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INCLUSIONARY HOUSING PROGRAMS: LOCAL GOVERNMENTS RESPOND TO CALIFORNIA'S HOUSING CRISIS

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Abstract: As anti-growth sentiment increases across the country, two laudable goals—affordable housing and environmental protection—are coming into conflict. This tension is most evident in California. Nine of the ten least affordable communities in the country are in California. California also has one of the most complicated and expensive environmental regulatory processes for development. This results in builders being unable to produce housing to keep up with demand, and an increase in the cost of those units that are available. "Smart Growth" is often proffered as the answer to this dilemma: by promoting more compact development, mixed-use and mixed-income neighborhoods, and creating jobs near housing and transportation, housing production will be available to meet the demand at affordable costs. While these principles may serve as a valuable planning guide, they are not a panacea. In this respect, local governments have used inclusionary housing programs as one tool to respond to this escalation of housing costs and probably will continue to do so.

INTRODUCTION

As anti-growth sentiment escalates throughout this nation, two laudable goals—affordable housing and environmental protection—are being pitted against each other. Nowhere is this tension more evident than in California. Home to nine of the ten least affordable communities in the entire country, California also has one of the most complicated and expensive environmental regulatory processes for development.[1] This results in a fundamental problem of supply

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[1] *See* LITTLE HOOVER COMM'N, REBUILDING THE DREAM: SOLVING CALIFORNIA'S AFFORDABLE HOUSING CRISIS 4, 9 (2002). The Little Hoover Commission was directed to explore "how public policies could be reformed to fortify the State's ability to provide an

and demand: the less housing builders are able to produce, the higher the cost for the available units. This imbalance affects every Californian, with housing prices continuing to soar.[2] It is those with household incomes at the lowest end of the economic spectrum, however, who feel the impact the most.[3]

In the past decade, housing production in California has lagged behind population and job growth.[4] According to the Little Hoover Commission, "between 1990 and 1997, annual production of housing as measured by statewide residential building permits averaged a mere 91,000 units."[5] Moreover, "in 1999, when national housing production was high, less than 140,000 residential permits were issued in California."[6] The year 2000 marked the eleventh consecutive year that housing production in the state failed to keep up with demand.[7]

The Little Hoover Commission reports:

> This housing shortage will become even more pronounced as the state's population continues to grow. The 2000 Census found just under thirty-four million people living in California, a 13.6 percent increase from 1990. The California Department of Finance projects growth will continue through the next twenty years, resulting in 40 million residents by 2010 and 45.5 million residents by 2020. These population figures translate into an additional 3 million households by 2010 and over 5 million additional households by 2020.[8]

An average of 220,000 housing units must be built each year between now and 2020 to accommodate this projected growth.[9] If current housing production trends continue, then California will build

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adequate supply of affordable housing for the growing number of young families, newcomers, seniors and other Californians with low incomes. *Id.* at i.

[2] *See id.* at 10 (noting that housing costs have risen for the last twenty-five years).

[3] *See id.* at 4–5. The State's Little Hoover Commission has made clear that providing housing, especially affordable housing, is crucial to the well-being of every Californian and the state as a whole. *See id.* at 3. In its recent report, the Commission recommended that in order for the private sector to supply an adequate housing stock at all income levels, "local governments must adopt land use plans and regulatory schemes that provide opportunities for housing development and eliminate unnecessary constraints." *Id.* at iv.

[4] *Id.* at 3.

[5] *Id.* at 3–4.

[6] *Id.* at 4.

[7] *See* LITTLE HOOVER COMM'N, *supra* note 1, at 3.

[8] *Id.*

[9] *Id.*

less than sixty percent of the new housing units required to meet the projected 1997–2020 demand.[10]

This lack of adequate supply results in escalating housing prices, making home ownership out of reach for many. "Less than 56 percent of Californians own homes, compared to a national average of 67 percent."[11] The impact of this housing shortage is often felt most profoundly by those households with low incomes. Affordable housing is generally defined as housing that costs less than or equal to thirty percent of a household's income.[12] Yet, "[a]mong low-income renters, about two-thirds pay more than half of their income for housing and 91 percent pay more than the recommended 30 percent."[13]

Faced with this crisis, there is growing consensus among local governments, citizen groups, planners, developers, and housing advocates that providing sufficient housing, particularly affordable housing, is a priority.[14] Local governments, confronted with significant opposition to proposed residential projects because of environmental concerns, are placed in the untenable position of trying to reconcile these competing objectives.[15] "Smart Growth" is often proffered as the answer to this dilemma. By promoting more compact development, mixed-use, and mixed-income neighborhoods, and creating jobs near housing and transportation, advocates of Smart Growth contend that housing will be available to meet the demand at affordable costs. Although these principles may serve as a valuable planning guide, they are not a panacea.[16] Wherever there is development, there will be im-

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[10] *See* CAL. DEP'T OF HOUS. & CMTY. DEV., RAISING THE ROOF: CALIFORNIA HOUSING DEVELOPMENT PROJECTIONS AND CONSTRAINTS 1997–2020 (2000), http://housing.hcd.ca.gov/hpd/hrc/rtr/intlr.htm (last visited Mar. 31, 2003).

[11] *See* LITTLE HOOVER COMM'N, *supra* note 1, at 4.

[12] *See id.*

[13] *Id.*

[14] *See id.* at 63–67 (listing various government, business, and community members testifying at the Little Hoover Commission's hearing on the need to ensure an adequate supply of housing).

[15] *See id.* at ii.

[16] The reality that Smart Growth principles must include the goal of increasing housing production was emphasized in a recent report by the California Association of Bay Area Governments (ABAG). In October 2002, ABAG issued its Final Report on projected growth in the Bay Area, presenting a comprehensive, region-wide Smart Growth land use vision. ASS'N OF BAY AREA GOV'TS, SMART GROWTH STRATEGY—REGIONAL LIVABILITY FOOTPRINT PROJECT FINAL REPORT: SHAPING THE FUTURE OF THE NINE-COUNTY BAY AREA (2002), http://www.abag.ca.gov/planning/smartgrowth/Final/SmartGrowthRpt_final.pdf (last visited Mar. 31, 2003). The Final Report focuses on three "key goals" of sustainability: a prosperous economy, a quality environment, and social equity. *Id.* at 3. It identifies the

pacts, environmental and otherwise; efforts to reduce these impacts will result in a restraint on housing production. Thus, housing prices can be expected to continue to escalate.

I. Inclusionary Housing Programs

One tool that local governments have used, and presumably will continue to use, to respond to this escalation of housing costs is the development of inclusionary housing programs. These programs may serve to encourage development in general, and affordable housing in particular, by fostering the development of mixed-income, diverse, and integrated communities.[17] Inclusionary housing programs[18] 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 to combat exclusionary zoning practices.[19] In general, localities enact such programs pursuant to

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housing shortage as a major impediment to economic growth and advocates more planning for and construction of residential units. *See id.* at 4.

[17] *See, e.g.*, Little Hoover Comm'n, *supra* note 1, at 20–28 (recommending implementation of an inclusionary housing plan). These programs impose affordable housing requirements on developers, and thus arguably serve as a disincentive to build. Many inclusionary housing programs, however provide benefits to the developer as well, such as density bonuses, expedited processing, fee deferrals, and loans or grants. Moreover, the inclusion of an affordable housing component may make approval of the entire project more politically feasible.

[18] In general, an "inclusionary housing program" is one that requires a residential developer to set aside a specified percentage of new units (often ten to fifteen percent) for very low-, low-, or moderate-income households in conjunction with the development of market-rate units. *See* Laura M. Padilla, *Reflections on Inclusionary Housing and a Renewed Look at Its Viability*, 23 Hofstra L. Rev. 539, 551–52 (1995). The term "inclusionary housing" or "inclusionary zoning," however, can include a variety of methods designed to create more affordable housing. *See id.* Some examples include density bonuses, reduced development standards, and imposition of fees on developers to fund affordable housing projects. *See id.* at 553.

[19] In California, by 2000, at least 108 cities and thirteen 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 Cal. L. Rev. 1847, 1861–62 (2001). Moreover, examples of creative inclusionary housing programs can also be found across the nation, in Colorado, Florida, Maryland, Massachusetts, New Jersey, New Mexico, and Virginia. *See* D.C. Office of Planning, Inclusionary Zoning, A Primer 7–8 (2002); Innovative Hous. Inst., Inclusionary Zoning Around the Country (2000), http://www.inhousing.org/USA%20Inclusionary/USA%20Inclusion.htm (last visited Mar. 31, 2003); *see also* Karen Destoral Brown, *Expanding Affordable Housing Through Inclusionary Zoning: Lessons From the Washington Metropolitan Area*, The Discussion Paper Series (Brookings Inst. Ctr. on Urban & Metro. Policy, Washington, D.C.), Oct. 2001, at 34–35. Finally, the inclusionary housing philosophy is also finding support internationally. *See generally, e.g.*, *In re* Article 26 of the Constitution & *In re* Part V of the Planning & Dev. Bill 1999, [2000] 2 I.R. 321 (Ir. S.C.) (Aug. 28, 2000) (unanimously upholding a national

their local police power, and are "typically effectuated through inclusionary housing ordinances, in zoning codes, policy statements, or a jurisdiction's housing element."[20]

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.[21]

Overall, such efforts have not been successful. Indeed, most of the few published decisions have upheld inclusionary housing programs.[22] 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 United States Supreme Court in *Nollan v. California Coastal Commission*[23] and *Dolan v. City of Tigard*.[24] Recently, a California appellate court squarely addressed this issue, and upheld yet another inclusionary housing program. In *Home Builders Ass'n of Northern California v. City of Napa*,[25] 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.

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twenty 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 twenty percent of the land for affordable housing or provides several sites or houses actually built for such purposes).

[20] *See* Padilla, *supra* note 18, at 551.

[21] *See id.* at 577–78.

[22] *But see* Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 33, 35–36 (Colo. 2000) (holding that the town's "affordable housing mitigation" ordinance, which required developers to create affordable housing for forty 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); Bd. of Supervisors v. DeGroff Enters., 198 S.E.2d 600, 602 (Va. 1973) (holding that a mandatory set-aside provision was invalid under state law as well as an improper socioeconomic regulation).

[23] 483 U.S. 825, 840–41 (1987).

[24] 512 U.S. 374, 391 (1994).

[25] 108 Cal. Rptr. 2d 60, 65–66 (Ct. App. 2001), *cert. denied*, 535 U.S. 954 (2002); *see also* San Remo Hotel L.P. v. City of San Francisco, 41 P.3d 87, 106 (Cal. 2002) (declining to extend heightened scrutiny to "housing replacement fees").

II. Judicial Treatment of Inclusionary Housing Programs

A. *In the Era Before* Nollan *and* Dolan

There are few published decisions considering the legality of inclusionary housing programs. A court first addressed the issue in *Board of Supervisors v. DeGroff Enterprises*.[26] 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 fifteen percent of multifamily units be affordable.[27] The court overturned the statute on the grounds that the ordinance exceeded the locality's police power, as well as constituted a taking under the Virginia State Constitution.[28]

Subsequent cases, however, have not followed suit. The seminal case of *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel I)* was the first decision explicitly to recognize the importance of inclusionary housing programs as a means to combat exclusionary zoning practices.[29] In *Mount 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.[30] The New Jersey Supreme Court found this exclusionary zoning ordinance unconstitutional, holding that it violated basic principles of fairness.[31] 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.[32]

In a later decision, *Mount Laurel II*, the New Jersey Supreme Court made clear that it would not back away from this position.[33]

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[26] 198 S.E.2d at 601–02.

[27] *Id.*

[28] *Id.* at 602.

[29] 336 A.2d 713, 728 (N.J. 1983).

[30] 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 719–21.

[31] *See id.* at 730–32.

[32] *See id.* at 724–25.

[33] S. Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390, 410 (N.J. 1983) (stating that "we believe that there is widespread non-compliance with the constitutional mandate of our original opinion . . . . To the best of our ability, we shall not allow it to continue. This court is more firmly committed to the original *Mount Laurel* doctrine than ever . . . .").

Rather, it extended this obligation to *all* municipalities, and advocated mandatory set-aside programs as one way for localities to fulfill their *Mount Laurel* obligations.[34] The court 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 any, of that condition."[35]

Several years later, the question arose whether the imposition of fees (to be dedicated to an affordable housing trust fund) on developers as a condition of approval 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 Ass'n v. Township of Holmdel* found the requirement permissible under state law.[36] The court did not directly reach the question whether the ordinance was unconstitutional.[37] Nevertheless, the court emphasized that such arguments, with respect to a facial challenge, lacked merit.[38]

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*, the court held that an ordinance conditioning certain types of nonresidential building permits upon the payment of a fee dedicated to an affordable housing trust fund did not amount to an unconstitutional taking.[39] The plaintiff, Commercial Builders, did not argue that Sacramento lacked a legitimate interest in increasing the supply of affordable housing.[40] Rather, citing *Nollan*, Commercial Builders argued that the ordinance constituted an impermissible means of advancing that interest, because it placed a burden of paying for low-income housing on nonresidential development without establishing a sufficient nexus between such development and the need for affordable housing.[41]

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[34] *Id.* at 443.

[35] *Id.* at 446 n.30.

[36] 583 A.2d 277, 295 (N.J. 1990). The ordinance at issue "create[d] an affordable housing trust fund and impose[d] a mandatory development fee on all new commercial and residential development as a condition for receiving a certificate of occupancy." *Id.* at 281.

[37] *Id.*

[38] *Id.* at 292.

[39] 941 F.2d 872, 873 (9th Cir. 1991).

[40] *Id.*

[41] *Id.*

The court, however, was not persuaded. Refusing to require a direct causal relationship,[42] it held that *Nollan* did not materially change the level of scrutiny in the case.[43] Further, 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.[44]

Most recently, the New Jersey Supreme Court case of *Toll Bros. v. Township of West Windsor*,[45] emphasized the continued vitality of the *Mount Laurel I* and *II* decisions. This case was brought in the context of a developer seeking a builder's remedy[46] against a municipality for failing to adhere to its *Mount Laurel* obligations.[47] After conducting a site-by-site evaluation, the court found for the developer, holding that the township's ordinances, regulations, and policies prevented a realistic opportunity for development of affordable housing.[48]

B. *A Facial Constitutional Challenge in the Era After* Nollan *and* Dolan: Home Builders Ass'n of Northern California v. City of Napa

Despite the increasing prevalence of various kinds of inclusionary housing programs, the above decisions represented the world of caselaw on this point for some time. Although 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 *Home Builders Ass'n of Northern California v. City of Napa* made it clear that inclusionary housing ordinances could withstand a facial constitutional challenge.[49]

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[42] This case took place before the *Dolan* decision; therefore, the court did not have to face the question of "how close a fit" is required. *See* Dolan v. City of Tigard, 512 U.S. 374, 387–88 (1994).

[43] *Commercial Builders*, 941 F.2d at 874.

[44] *Id.* at 874–75.

[45] 803 A.2d 53, 92 (N.J. 2002).

[46] The New Jersey Supreme Court created a "builder's remedy" as a means of enforcing the affordable housing obligations under *Mount Laurel I* and *Mount Laurel II*. This remedy permits builders to seek court approval for construction of a housing project with an affordable housing component, which a township failed to approve. *See* Oakwood at Madison, Inc. v. Township of Madison, 371 A.2d 1192, 1200 (N.J. 1977).

[47] *Toll Bros.*, 803 A.2d at 76.

[48] *Id.* at 92.

[49] Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 63–64 (Ct. App. 2001), *cert. denied*, 535 U.S. 954 (2002).

1. Napa's Inclusionary Housing Ordinance

In an effort to address the escalating problems resulting from a lack of affordable housing within the City of Napa and surrounding areas, Napa enacted an inclusionary housing ordinance.[50] The primary mandate imposed was a requirement that ten percent of all newly constructed units be "affordable," as that term was defined in the ordinance.[51]

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 vacant land [or] the construction of affordable units on another site."[52] Developers of multifamily 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.[53]

As a second alternative, a residential developer could choose to satisfy the inclusionary requirement through payment of an "in-lieu-of" fee.[54] Developers of single-family units could choose this option by right, whereas developers of multifamily units were permitted this option only upon city council approval.[55] All in-lieu fees generated were required to be deposited in a housing trust fund. This fund then could be used by the City only for the purposes of increasing and improving affordable housing in Napa.[56]

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."[57]

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[50] *See generally* NAPA, CAL., MUN. CODE § 15.94 (1999).

[51] *See id.* § 15.94.050(A). "At least 10% of all new dwelling units in a residential development project shall be affordable units which shall be constructed and completed not later than the related market rate units." *Id.*

[52] *Id.* § 15.94.050(B).

[53] *Id.*

[54] *Id.*

[55] *Id.* § 15.94.050(C).

[56] *Id.* § 15.94.050(D).

[57] *Id.* § 15.94.080(A).

In September of 1999, the Home Builders Association of Northern California (HBA), an association of professionals in the residential construction industry, sued the City of Napa, contending that the ordinance was facially invalid because it: (1) was an impermissible taking under both state and federal law; and (2) violated the Due Process Clause of the United States Constitution.[58] After the trial court entered judgment in favor of Napa, HBA appealed.[59] In ruling for Napa, the court affirmed the trial court's decision and upheld the ordinance against the facial constitutional challenges.[60]

With respect to the takings claim, although acknowledging that the ordinance imposed significant burdens on developers, the court found relevant that it also provided benefits to those complying with its terms.[61] Moreover, the court found the fact that the ordinance contained an administrative relief clause, allowing for a complete waiver of its requirements, dispositive.[62] The court held that "[s]ince [the] 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."[63]

Further, because the ordinance substantially advanced a legitimate state interest, it did not result in a taking.[64] 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.[65] Second, the court stated that it was "beyond question" that the City's ordinance would substantially advance this important governmental interest.[66] The court reasoned that "[b]y requiring developers in [the] City to create a modest amount of affordable housing (or to comply with one

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[58] Home Builders Ass'n of N. Cal. v. City of Napa, 108 Cal. Rptr. 2d 60, 63 (Ct. App. 2001), *cert. denied*, 535 U.S. 954 (2002).

[59] *Id.* at 61.

[60] *Id.* at 63–67.

[61] *Id.* at 64.

[62] *Id.*

[63] *Id.* 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 ha[d] not established a justification for the exactions mandated by the ordinance." *Id.* The court emphasized that the burden shifting under *Dolan* does not apply when evaluating generally applicable zoning regulations. *Id.*

[64] *City of Napa*, 108 Cal. Rptr. 2d at 64–65.

[65] *Id.* at 64.

[66] *Id.* at 65.

of the alternatives) the ordinance will necessarily increase the supply of affordable housing."[67]

HBA's principal constitutional claim was that the City's ordinance was invalid under the heightened scrutiny standard required by *Nollan* and *Dolan*.[68] 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 the property.[69]

The court rejected this argument, however, holding that *Nollan* and *Dolan* were inapplicable to the facts of this case.[70] 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, in which the local government imposes project-specific conditions on approved future land uses purportedly to offset the impact of the proposed development.[71] The *City of Napa* court noted, "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."[72] The court held that because 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."[73]

The court also rejected HBA's due process challenge.[74] 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.[75] If such provisions exist to allow for the exercise of discretion by the authorities, the court must presume that those

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[67] *Id.*; *see also* San Remo Hotel L.P. v. City of San Francisco, 41 P.3d 87, 107 (Cal. 2002) (upholding San Francisco's Residential Hotel Unit Conversion and Demolition Ordinance). The *San Remo* court found that the housing replacement fees have a reasonable relationship to housing lost by conversion to tourist use, making clear that generally applicable ordinances must be reviewed under the deferential standard rather than the heightened scrutiny standard under *Nollan*, *Dolan*, and *Ehrlich v. City of Culver City*, 911 P.2d 429 (Cal. 1996). *San Remo*, 41 P.3d at 103, 105–07.

[68] *City of Napa*, 108 Cal. Rptr. 2d at 64.

[69] *Id.* at 65.

[70] *Id.*

[71] *Id.*

[72] *Id.* (quoting *Ehrlich*, 911 P.2d at 438).

[73] *Id.* (quoting Santa Monica Beach Ltd. v. Superior Court, 968 P.2d 993, 1002 (Cal. 1999) (quoting *Ehrlich*, 911 P.2d at 444)).

[74] *City of Napa*, 108 Cal. Rptr. 2d at 65.

[75] *Id.*

implementing the regulations will exercise their authority in conformity with the Constitution.[76] Thus, "when an ordinance contains provisions that allow for administrative relief," a claim of facial constitutional invalidity must fail.[77]

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.[78] Because it included a provision that gave the City the authority to waive the developer's obligations completely 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.[79] In the event that 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 California Court of Appeal's sound rejection of HBA's arguments in *Home Builders Ass'n of Northern California v. City of Napa* 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 new and creative means of addressing the affordable housing issue, as well as ensuring that their current ordinances can withstand constitutional challenge.

Inclusionary housing ordinances, such as those in *City of Napa*, are legislative acts entitled to deference from the courts. Therefore, the challenger bears a 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. Third, provide

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[76] *Id.*
[77] *Id.*
[78] *See id.*
[79] *See id.*

some flexibility. In particular, including an administrative relief provision will go far in establishing the constitutionality of the ordinance.[80] Finally, providing benefits to the developer, such as density bonuses, expedited processing, fee deferrals, and loans or grants, elicits compliance while also providing further support for the argument that the requirements do not constitute an impermissible taking.[81]

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[80] *See* Thomas Jacobson, Inclusionary Housing Requirements: An Overview, Presentation at the American Planning Association National Conference 2 (Apr. 14–17, 2002) (on file with authors).

[81] *See generally* INST. FOR LOCAL SELF GOV'T, THE CALIFORNIA INCLUSIONARY HOUSING READER (2003), *at* www.ilsg.org/inclusionary (providing information regarding inclusionary housing ordinances).