



California Supreme Court Holds Facial Challenge to Inclusionary Zoning Ordinance Subject to Deferential Standard of Review

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In a decision with major repercussions for the building industry in California, the California Supreme Court unanimously rejected a constitutional challenge to San Jose's affordable housing ordinance. *California Building Industry Association v. City of San Jose*. The Court held that a housing ordinance requiring that 15 percent of the for-sale units at a price that is affordable to low or moderate income households did not on its face impose an unconstitutional exaction. The Court reasoned that because the ordinance was merely imposing a land use restriction, it fell within the City's broad police power to address the health and welfare of the community and did not require the City to demonstrate an "essential nexus" or "rough proportionality" to the effects of housing projects subject to the ordinance. The decision provides a template that land use agencies across the State will likely follow to protect against facial constitutional takings challenges to affordable housing ordinances.

After the San Jose affordable housing ordinance was enacted in 2010, the California Building Industry Association (CBIA) filed an action alleging that the ordinance was invalid because the city failed to demonstrate a reasonable relationship between the adverse impacts reasonably attributed to new residential developments and the new affordable exactions. In other words, CBIA alleged that the conditions imposed by the inclusionary housing ordinance amounted to an unconstitutional exaction. The California Supreme Court rejected this contention.

The Court's decision rests on a subtle distinction between monetary and physical exactions (e.g., traffic mitigation fees, open space dedication requirements) designed to mitigate the impacts of a development project, and land use restrictions (e.g., height limits) within a city's traditional power to promote health and welfare. The Court found that the inclusionary housing ordinance was simply a land use restriction, as it

restricted how the developer may use its property by limiting the price of some of the units. Based on this distinction, the California Supreme Court distinguished several U.S. Supreme Court decisions that concluded that agencies imposing conditions imposed on development approvals are required to demonstrate an "essential nexus" and "rough proportionality" between the exaction and the impact of the project subject to the exaction.

As a land use restriction, the Court found that the inclusionary housing ordinance was subject to the deferential standard of review ordinarily applied to legislative land use measures, and because there was a reasonable relationship between the land use restriction and the public welfare, the facial challenge failed.

There is a potential silver lining for the building industry because the decision does not foreclose future "as applied" challenges. The Court declined to address whether the California Mitigation Fee Act applied to affordable housing conditions where the ordinance did not require the developer to pay a fee or dedicate land. Chief Justice Cantil-Sakauye, the author of the decision, states that while price controls that deny a property owner a "fair and reasonable return on its property" would be unconstitutional, in this case the ordinance has not yet been applied to any proposed development. Similarly, the concurrence by Justice Chin notes that if an ordinance required a developer to provide subsidized housing, "for example, by requiring it to sell some units below cost, [that] would present an entirely different situation. Such an ordinance would appear to be an exaction and I question whether it could be upheld as simply a form of price control." As such, and because there are more than 170 counties and cities in California that have adopted inclusionary housing ordinances, we can expect that more litigation is on the horizon.