firms were not immune from the financial collapse. Venerable firms such as Heller Ehrman, Thelan and Thaccher Proffit all simply disappeared. Watching the daily layoffs from the top 100 firms in the country was like viewing the Bataan Death March — each day scores of lawyers and even more support staff were fired from more than half of the largest 100 firms. "Over capacity" was the oft-cited reason.

As the economy froze, legal work dried up as well. Transactional work ceased. Litigation became a suddenly unnecessary expense.

Firms such as Latham, Orrick and Bryan Cave took the unheralded step of freezing associate salaries because of the drying up of income. Other firms have told this year's senior law students to hold off start dates until 2010.

As we look around, there is plenty of fuel for the fear of 2008. Unemployment is up to 6.8 percent nationally and 8.4 percent here in California. Our economy has shrunk rather than expanded, as we have enjoyed for decades. Home prices fell 13.5 percent in November alone, and November electronics sales, according to Mastercard, are 25.26 percent below the prior year. Car lots are still full of old 2008 models, with the showrooms eerily empty of customers. Construction has plummeted to a standstill. State and local governments are running out of cash.

Even the temporary solutions such as the Treasury Department's Troubled Asset Relief Program seem unable to stem the economic downslide. The billions it disbursed while panicked sits stockpiled in banks.

Unfortunately, government's planned future spending on infrastructure construction will not have an immediate effect. Most likely it will take months, if not years, to put people back to work by building roads, repairing bridges and constructing schools.

But, as Franklin Roosevelt warned some 70 years ago, fear is self-fulfilling. Because we are so uncertain as to what tomorrow brings, we are afraid to take any risk. Banks hoard their savings and are disinclined to take the risk of lending, even to the most creditworthy. Consumers are afraid to purchase that new car or appliance because they do not know what tomorrow brings. Will we have a job to pay the bill? Will the home we buy keep its value?

Will our investments in mutual funds and retirement plans disappear even further? For businesses, the drying up of cash flow made them cut any absolutely unnecessary expenditure, legal services being one of the prime targets.

As a result, tomorrow brings fulfillment of our fears. Fear feeds on itself and puts the economy on a downward spiral, as each fear leads to a realization that things are even getting worse than before.

Let us pray and hope that the legacy of 2009 will be confidence. If we have confidence that a better day is around the corner, that confidence — like our fear — becomes self-fulfilling. We are willing to take chances if we are confident the future portends well. Law firms go back to expansion modes. We borrow to buy that car. We purchase that new television. And each act of spending leads to more jobs and more spending and more dollars to spread around. The downward spiral becomes an upward arc.

Fortunately, we seem to be on the edge of a new confidence. Economists are already talking about the economy resuming growth by mid-2009. Just as the computer dot-com age generated prosperity of the '90s and dragged us out of the recession of the '80s, the "green" industry revolution portends to be the engine to revive us. With old energy waning, we are turning to new horizons, which will mean new jobs.

For example, in the past decade, the United States has allowed itself to lose the lead in the production of solar panels. Germany now produces some 79 percent of the world's photovoltaic modules — the key to solar energy. But already the United States — that slumbering industrial giant — seems to be stirring as it recognizes its future in solar energy.

Plans for 2009 call for factories to open and begin to produce solar panels in Oregon and Massachusetts. Battery manufacturers are forming consortiums, led by Johnson Controls, to develop new and better sources of electrical power. Even dowdy General Motors is touting its new Chevy Volt electric car, and Chrysler it rapidly putting together a similar vehicle. Soon people will be back to work producing these new items and spurring our economy on to greater and greater growth.

In just days, hundreds of millions of new dollars will be available for investment as IRAs, 401k's and other retirement vehicles get another infusion of their annual contributions. This money can fuel new loans and new investments.

For lawyers and law firms, there is the glimmer of better days as well. Yes, bankruptcy will have a spurt, but out of many of those bankruptcies will arise new deals for transactional lawyers. As new investments come into the market and new companies are formed for the green revolution, there will be the same burst of securities work that we saw in the dot-com days. And, of course, once the dust settles, litigation — historically countercycled and protected during tough times — will become strong again.

The change of administrations this month brings hope of a renewed confidence in our institutions and a plan for moving forward. It provides an important break with the past, especially this last year.

And for lawyers, a revival of regulation and government enforcement will bring yet more legal work.

So, as we begin 2009, let us put aside our fear, and pray and hope that a year from now, when we look back at it, we see its legacy as the confidence we so desperately need today.

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Danger Zoning: Density Law Pits Developers Against City Planners

By Jon E. Goetz

California's density bonus law has been revised again, for the third time in five years, the result of another skirmish in the ongoing battle between municipalities and homebuilders over the controversial affordable housing tool.

The state density bonus law rewards housing projects containing affordable and senior citizen housing by granting developers the right to build additional market rate units in the project, providing regulatory incentives and concessions, limiting parking requirements and requiring the locality to waive inconsistent development standards that prevent the development of the density bonus units. Recent legislative changes have made the density bonus statute a more flexible and useful tool for housing developers, but have raised the ire of local governments, who often view the law as an imposition on their planning authority.

Sponsored by the League of California Cities and the California chapter of the American Planning Association, Assembly Bill 2280 makes a number of changes to Government Code Section 65915 that were sought by municipalities and planners. It closes a loophole identified in a 2007 case, *Friends of Lagoon Valley v. City of Vacaville*, 154 Cal. App. 4th 807, which would have allowed a developer of a mixed-use project containing a senior housing component to obtain a density bonus calculated on the number of all housing units, rather than just the senior units. In the example cited by the court, a 2000 home project would have to include 200 low-income units or 100 very low-income units to qualify for a 400-unit density bonus, but could obtain the same density bonus by building only 35 units of senior housing. The density bonus will now be equal to 20 percent of just the number of senior units. Also in response to *Friends of Lagoon Valley,* the bill allows a municipality to grant a density bonus greater than the state standards only if authorized by local ordinance.

It provides that if the general plan and zoning are inconsistent as to the number of units allowed on the site, the density bonus will be calculated based on the general plan density. In response to complaints from localities that developers have requested such concessions as fee waivers and modifications of public review processes, it clarifies that the developer can only obtain relief from local development standards that physically prevent the project from being built out to the maximum density, such as a height limitation or setback requirement, and not from standards that impact the economic feasibility of the project.

It deletes the requirement that developers prove that requested incentives or concessions are necessary to make the housing economically feasible, and provides that municipalities would not be required to provide concessions and incentives that are contrary to state or federal law. The bill clarifies that a municipality must provide the density bonus required by state law whether or not it has adopted its own density bonus ordinance.

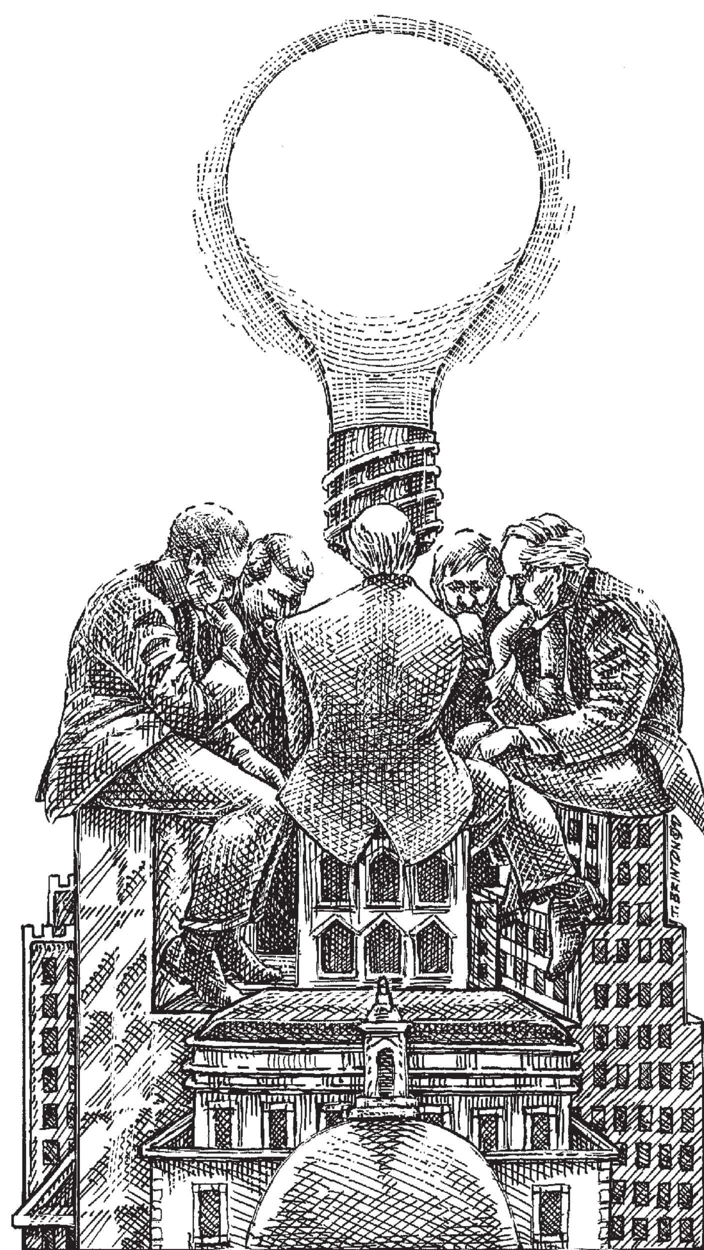
Often the density bonus is best used cooperatively as a tool to obtain entitlements for an affordable or mixed-income project.

What was left out of the final version of AB 2280 is perhaps as significant as what was contained in the final legislation. One of the primary objectives of the original version was to force developers to request the density bonus at the time of the first discretionary approval for the project. This change was later dropped due to opposition by nonprofit housing developers, who maintain that the precise density bonuses and incentives necessary to build their projects often could not be determined until later in the entitlement process, generally due to significant changes in the project imposed by the municipality itself. The early version of the bill also unsuccessfully attempted to eliminate attorney fees for developers who successfully challenge a municipality's refusal to provide a density bonus.

Moreover, the legislation did not address what has possibly been the biggest bone of contention between local governments and the development community over the density bonus law — whether affordable units built to satisfy local inclusionary housing ordinances also count as affordable units for the density bonus law. Some cities with such requirements argue that the density bonus applies only when the developer has voluntarily provided affordable units, but not when those units are required of the developer by local ordinance. Legislators have publicly differed on the issue, and unless this stalemate is later addressed by legislation, it is likely to be resolved through future litigation.

The recent changes are not as revolutionary as those made in 2004, when Senate Bill 1818 overhauled the longstanding statute. SB 1818 changed the formerly fixed density bonus amount to a sliding-scale bonus, with larger density bonuses and more incentives and concessions provided for greater percentages of affordable units. SB 1818 also added a density bonus for moderate-income for-sale units, and enabled developers to qualify for a density bonus through the donation of land suitable for very low-income housing. SB 1818 also provided significant parking breaks for density bonus projects.

The root of the controversy over the density bonus lies in the anti-planning nature of the law, which elevates the state's goal of encouraging affordable housing development above local government ability to control land use. From the state's perspective, offering additional density in exchange for an affordable housing bonus is a tremendous bargain. The additional homes allowed provide a valuable economic subsidy to the developer, a subsidy that does not require any cash outlay from the state. The density bonus, however, is just one of the patchwork of regulatory and financial approaches taken by the state to facilitate the development of affordable housing, including the requirement for each city and county to adopt a general plan housing element facilitating the construction of the locality's "fair share" of low- and moderate-income housing, direct financial assistance provided by the state through a range of loan and grant programs, and tax credits for low-income housing. The density bonus is also complementary with the new Senate Bill 375, which provides California Environmental Quality Act exemptions and additional incentives for infill and transit oriented housing development.



While the density bonus is a powerful tool available as of right to developers of affordable and senior housing, developers must carefully consider whether to use those rights to force additional development on a municipality or neighborhood that does not want the additional density on the site. Additional density can generate public opposition and litigation, which at the very least will slow down and increase the cost of the project.

Often the density bonus is best used cooperatively as a tool to obtain entitlements for an affordable or mixed-income project that is sponsored by the municipality. The automatic expansion of density, and the modification of development standards impeding the project, can often be accomplished much more easily through the density bonus rather than through general plan amendments, zoning modifications and variances. A local government that is providing financial assistance to a housing project should also be keenly aware that the density bonus might significantly reduce the required amount of public subsidy for the project. Developers may also gain local support through careful design of the project to satisfy legitimate aesthetic, traffic and parking concerns, even if the project does not take maximum advantage of the regulatory incentives of the density bonus law.

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