

INCLUSIONARY HOUSING—

- CRITICAL REGIONAL PLANNING TOOL
- STILL in LEGAL LIMBO?



Key to:

- *Regional Integration*
- *Combatting Gentrification*
- *Furthering Fair Housing*

Legal Update:

- *CBIA v. San Jose Victory!*
- *U.S. Supreme Ct?*

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WHY INCLUSIONARY?

- Equal Opportunity....Location, location, location..
 - Access to “Areas of Opportunity”—
 - Schools, Jobs, Health Care, Transportation
- Land Use a Key Instrument of Exclusion
 - Citadels of Prejudice, Segregation & Inequality
- Financial Opportunity—Leverage Private Capital
 - Land Value Recapture – Nico
 - The Only Way to Keep Up
- Combat Gentrification & Displacement

New Opportunities to Win IZ

- **AFFH Rule Requires Actions That:**
 - Overcome Patterns of Segregation
 - Foster Inclusive Communities

[24 CFR 5.150, .152, .154]
- **The Assessment of Fair Housing (AFH) Must:**
 - Analyze Factors to Limiting Access to Opportunity
 - Include Actions to Open Access to Opp.
 - Include Anti-Displacement Plan

[24 CFR 91.105(b)(1)(i) (& .115)]
- **Department of Transportation Funds for TOD**
 - DOT Must Do Title VI “Equity Analysis”
 - Regs Recognize IZ as a Tool

TWO REMAINING LEGAL ISSUES

- Takings Challenge & Rent Control Preemption

1st - IS IZ AN “EXACTION”—A “TAKING”?

- Does It Require A Dedication of Property as a Condition?
 - Land, Easement or Money
- And Therefore: Must IZ Be Proportional to:
Need for Affordable Housing Created by Market Rate Housing?
- California Supreme Court Says “NO”
[CBIA v. San Jose, 61 Cal. 4th 435 (2015)]
- – BUT : U.S. Supremes??

CBIA v. City Of San Jose: **IZ Not An “Exaction”**

61 Cal. 4th 435 (2015)

- **Iz Is A Land Use Regulation**

- “Police Power, to regulate the development and use of real property to promote the public welfare”

- **Iz Not A “Conveyance” Of Property**

- A land use regulation that merely restricts the use of property by limiting the price of some units.

- **Iz Does Not Require A “Nexus Study”**

- *Nollan/Dolan* Proportional Impact Nexus Not Required
- CBIA Argued: IZ valid only if need for affordable housing “was caused by or attributed to” the impact of new housing

CBIA Court Endorses San Jose's Public Purposes For IZ

- Meet “Current and future needs”
- Meet regional needs under Housing Element Law
- Ensure affordable housing “distributed throughout the city”
- “Benefits...from economically diverse communities”
- “Avoid the problems... associated with isolated low income housing.”

Other Legitimate Purposes (& One Cautionary Note)

- **AFFH:**
 - Promote Integration/ Reduce Segregation
- **Provide Workforce Housing**
- **Reduce Greenhouse Gas Emissions**
- **CAUTION:** *Sterling Park v. Palo Alto:*
 - *Granting 1st Right of Refusal to City is an Interest in Property for Purposes of the Mitigation Fee Act Statute of Limitations*

In-lieu Fees & Other Options Permissible

- Amount Must Be Related Only to Cost of IZ Units
 - NOT Just Housing Need Created by Housing
- Because IZ is not an Exaction/Takings:
 - “the voluntary off-site options and in lieu fee ...—does not impose an unconstitutional condition in violation of the takings clause.”

CBIA v. San Jose Goes To Washington?

- Filed “*Petition for Certiorari*” Sept. 15
- CBIA’s Question To the Court:
 - Is an IZ Ordinance an “Unconstitutional Condition”?
 - *i.e.* – Is IZ and Exaction? – a Taking of Property?
- We Filed Response 12-4 – Decision by 1/31?

PALMER v. L.A.— **The Fix is Not In—Yet**

2nd Issue – Rent Control Preemption

- *EG. CA (Palmer), CO (Telluride), WI (Apt Ass'n)*
- California – AB 1229 (2013) Overturning Palmer—
 - Vetoed By Brown
 - Next Yr? Depends in Part on *CBIA v. San Jose*

OTHER APPROACHES & ALTERNATIVES

- Impact Fees (Cautious Approach)
 - Based on Nexus Study? Some CA cities
 - For Rentals In States w/ Rental Control Preemption
- Affordable Housing Fee (“Boulder” Approach)
 - Based IZ percentage & Gap Financing
- Off-Site Ownership—Boulder
 - Fee *OR* Off-Site *if* Converted to Ownership w/ 5 yrs
- Voluntary Overlay *or* Super Density Bonus:
 - IZ If Density Bonus, \$\$ or Other Incentives Elected

OPPORTUNITY FOR NEW FRAMING

LAND VALUE RECAPTURE– See Nico

CRITICAL TO TURNING POLITICAL DEBATE IN U.S.

- “Ask not what developers have done for us,
Ask what we have done for developers....”
- Inclusionary attacked as “Exaction” on Private Investment
- Massive Public Investment Windfall Ignored
- The Many Legit Public Purposes Served by IZ Ignored

TURN FOCUS TO The PUBLIC GIFT TO DEVELOPERS