

## Calif. Supreme Court Upholds Local Affordable Housing Laws

By **Beth Winegarner**

*Law360, San Francisco (June 15, 2015, 6:28 PM ET)* -- California cities that require developers to include affordable housing in multi-unit projects are not violating the takings clause of the state constitution, the California Supreme Court ruled Monday in the California Building Industry Association's challenge to a San Jose inclusionary housing law.

The ruling validates similar laws currently on the books in 170 cities across California, which many have adopted in response to the state's affordable housing requirements. San Jose requires developers that build or renovate 20 or more housing units to make at least 15 percent of them affordable — or pay an in-lieu fee to the city. The CBIA sued after that ordinance was adopted in 2010, arguing the law was an illegal exaction under the California Constitution's takings clause.

The state's high court disagreed, affirming a California appeals court decision finding that inclusionary housing laws like San Jose's fall within a city's right to regulate the use of land through broad police powers.

In San Jose's case, the California Supreme Court found that "there is no exaction — the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process," according to the ruling.

San Jose's affordable housing law doesn't require a developer to dedicate any portion of its property to the public or pay any money to the public, according to the ruling. Instead, it places restrictions on the way a developer may use its property by limiting the prices for which some of the residential units are offered, the high court said, comparing it to the way cities are allowed to zone areas for commercial or residential development.

Although the court acknowledged that any land use regulation, including affordable housing laws, might diminish a property's market value, it said that such laws don't constitute a "taking" of the diminished value of the property.

Melissa Morris of the Public Interest Law Firm, representing intervenor Affordable Housing Network of Santa Clara County, said she's thrilled with the ruling and the fact that the state's high court has upheld the ability of local governments to adopt inclusionary housing policies.

Tony Francois, a senior staff attorney with Pacific Legal Foundation, which represented CBIA in the suit,

said the high court's ruling was a disappointment — particularly from the standpoint of those who want to build or buy housing in California.

“The ruling allows government to impose financial penalties on providers of new housing — a penalty that can only deter efforts to ease the state's housing shortage and make it even harder and costlier for average families to afford a home in California,” Francois said in a statement.

Damien M. Schiff of Alston & Bird LLP, former counsel for CBIA, criticized the California Supreme Court for misunderstanding the law on exactions.

“The key question is whether San Jose's ordinance is a conditional exercise of the land-use power, which of course it is,” Schiff told Law360. “If so, then the U.S. Supreme Court has made crystal-clear that a regime like San Jose's creates a great risk of governmental extortion of property rights and therefore deserves heightened, rather than perfunctory, judicial scrutiny.”

Edgar Khalatian, a Mayer Brown attorney who specializes in land use entitlements and compliance with the California Environmental Quality Act, said the ruling will ultimately make it easier for California cities facing housing shortages to require developers to either provide low-income housing or pay in-lieu fees.

Many developers and property owners don't want to create affordable housing because they wind up losing money on those units, Khalatian said.

“Inclusionary housing ordinances need to be drafted to ... ensure property owners continue to develop much needed market-rate housing, which will in turn increase the number of affordable units and reduce the cost of housing and ... provide sufficient incentives to a property owner to spread the cost of building affordable housing, such as density bonuses, fee reductions and expedited processing at the city level,” he said.

Khalatian, who also serves on the Los Angeles zoning committee, said that cities should think about adopting affordable housing laws that are flexible and not overly burdensome. Otherwise, property owners will drive up the costs of market-rate housing to offset the cost of low-income units, which ultimately winds up hurting the middle class, he said.

The CBIA is represented by Sheppard Mullin Richter & Hampton LLP, David P. Lanferman of Rutan & Tucker, and Anthony L. Francois and others at the Pacific Legal Foundation.

San Jose is represented by Margo Laskowska in the San Jose City Attorney's Office and Thomas P. Murphy and Andrew L. Faber of Berliner Cohen.

The case is California Building Association vs. City of San Jose, case number S212072, in the California Supreme Court.

--Editing by Philip Shea.