

Inclusionary Housing Ordinance Survives Constitutional Challenge in Post-*Nollan-Dolan* Era: *Homebuilders Association of Northern California v. City of Napa*

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Inclusionary housing programs¹ have been in effect since the early 1970s, and are growing in popularity today as more jurisdictions view them as innovative ways to increase the supply of affordable housing as well as combat exclusionary zoning practices.² In general, localities enact such programs pursuant to their local police power, which are typically effectuated through inclusionary housing ordinances, in zoning codes, policy statements, or a jurisdiction's housing element.³

Given the reality that inclusionary housing programs essentially transfer property from developers to less materially advantaged households, it is not surprising that such programs have been challenged in court. Overall, such efforts have been unsuccessful. Indeed, most of the few published decisions have upheld inclusionary housing programs.⁴ Because these cases applied a relatively deferential standard of review, their continued viability became uncertain with the adoption of the heightened scrutiny standard enunciated by the U.S. Supreme Court in *Nollan v. California Coastal Commission* [483 U.S. 825 (1987), 39 ZD 226] and *Dolan v. City of*

Tigard [512 U.S. 374 (1994), 46 ZD 232]. Recently, a California appellate court squarely addressed this issue, and upheld yet another inclusionary housing program. In *Home Builders Association of Northern California v. City of Napa*,⁵ the court refused to apply the heightened standard of judicial review under *Nollan* and *Dolan*, and instead determined that an inclusionary housing ordinance that imposed a ten percent mandatory set-aside requirement on new development was constitutional.

2. In California, by 2000, at least 108 cities and 13 counties had adopted various inclusionary housing programs, a majority of which are mandatory. See Nadia I. El Mallakh, "Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?" 89 CALIF. L. REV. 1847, 1861-62 (2001). See also City of San Diego Planning Department, CALIFORNIA JURISDICTIONS WITH INCLUSIONARY HOUSING PROGRAMS (2001). Moreover, examples of creative inclusionary housing programs can also be found across the nation, in Colorado, Florida, Maryland, Massachusetts, Minnesota, New Jersey, New Mexico, and Virginia. See www.inhousing.org/USA%20Inclusionary/USA%20Inclusion.htm. Finally, the inclusionary housing philosophy is also finding support internationally. See, e.g., In the Matter of Article 26 of the Constitution and In the Matter of Part V of the Planning and Development Bill 1999, Supreme Court of Ireland, August 28, 2000 (unanimously upholding a national 20 percent affordable housing statute, which allows the local agency, as a condition of approval, to require the developer to enter into an agreement whereby it gives up to 20 percent of the land for affordable housing or provides several sites or houses actually built for such purposes).

3. See Padilla, at 551.

4. *But see* Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P. 3d 30 (Col. 2000) (holding town's "affordable housing mitigation" ordinance, which required developers to create affordable housing for 40 percent of the employees generated by the new development, as well as setting a base rental rate, constituted "rent control," thereby violating the state's anti-rent control statute); Board of Supervisors v. De Groff Enterprises, 198 S.E. 2d 600 (Va. 1973) (holding that a mandatory set-aside provision was invalid under state law as well as an improper socio-economic regulation).

5. 90 Cal. App. 4th 188 (2001), 53 ZD 215, *cert. denied*, 122 S. Ct. 1356 (Mar. 25, 2002). See also San Remo Hotel LP v. City and County of San Francisco, 27 Cal. 4th 643, 673 (2002), 54 ZD 175.

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1. In general, an "inclusionary housing" program is one that requires a residential developer to set aside a specified percentage of new units (often 10 to 15 percent) for very low-, low- or moderate-income households in conjunction with the development of market rate units. However, the term "inclusionary housing" or "inclusionary zoning" can include a variety of methods designed to create more affordable housing. Some examples include density bonuses, reduced development standards, and imposition of fees on developers to fund affordable housing projects. See Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 HOFSTRA L. REV. 539, 551-52 (1995).

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JUDICIAL TREATMENT OF INCLUSIONARY HOUSING PROGRAMS

There are few published decisions considering the legality of inclusionary housing programs. The first court to address the issue was the case of *Board of Supervisors v. De Groff Enterprises* [198 S.E. 2d 600 (Va. 1973)]. In that decision, despite acknowledging the “urgent need for housing units for lower and moderate income families,” the Virginia Supreme Court invalidated a mandatory inclusionary housing ordinance requiring that 15 percent of multi-family units be affordable. *Id.* It did so based on the grounds that the ordinance exceeded the locality’s police power, as well as constituted a taking under the Virginia State Constitution. *Id.* at 602.

GIVEN THE REALITY THAT INCLUSIONARY HOUSING PROGRAMS ESSENTIALLY TRANSFER PROPERTY FROM DEVELOPERS TO LESS MATERIALLY ADVANTAGED HOUSEHOLDS, IT IS NOT SURPRISING THAT SUCH PROGRAMS HAVE BEEN CHALLENGED IN COURT.

Subsequent cases, however, have not followed suit. The seminal case of *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel (“Mt. Laurel I”)* [336 A.2d 713 (N.J. 1975) 27 ZD 282] was the first decision to explicitly recognize the importance of inclusionary housing programs as a means to combat exclusionary zoning practices. In *Mt. Laurel I*, the plaintiffs, representing minority, low-income residents, attacked a local zoning ordinance that had both the intent and effect of excluding low- and moderate-income residents from the municipality.⁶ The New Jersey Supreme Court found this exclusionary zoning ordinance unconstitutional, violating basic principles of fairness. *Id.* at 731-732. In so doing, the court imposed on all “developing” municipalities, through their land-use regulations, an affirmative obligation to provide a realistic opportunity for affordable housing. *Id.* at 174.

In a later decision, *Southern Burlington County N.A.A.C.P. v. Mt. Laurel Township (“Mt. Laurel II”)*, [456 A.2d 390 (N.J. 1983), 35 ZD 90], the court made clear that it would not back away from this position. Rather, it extended this obligation to *all* municipalities, and advocated mandatory set-aside programs as one way for localities to fulfill their *Mt. Laurel* obligations. *Id.* at 443. It flatly rejected the argument that such programs constituted an impermissible taking, concluding that “the builder who undertakes a project that includes a mandatory set-aside voluntarily assumes the financial burden, if there is one, of that condition.” *Id.* at 446.

6. The ordinance accomplished this goal by: (1) permitting only single-family detached dwelling units in residentially zoned areas; and (2) requiring significant minimum lot sizes and floor areas. See *id.* at 719-721.

Several years later, the question arose whether the imposition of fees on developers as a condition of approval, which would be dedicated to an affordable housing trust fund, was proper. Stressing the affirmative obligation upon municipalities to provide realistic housing opportunities for all income levels, the New Jersey Supreme Court in *Holmdel Builders Association v. Township of Holmdel* [583 A.2d 277 (N.J. 1990), 42 ZD 167] found the requirement permissible under state law.⁷ The court did not directly reach the question whether the ordinance was unconstitutional. Nevertheless, the court emphasized that such arguments, with respect to a facial challenge, lacked merit. *Id.* at 292.

A Ninth Circuit decision addressed the question left unanswered by *Holmdel*—whether such ordinances could survive constitutional challenge. In *Commercial Builders of Northern California v. City of Sacramento*, [941 F.2d 872 (9th Cir. 1991)] the court held that an ordinance, which conditions certain types of non-residential building permits upon the payment of a fee dedicated to an affordable housing trust fund, did not amount to an unconstitutional taking. The plaintiff, Commercial Builders, did not argue that the city lacked a legitimate interest in increasing the supply of affordable housing. Rather, citing *Nollan*, it argued that the ordinance constituted an impermissible means of advancing that interest, because it placed a burden of paying for low-income housing on non-residential development without establishing a sufficient nexus between such development and the need for the affordable housing. *Id.* at 873. The court was not persuaded, however. Refusing to require a direct causal relationship,⁸ it held that *Nollan* did not materially change the level of scrutiny here. And because the ordinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed, this nexus was sufficient to pass constitutional muster. [*Id.* at 874-75].

Despite the increasing prevalence of various kinds of inclusionary housing programs, the above decisions represented the world of case law on this point for some time. While some questions had been answered, no case had faced the issue of how *Nollan* and *Dolan* affected the constitutional analysis. Then, in June 2001, a California appellate court in *Napa* made clear that inclusionary housing ordinances could withstand a facial constitutional challenge.

Napa’s Inclusionary Housing Ordinance

In an effort to address escalating problems resulting from a lack of affordable housing within the City of Napa and surrounding areas, the city enacted an inclusionary housing ordinance.⁹ The primary mandate imposed was a require-

7. The ordinance at issue created an affordable housing trust fund and imposed a mandatory development fee on all new commercial and residential development as a condition for receiving a certificate of occupancy. *Id.* at 281.

8. This case took place prior to the *Dolan* decision; therefore, the court did not have to face the question of “how close a fit” is required.

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ment that ten percent of all newly constructed units be “affordable,” as that term was defined in the ordinance.

The ordinance also offered developers two alternative means of compliance. First, developers of single-family homes could, at their option, satisfy the inclusionary requirements through an “alternative equivalent proposal,” such as the dedication of land or the construction of affordable units on another site. Developers of multi-family units also could satisfy the ten percent requirement through a similar mechanism, but only if the city council determined that the proposed alternative would result in affordable housing opportunities equal to or greater than those created by the basic inclusionary requirement.

WHILE ACKNOWLEDGING THAT THE ORDINANCE IMPOSES SIGNIFICANT BURDENS ON DEVELOPERS, THE COURT FOUND RELEVANT THAT IT ALSO PROVIDES BENEFITS TO THOSE COMPLYING WITH ITS TERMS. . . . THE ORDINANCE CONTAINED AN ADMINISTRATIVE RELIEF CLAUSE, ALLOWING FOR A COMPLETE WAIVER OF ITS REQUIREMENTS.

—CITY OF NAPA [90 CAL.APP.4TH AT 194]

As a second alternative, a residential developer could choose to satisfy the inclusionary requirement through payment of an “in-lieu” fee. Developers of single-family units could choose this option by right, while developers of multi-family units were permitted this option only if the city council approved. All fees generated were required to be deposited into a housing trust fund, and could be used only to increase and improve the supply of affordable housing in Napa.

The ordinance also contained an administrative relief clause, permitting city officials to reduce, modify, or waive the requirements contained in the ordinance “based upon the absence of any reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement.” [Napa Mun. Code § 15.94.080]

In September 1999, the Home Builders Association of Northern California (HBA), an association of professionals involved in the residential construction industry, sued the City of Napa, contending that the ordinance was facially invalid because it was an impermissible taking under both state and federal law, and violated the Due Process Clause of the U.S. Constitution. After the trial court entered judgment in favor of the city, HBA appealed. In ruling for the city, the Ninth Circuit court affirmed the trial court’s decision and upheld the ordinance against the facial constitutional challenges.

9. See generally Napa Municipal Code, § 15.94.

With respect to the takings claim, while acknowledging that the ordinance imposes significant burdens on developers, the court found relevant that it also provides benefits to those complying with its terms. [90 Cal.App.4th at 194]. Moreover, the court found dispositive the fact that the ordinance contained an administrative relief clause, allowing for a complete waiver of its requirements. “Since City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking.”¹⁰

Further, because the ordinance substantially advanced a legitimate state interest, it did not result in a taking. First, the court noted that both the California Supreme Court and the state legislature had recognized that creating affordable housing for low- and moderate-income families was a legitimate governmental purpose. [90 Cal.App.4th at 195]. Second, the court stated that it was “beyond question” that the city’s ordinance would substantially advance this important governmental interest. “By requiring developers in City to create a modest amount of affordable housing (or comply with one of the alternatives) the ordinance will necessarily increase the supply of affordable housing.” *Id.* at 195-96.

HBA’s principal constitutional claim was that the city’s ordinance was invalid under the heightened scrutiny standard required by *Nollan* and *Dolan*. HBA contended that there was no “essential nexus” or “rough proportionality” between the exaction required by the ordinance, and the impacts caused by development of property.

The court rejected this argument, however, holding that *Nollan* and *Dolan* were inapplicable to the facts of this case. The court stated that the standard of judicial scrutiny formulated by the U.S. Supreme Court in *Nollan* and *Dolan* was intended to address land-use “bargains” between property owners and regulatory bodies—those in which the local government imposes project-specific conditions on approved future land uses to purportedly offset the impact of the proposed development. “It is in this paradigmatic permit context—where the individual property owner-developer seeks to negotiate approval of a planned development—that the combined *Nollan* and *Dolan* test quintessentially applies.” [90 Cal.App. 4th at 196-197, quoting *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 868 (1996), 48 ZD 183]. The court held that since the ordinance was generally applicable to all development in Napa, the more deferential standard of scrutiny applied “because the heightened risk of the ‘extortionate’ use of the police power to exact unconstitutional conditions is not present.” *Id.* at 197.

The court also rejected HBA’s due process challenge. In so doing, it stated that such a claim is tenable only if the regulation will not permit those who administer it to avoid an unconstitutional application of its terms. If such provi-

10. The court also rejected HBA’s argument that the waiver provision violated *Dolan* by improperly placing the burden on the developer to prove that a waiver would be appropriate when the city had not established a justification for exactions mandated by the ordinance. The court emphasized that the burden shifting under *Dolan* does not apply when evaluating generally applicable zoning regulations.

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sions exist to allow for the exercise of discretion by the authorities, the court must presume that those implementing the regulations will exercise their authority in conformity with the Constitution. Thus, when an ordinance contains provisions that allow for administrative relief, a claim of facial constitutional invalidity must fail. *Id.* at 199.

Here, the city's ordinance contained exactly the type of opportunities for administrative relief that preclude an assumption that the ordinance will be unconstitutionally applied. Because it included a provision that gave the city the authority to completely waive the developer's obligations in the absence of any reasonable relationship between a project's impacts and the ordinance's affordable housing requirements, the court held that it must presume that the city would, in fact, exercise that authority in such a way as to avoid unconstitutional application of the ordinance. In the event the city subsequently applied the ordinance in violation of a particular individual's constitutional rights, the applicant's recourse at that time would be to bring an as-applied challenge.

THE FUTURE OF INCLUSIONARY HOUSING ORDINANCES

The *Napa* court's sound rejection of HBA's arguments reaffirms the continuing viability of inclusionary housing ordinances when confronted with facial takings and due process challenges. Moreover, it creates a framework within which

city and county legislatures can formulate additional new and creative means of addressing the affordable housing issue, as well as ensuring that their current ordinances can withstand constitutional attack. Inclusionary housing ordinances, such as in *Napa*, are legislative acts entitled to deference from the courts. Therefore, the challenger bears the heavy burden to establish that the law is arbitrary or capricious. If a locality has properly adhered to all procedural requirements in enacting an inclusionary housing ordinance, it will likely pass constitutional muster.

There are several ways to enhance the legal defensibility of such ordinances. First, establish clear policy bases for the ordinance, which are supported by a well-developed factual record. Second, adopt generally applicable rather than ad hoc requirements.¹¹ Third, provide benefits to the developer such as density bonuses, expedited processing, fee deferrals, and loans or grants. And finally, consider providing some flexibility by including an administrative relief provision.¹² Although this type of provision is not necessary to uphold an inclusionary ordinance, it lends further support for the argument that the requirements do not constitute an impermissible taking.

11. See Thomas Jacobson, Inclusionary Housing Requirements: An Overview, American Planning Association, National Conference, April 2002.

12. *Ibid.*