Blogs
June 16, 2015
California Land Use & Development Law Report

California Supreme Court Broadly Construes Municipal Power to Enact Affordable Housing Measures

In a case closely watched by home builders, low-income housing advocates, and cities and counties throughout the state, the California Supreme Court has strongly endorsed inclusionary housing ordinances, ruling that they are legally permissible as long as it can be shown the ordinance is reasonably related to the public welfare. *California Building Industry Association v. City of San Jose,* No. S212072 (Cal. Sup. Ct., June 15, 2015). The court rejected a claim that a city may only impose inclusionary housing requirements on new residential development projects it if first shows that the need for affordable housing is attributable to new development. **The City's Inclusionary Housing Ordinance.** In order to respond to the lack of sufficient housing affordable to low and moderate income residents, many California cities have adopted "inclusionary housing" programs, which require developers to set aside units in new residential development projects for low and moderate income households. San Jose's inclusionary housing ordinance, for example, requires that the sale price of at least 15 percent of for-sale units in projects of 20 or more units be affordable to low or moderate income households. The ordinance gives developers the option of meeting their inclusionary housing obligations by constructing affordable units off site, paying an in-lieu fee or dedicating land of an equivalent value, or acquiring and rehabilitating a comparable number of inclusionary units. The ordinance also provides various incentives to encourage developers to meet the ordinance's affordable unit requirements onsite. **CBIA's Legal Challenge.** The California Building Industry Association challenged the San Jose ordinance under the "unconstitutional conditions" doctrine, which prevents government from using the permit process to exact property for which it would have been required to pay just compensation outside of the permit context unless it has shown that the property is needed to mitigate an adverse public impact of the development. When it adopted the ordinance, San Jose did not demonstrate that the problem the ordinance addressed – the need for affordable housing – resulted from construction of new homes. CBIA challenged the ordinance, arguing that, in the absence of such a showing, the ordinance imposed an unconstitutional condition because it required the developer to give up a property interest for which the government would had to pay just compensation under the takings clause outside of the permit process. The trial court agreed with CBIA and invalidated the ordinance. After the trial court's decision was overturned on appeal, the California Supreme Court accepted CBIA's request to review the case. Agreeing with the court of appeal, the high court rejected CBIA's arguments and upheld the ordinance. **The California Supreme Court's Decision**. At the heart of the court's decision is its ruling that the requirements of the San Jose ordinance did not amount to an "exaction" of property, and thus the constitutional limitations on a public agency's ability to exact property for public use as a condition of development were inapplicable. The court reasoned that it is the requirement that a property owner convey a property interest – a dedication of property or the payment of money – that constitutes the "exaction" that brings the unconstitutional conditions doctrine into play. It concluded, however, that the ordinance did not require developers to convey any property interests for public purposes. Instead, the court found, the ordinance operated like zoning and other land use measures that restrict the use developers may make of their property by regulating matters such as permitted uses, unit size, maximum heights, and development density. Such regulations on the use of land are constitutionally permissible as long as they are reasonably related to the city's interest in promoting the health, safety, and welfare of the community. Thus, the court concluded, "just as it would be permissible for a municipality to attempt to increase the amount of affordable housing in the community and to promote economically diverse developments by requiring all new residential developments to include a specified percentage of studio, one-bedroom, or small-square-footage units, there is no reason why a municipality may not alternatively attempt to achieve those same objectives by requiring new developments to set aside a percentage

of its proposed units for sale at a price that is affordable to moderate or low income households." The city had determined there was a significant need for affordable housing in San Jose and that the public interest would best be served by integrating new affordable housing into economically diverse development projects. It enacted the ordinance to further these objectives. This, the court concluded, constituted a legitimate public purpose sufficient to pass constitutional muster under the broad standards governing zoning enactments. The court also concluded that the fact the ordinance imposed price controls, rather than restrictions on the use of land, did not change the applicable legal standard. Price controls on for-sale units, the court reasoned, are similar to rent control, which has long been deemed a constitutionally permissible means of achieving legitimate public purposes, so long as it is not confiscatory. Nor did it matter, the court found, that the ordinance would adversely affect the value of developers' property. In this respect, the court observed, the city's affordable housing ordinance was no different from other zoning ordinances and regulations that limit the use a developer may make of its property.

* * *

Over the past decade, more than 170 cities in California have adopted inclusionary housing ordinances. The California Supreme Court's conclusion that such ordinances should be evaluated under constitutional standards applicable to zoning measures rather than exactions significantly broadens a public agency's flexibility to adopt such ordinances. The key question facing local agencies now is how to increase availability of low and moderate income housing through inclusionary housing programs without adversely affecting the supply of market-rate housing.

Blog series

California Land Use & Development Law Report

California Land Use & Development Law Report offers insights into legal issues relating to development and use of land and federal, state and local permitting and approval processes.

View the blog