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COUNTY OF SANTA CLARA
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California Building Industry Assoc. v. City of San Jose
DATE: TIME: CASE NO.: 110CV167289 LINE NUMBER:

ORDER GRANTING PLAINTIFF'S REQUEST FOR TEMPORARY, PRELIMINARY, AND PERMANENT INJUNCTIVE RELIEF

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Nobody seriously disputes the proposition that the South Bay Area is an expensive place in which to live. There is no serious argument that inclusionary housing laws are a legitimate concern of local government agencies. No one seriously argues that inclusionary housing laws increase the availability of housing to people with lower incomes.

Plaintiff California Building Industry Association ("CBIA") filed this action on 24 March 2010. It seeks declaratory relief, injunctive relief, in validation of City of San Jose Ordinance Number 28689 which establishes "Inclusionary Housing Exactions" which require private entities to provide "affordable housing" for the public.

Plaintiff contends that City of San Jose enacted the new ordinance arbitrarily and unlawfully, without evidentiary support or any attempt to demonstrate the reasonable relationship between the burdens imposed by the new ordinance and any adverse public impacts shown to be caused by new residential development, in disregard of clear constitutional standards and requirements.

On 26 January 2010, the City of San Jose adopted Ordinance Number 28689. This ordinance, in excess of 56 pages, applies to all residential development within the City of San Jose which requires a City of San Jose planning permit and which would create 20 or more new, additional, or modified dwelling units, with certain specified exceptions.

The ordinance defines "inclusionary units" as units which are affordable to low, very low, lower, or moderate income households." The ordinance requires that residential developments shall include "inclusionary units" upon the same side as the new residential development itself, unless otherwise exempted or accepted.

In "for sale" residential projects, 15% of the total new dwelling units in the residential development are required to be made available for purchase by income-restricted households at below-market rates.

For "for rent" residential projects, 9% of the total new dwelling units in the residential development are required to be available for rent at below-market rents by income-restricted households defined as "moderate income" and another 6% required to be available at below-market rents by households meeting the definition of "very low income" households.[1]

The ordinance allows for alternative methods of compliance. Plaintiff, however, asserts that the ordinance requires similar exactions of new homes, either on-site or off-site, where dedication of land or payment of fees "in lieu" of providing it in inclusionary units at the artificial below-market prices or rents are under the ordinance.

Paragraph 15 of the complaint alleges that the requirement of new inclusionary housing may be satisfied by a payment of a fee to the City of San Jose, in lieu of constructing the affordable units otherwise required, in the amount of $122,000. The deed also requires decreased erections against homes that are subject to the ordinance to permit the city to capture a portion of the appreciated value of the home in an amount to be determined by the city in its sole discretion.

In Paragraph 18, Plaintiff alleges that at no time did Defendant City of San Jose publicly produce or provide substantial evidence, or any evidence in the record purporting to demonstrate a reasonable relationship between adverse public impacts or needs for additional subsidized housing units caused by or reasonably attributed to the development of new residential developments of 20 units or more. Plaintiff believes that the burdens and financial impacts required under the ordinance greatly exceed any reasonable share of the city's cost of addressing public needs for additional subsidized housing or affordable housing caused by such new development.

Plaintiff makes a facial challenge to the ordinance and argues that the ordinance is an "impact fee" or "exaction." Defendants and Intervenors frame the Plaintiff's argument as, prior to adopting an inclusionary housing ordinance, a city must first prove that the construction of new market-rate housing creates a need for affordable housing and quantifies the extent of the need for affordable housing purportedly caused by the new construction.

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[1] The subsection of the ordinance which restricts rents for new "for rent" developments shall become operative only at such time as current appellate law in Palmer/Sixth Street Properties, L.P. v. City of Los Angeles (2009) 175 Cal. App. 4th 1396 is overturned, disapproved, or de-published by a court of competent jurisdiction, or modified by the State Legislature to authorize control of rents in Inclusionary Units. As of the date of this Order, this case has received no negative treatment although it was distinguished in the Sixth District's decision in more on that in a moment. Trinity Park, L.P. v. City of Sunnyvale (2011) 193 Cal. App. 4th 1014.

Standard Of Review

When an ordinance contains provisions that allow for administrative relief, we must presume the implementing authorities will exercise their authority in conformity with the Constitution. Home Builders Ass'n v. City of Napa (2001) 90 Cal. App. 4th 188, 199.

In a facial challenge, the Court considers only the text of the measure itself, not its application to the particular circumstances of an individual or by a suggestion that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. The required showing must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions. County of Sonoma v. Superior Court (2009) 173 Cal. App. 4th 322, 337.

The minimum showing that the Supreme Court of California has required for a facial challenge to the constitutionality of a statute is that in a facial challenge to a city ordinance, a plaintiff must demonstrate from the face of the ordinance that the challenged portion of the ordinance bears no reasonable relationship to permissible outcomes in the generality or great majority of cases. San Remo Hotel v. City and County of San Francisco (2002) 27 Cal. 4th 643, 673.

> "We do not hold that a court in inquiring whether an ordinance reasonably relates to the regional welfare, cannot defer to the judgment of the municipality's legislative body. But judicial deference is not judicial abdication. The ordinance must have a real and substantial relation to the public welfare. There must be a reasonable basis in fact, not in fancy, to support the legislative determination. Although in many cases it will be "fairly debatable" that the ordinance reasonably relates to the regional welfare, it cannot be assumed that a land use ordinance can never be invalidated as an enactment in excess of the police power." Associated Home Builders etc., Inc. v. City of Livermore (1976) 18 Cal. 3d 582, 609 (internal citations and footnotes omitted.)

Government Code, § 66001 (a) and (b) state:

(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or

may be made in other public documents that identify the public facilities for which the fee is charged.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

(b) In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

Plaintiff certainly does not dispute the legitimacy of cities encouraging and making adequate provision for affordable housing. (Closing brief, page 5, lines 17-18.)

In Home Builders Association of Northern California v. City of Napa (2001) 90 Cal. App. 4th 188, the Court of Appeal held that the assistance of moderate-income households with their housing needs is recognized in California as a legitimate governmental purpose. (p. 195.) "A claimant who advances a facial challenge faces an uphill battle. A claim that a regulation is facially invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional application to the complaining parties. This is because a facial challenge is predicated on the theory that the mere enactment of the ordinance worked a taking of plaintiff's property." Id. at 194.

Plaintiff makes an effort to distinguish between incentives for developers who may voluntarily agreed to include affordable housing units in their projects (Government Code, §§ 65580, et seq.) versus arbitrary mandates such as that claimed by Plaintiff in the ordinances under scrutiny in this case.

Plaintiff argues that as a matter of both statutory and constitutional law, legislatively imposed development mitigation fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. Government Code § 66001. Plaintiff further argues that if the condition fails to further the end advanced as the justification for the fee, the fee is not a valid regulation of land use but a plan of extortion. In support of this contention, Plaintiff places reliance upon San Remo Hotel v. City and County of San Francisco (2002) 27 Cal. 4th 643. That case made the following observations:

The takings clause of the California Constitution (art. I, § 19) provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."

By virtue of including "damage" to property as well as its "taking," the California clause "protects a somewhat broader range of property values" than does the corresponding federal provision. Hensler v. City of Glendale (1994) 8 Cal. 4th 1, 9, fn. 4; Varjabedian v. City of Madera (1977) 20 Cal. 3d 285, 298.

The federal takings clause (U.S. Const., 5th Amend.) provides: "nor shall private property be taken for public use without just compensation." "In determining whether a government regulation of property works a taking of property under the Fifth Amendment to the United States Constitution, the United States Supreme Court has generally eschewed any set formula for determining whether a taking has occurred, preferring to engage in "essentially ad hoc, factual inquiries" (Lucas v. South Carolina Coastal Council (1992) 505 U.S. 1003, 1015), which focus in large part on the economic impact of the regulation. See Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104, 124.

The Court has held that property is taken when a government regulation compels a property owner to suffer physical invasion of his property or denies all economically beneficial or productive use of land. Lucas, supra, 505 U.S. at pp. 1015-1016. The court has also stated that the Fifth Amendment is violated when a land-use regulation "does not substantially advance legitimate state interests." Lucas, supra, 505 U.S. at p. 1016.

Here, the City argues that the "inclusionary ordinance does not require that developers 'dedicate' affordable housing or 'convey' property. (Defendants' brief of November 17, 2011.) The City claims that a requirement that a developer sell property at a below-market price is analogous to a law limiting the rent that can be charged by a landlord.

Therein lies what this Court sees as the defect in the position taken by the City. This is not a rent-control case. It is a case where one a developer is required to sell 15% of its homes in affected developments, and which are substantially similar to the rest of the homes in the development, at below market rates. This Court believes that it is incumbent for the city to demonstrate its legal ability to require that a developer sell a home at a level which may be potentially below its costs in building that home.

Plaintiff agrees that increasing the availability of affordable housing is a legitimate and important public policy objective. Government Code, §§ 65913, 65915, 65582.1, et seq. While California law encourages the voluntary production of affordable housing, voluntary programs pursuant to enactments such as Government Code, § 65915, et seq. are different than the mandatory exactions of homes and in lieu fees imposed by this ordinance.

Plaintiff has persuaded this Court to conclude that the face of the ordinance that the challenged portion of the ordinance bears no reasonable relationship to permissible outcomes in the generality or great majority of cases.

Any evidently constitutional propriety of the enacted legislation disappears if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. Without this "essential nexus," between the permit condition and the development ban, "the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion." San Remo Hotel v. City and County of San Francisco (2002) 27 Cal. 4th 643, 665.

This Court had previously asked the City of San Jose to demonstrate where in the record was there evidence demonstrating the constitutionally required reasonable relationships between deleterious public impacts of new residential development and the new requirements to build and to dedicate the affordable housing or pay the fees in lieu of such property conveyances. The City of San Jose has appeared to be unable to do so.

Since the City of San Jose adopted this ordinance in derogation of controlling state law without providing any evidence purporting to meet the legal standards required, the ordinance was not properly enacted and is invalid on its face. The City of San Jose "has no authority to exercise its discretion in a way that violates constitutional provisions or undermines their effect." See Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority (2008) 44 Cal. 4th 431, 448.

Therefore, good cause appearing, IT IS ORDERED THAT:

1. This Court determines and declares that Ordinance Number 28689 is invalid;

2. The City of San Jose may not lawfully impose the new IHO exactions in Ordinance Number 28689 as conditions of providing planning or other development permits or other approvals for new residential development; and

3. Plaintiff's request for temporary, preliminary, and permanent injunctive relief is GRANTED. Defendants are restrained from enforcing or implementing Ordinance Number 28689 unless and until the City of San Jose provides a legally sufficient evidentiary showing to demonstrate justification and reasonable relationships between such IHO exactions and impacts clause by new residential development.

Plaintiff is granted leave to file a Memorandum of Costs and to prepare an appropriate Judgment.

DATED: 24 May 2012

HON. SOCRATES PETER MANOUKIAN
Judge of the Superior Court
County of Santa Clara

IN THE SUPERIOR COURT OF CALIFORNIA IN AND FOR THE COUNTY OF SANTA CLARA	(ENDORSED) FILED MAY 25 2012 DAVID H. YAMASAKI Chief Executive Officer/Clerk Superior Court of California, County of Santa Clara BY _____ DEPUTY
Plaintiff: CALIFORNIA BUILDING INDUSTRY Defendant: CITY OF SAN JOSE	
PROOF OF SERVICE ON ORDER GRANTING PLAINTIFF'S REQUEST FOR TEMPORARY, PRELIMINARY, AND PERMANENT INJUNCTIVE RELIEF	Case Number: **110 CV 167289**

CLERK'S CERTIFICATE OF SERVICE: I certify that I am not a party to this case and that a true copy of this document was served as follows:

[] By personal service on the parties and on the date shown below.

[X] By first class mail, postage prepaid, addressed as shown below and mailed on the date shown below.

DATED: 5/25/12

David Yamasaki, Chief Executive Officer/Clerk

BY _____, Deputy
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