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OPINION	:	No. 80-214
	:	
of	:	<u>June 9, 1980</u>
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SUBJECT: DENSITY BONUS—When a developer of housing agrees to construct at least 25 percent of the total units of a housing development for persons and families of low or moderate income, the local government need not grant a density bonus or provide at least two of the incentives specifically listed in Government Code section 65915, but may provide at least two alternative incentives that are acceptable to the developer and in furtherance of the purpose of the statute.

The Honorable Mike Roos, Assemblyman, Forty-Sixth District, has requested an opinion on the following question:

When a developer of housing agrees to construct at least 25 percent of the total units of a housing development for persons and families of low or moderate income, must the local government grant a density bonus or provide at least two of the incentives specifically listed in Government Code section 65915?

CONCLUSION

When a developer of housing agrees to construct at least 25 percent of the total units of a housing development for persons and families of low or moderate income, the local government need not grant a density bonus or provide at least two of the incentives specifically listed in Government Code section 65915, but may provide at least two alternative incentives that are acceptable to the developer and in furtherance of the purpose of the statute.

ANALYSIS

In 1979, the Legislature added sections 65915–65918 to the Government Code.¹ (Stats. 1979, ch. 1207, § 10.) These statutes now provide:

“When a developer of housing agrees to construct at least 25 percent of the total units of a housing development for persons and families of low or moderate income, as defined by Section 50093 of the Health and Safety Code, a city, county, or city and county shall enter into an agreement with the developer to either grant a density bonus or provide not less than two other bonus incentives for the project.

“For the purposes of this chapter, ‘density bonus’ means a density increase of at least 25 percent over the otherwise allowable residential density under the applicable zoning ordinance. The density bonus shall not be included when determining the otherwise allowable density. The density bonus shall apply to housing developments consisting of five or more dwelling units. *Other bonus incentives which a city, county or city and county may agree to provide under this section include the following:*

“(a) Exemption of the development from the requirements of Section 66477 and any local ordinance adopted pursuant thereto.

“(b) Construction of public improvements appurtenant to the proposed housing development, which may include, but shall not be limited to, streets, sewers and sidewalks.

“(c) Utilization of federal or state grant moneys or local revenues to provide the land on which the housing development will be constructed at a reduced cost.

¹ All unidentified section references hereinafter are to the Government Code.

“(d) Exemption of the development from any provision of local ordinances which may cause an indirect increase in the cost of the housing units to be developed.

“Nothing in this section shall preclude a city, county, or city and county from taking any additional actions which will aid housing developers to construct housing developments with 25 percent or more of the total units of a housing development for persons and families of low or moderate income. *The determination of the means by which a city, county, or city and county will comply with this chapter shall be in the sole discretion of the city, county, or city and county; provided, that no developer shall be required to enter into an unacceptable agreement as a prerequisite to approval of a housing development.*”² (§ 65915, emphasis added.)

“Where there is a direct financial contribution to a housing development pursuant to Section 65915 through participation in cost of infrastructure, write-down of land costs, or subsidizing the cost of construction, the city, county, or city and county shall assure continued availability for low and moderate income units for 30 years. When appropriate, the agreement provided for in Section 65915 shall specify the mechanisms and procedures necessary to carry out this section.” (§ 65916.)

“In enacting this chapter *it is the intent of the Legislature that the agreement offered by the city, county, or city and county pursuant to this chapter contribute significantly to the economic feasibility of low and moderate income housing in proposed housing developments.*” (§ 65917, emphasis added.)

“The provisions of this chapter shall apply to charter cities.” (§ 65918.)

The question presented for analysis concerns what measures are required of a local government in complying with this legislative scheme. Particularly, we are asked whether a local government may devise measures that are alternatives to the density bonus and other

² “Persons and families of low or moderate income” are generally those whose incomes do not exceed 120 percent of the median household income for their geographic axes of the state. (Health & Saf. Code § 50093.) As for “the requirements of section 66477,” it provides for the dedication of land or the payment of fees in lieu thereof, or a combination of both, for park or recreational purposes as a condition to the approval of a parcel or final subdivision map under certain circumstances.

incentives described in section 65915. We conclude that *alternatives* may be fashioned as long as they are acceptable to the developer and contribute significantly to the economic feasibility of low and moderate income housing in proposed housing developments.

In determining which provisions of section 65915 are mandatory and which are permissive, we are guided by two well established principles of statutory construction. The cardinal rule is to “ascertain the intent of the Legislature so as to effectuate the purpose of the law.” (*Select Base Materials v. Board of Equal.* (1959) 51 Cal. 2d 640, 645.) Legislative intent may be found from the words used in the statute, with the language given its usual and ordinary import. (*Moyer v. Workmen’s Comp. Appeals Bd.* (1973) 10 Cal. 3d 222, 230.)

In accordance with these principles, we note that the stated purpose of the legislation is to “contribute significantly to the economic feasibility of low and moderate income housing in proposed housing developments.” (§ 65917.)

In carrying out this purpose, the Legislature has specified that local governments “shall enter into an agreement with the developer to either grant a density bonus or provide not less than two other bonus incentives for the project.” (§ 65915.) The term “shall” is mandatory in its common usage. (*Hogya v. Superior Court* (1977) 75 Cal. App. 3d 122, 133; *California Teachers Assn. v. Governing Board* (1977) 70 Cal. App. 3d 833, 842.) Moreover, when “shall” and “may” are used in the same statute, as in section 65915, it is to be presumed that the former is mandatory and the latter is permissive. (*In re Richard E.* (1978) 21 Cal. 3d 349, 353–354; *Hogya v. Superior Court, supra*, 75 Cal. App. 3d 122, 133 fn. 8.) Clearly, the Legislature was aware of this distinction for purposes of section 65915. (See § 14.)

Hence, a local agency is required to give a density bonus or at least two other types of incentives whenever a developer offers to construct at least 25 percent of his project for low or moderate income housing.³

The Legislature, however, has made clear that local governments have wide discretion in how best to implement the purposes of the statutory scheme. Section 65915 specifically states: “The determination of the means by which a city, county, or city and

³ If a local agency has its own program for encouraging low and moderate income housing, a developer could still obtain the benefits of section 65915 by complying with just the terms of the statute. For example, if a city gives a particular incentive for a 10 percent construction of low income housing, the developer may choose to build an additional 15 percent to obtain the benefits of section 65915. A local 25 percent requirement would trigger, without more, the incentives of the statute.

county will comply with this chapter shall be in the sole discretion of the city, county or city and county.” The Legislature thus has not completely controlled a local government’s statutory duties.

Nevertheless, certain controls are present. The most significant is that the density bonus or other incentives offered by the local government must be acceptable to the developer. Section 65915 expressly provides: “no developer shall be required to enter into an unacceptable agreement as a prerequisite to approval of a housing development.”

As for providing alternatives to the density bonus and other incentives specifically listed in section 65915, who note first that the requirement is for the granting of a density bonus or two other bonus incentives. Consequently, if a local government does not wish to grant a density bonus, it may choose to provide two other types of incentives.

Section 65915 does not expressly limit the types of other bonus incentives to those listed in the statute. Rather, the Legislature has used the word “include” in authorizing the use of the other incentives listed: “Other bonus incentives which a city, county or city and county may agree to provide under this section include the following”

Ordinarily, the term “include” is one of enlargement and not of limitation. (*People v. Western Air Lines, Inc.* (1954) 42 Cal. 2d 621, 639; *Paramount Gen. Hosp. Co. v. National Medical Enterprises, Inc.* (1974) 42 Cal. App. 3d 496, 501; *People v. Homer* (1970) 9 Cal. App. 3d 23, 27.)

Here, an expansive interpretation would be consistent with the Legislature’s express grant of discretion to local governments in determining the exact means by which they must comply with the statutory scheme. (§ 65915.) We can find no direct expression of legislative intent that would preclude a local government from fashioning alternative bonus incentives to those specifically mentioned in section 65915.

It may be argued, however, that such an intent may be found indirectly in the following language of section 65915:

“Nothing in this section shall preclude a city, county, or city and county from taking any additional actions which will aid housing developers to construct housing developments with 25 percent or more of the total units of a housing development for persons and families of low or moderate income.”

This language might suggest that any initiative by local governments is limited to “additional” incentives rather than “alternative” incentives to those listed in section 65915.

It may also be argued that an intent of limitation may be found in the change of language in section 65915 with reference to the word “include.” In subdivision (b) of the statute, the Legislature states, “Construction of public improvements appurtenant to the proposed housing development, which may include, but shall not be limited to, streets, sewers and sidewalks.” By the addition of the phrase “but shall not be limited to” in subdivision (b) after its omission with regard to the list of bonus incentives, the Legislature may have intended for the list of bonus incentives to be a list of limitation. The construction of a statute that renders some words surplusage is to be avoided (*California Mfgs. Assn. v. Public Utilities Com.* (1979) 24 Cal. 3d 836, 844; *Fields v. Eu* (1976) 18 Cal. 3d 322, 328), and a difference of language used in a particular statute indicates that differing consequences are intended by the Legislature. (See *In re Dees* (1920) 50 Cal. App. 11, 19; *McCarthy v. Board Of Fire Commrs.* (1918) 37 Cal. App. 495, 498.)

We believe that it is more reasonable to conclude that a local government is free to choose, alternative incentives as well as to provide additional aids to a developer if it so desires. Sufficient “controls” are built into the statutory system so that the purposes of the legislation will be effectuated even though a density bonus or other incentives listed in section 65915 are not provided.

These “controls” placed upon a local government wishing to devise alternative incentives are: (1) at least two alternative incentives must be provided, (2) the alternative incentives must be acceptable to the individual developer, and most importantly (3) the alternatives must contribute significantly to the economic feasibility of housing for low and moderate income persons and families in proposed housing developments.⁴

We conclude that when a developer of housing agrees to construct at least 25 percent of the total units of a housing development for persons and families of low or moderate income, the local government need not grant a density bonus or provide at least two of the incentives specifically listed in section 65915 as long as two alternative incentives are provided that are acceptable to the developer and carry out the purpose of the statute.

⁴ ‘We do not mean to suggest that an alternative incentive could be the granting of an exemption from otherwise applicable state law, except section 66477, since section 65915 clearly speaks in terms of exemptions from “any local ordinance” or “any provision of local ordinances.” Also, we note the requirement of section 66473.5 that a subdivision be consistent with a housing clement of a general plan that makes adequate provision for all economic segments of the community. (§ 65302, subd. (c).)