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AFFORDABLE HOUSING: COULD CALIFORNIA'S INCLUSIONARY ZONING LAWS BE ON THE BRINK OF COLLAPSE?

by James Pugh

On July 22, 2009, the California Court of Appeals issued a ruling that could send California's affordable housing laws into a tailspin. The case is *Palmer/Sixth Street Properties, L.P., et al., v. City of Los Angeles*, and it questioned whether cities can impose mandatory affordable housing, also known as inclusionary zoning, requirements on the development of market-rate apartment projects. The Second Appellate District Court believes not.

Specifically, the court affirmed a superior court decision that precluded the City of Los Angeles from enforcing an affordable housing ordinance against a mixed-use project that is being developed by Palmer. The court concluded that, as applied to Palmer's project, the ordinance conflicts with, and is preempted by, the rent control provisions of the Costa-Hawkins Rental Housing Act ("Costa-Hawkins"), which allows residential landlords to set the initial rent levels at the commencement of a tenancy. It appears, however, that the battle is not over. Based on recent statements from the City Attorney's Office, it is likely that the City will petition the California Supreme Court for review of this decision.

The case grew out of Palmer's 2006 Piero II project in downtown Los Angeles. The project included 350 residential units and 9,705 square feet of commercial space on a 2.84-acre parking lot site. The site previously contained a 60-unit low income apartment hotel that was demolished in 1990. The project was within the boundaries of the Central City West Specific Plan area, which imposes an affordable housing requirement on residential and mixed use projects of more than 10 dwelling units per lot. The City approved the project, but conditioned it to (1) either provide 60 replacement low-income dwelling units or pay an approximately $5,770,930 in-lieu fee; and (2) maintain rent restrictions pursuant to the Specific Plan for at least 30 years. Palmer claimed that these conditions conflicted with Costa-Hawkins.

The Act provides in relevant part that all residential landlords may "establish the initial rental rate for a dwelling or unit." Civ. Code §1954.53(a). The court quickly honed in on how this provision of Costa-Hawkins preempted the Specific Plan's affordable housing requirements. The court found that the Specific Plan's affordable housing requirements were "hostile or inimical" to Costa-Hawkins because they stripped Palmer of the right to establish initial rent rates and effectively locked in rent levels for 30 years. The court felt

that the language of Costa-Hawkins was clear and unambiguous, and therefore the City's constraints on the project were unlawful.

The City then argued that the in-lieu fee provisions of the Specific Plan were severable and did not conflict with Costa-Hawkins because it does not mention impact fees. The court disagreed and found that the fee provisions were inextricably intertwined with the Specific Plan's affordable housing requirements. In other words, the Specific Plan boxed Palmer into either paying for, or building, the affordable units, which is in conflict with Costa-Hawkins because neither of those options allow the landlord to establish the initial rental rate for the units.

In summary, it appears that the court may have dealt similar affordable housing laws a serious blow, at least to the extent that they may attempt to mandate the dedication or provision of rent-restricted affordable units. Although the court recognized that affordable housing requirements could still apply to certain projects, such as those receiving government support or under contract with a public entity, the ruling appears broad enough to call into question affordable housing programs across California. Adding to the uncertainty, the Fifth Appellate District Court decided the *Building Industry Association of Central California v. City of Patterson* case in March 2009, which questioned the legitimacy of affordable housing in-lieu fees. Are these recent appellate court decisions the harbingers of substantial change in the way local communities address the provision of affordable housing? It is too early to tell. For now, however, the affordable housing atmosphere is unstable while cities, developers and affordable housing advocates anxiously await the next step in the *Palmer* case. The City has until August 31 to file its petition to the California Supreme Court.

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