DIRT Periodic Development for Thursday, October 3, 2013
California Bldg. Indus. Ass'n v. City of San Jose

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California Bldg. Indus. Ass'n v. City of San Jose (2013) 216 CA4th 1373

The California Supreme Court recently agreed to hear a case out of San Jose regarding the validity of its affordable housing fee, which the trial court had found to be invalid for lack of linkage, but which the court of appeals had upheld as a proper police power act. David Callies, of U Hawaii, wrote a rather critical comment of the court of appeals decision, which we then updated after the US Supremes decided the Koontz case on Nollen/Dolan takings which looked awfully similar. It is from the CEB Real Property Law Reporter, 36 Real Property Law Reporter 85 (Cal CEB July 2013):

Proper standard of judicial review of housing ordinance is whether it is reasonably related to city's legitimate public purpose of ensuring adequate supply of affordable housing.

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City's "inclusionary housing ordinance" required developers to construct affordable housing at a specified percentage or pay an in lieu fee. Petitioners challenged the ordinance in an action for declaratory and injunctive relief, claiming City had adopted the ordinance without having shown a "reasonable relationship between affordable housing exactions and demonstrable impacts of new development." The trial court granted the requested relief, applying a standard based on a takings claim under Cal Const art I, §19, and holding that the amount of the fees to be paid had to "bear a reasonable relationship to the deleterious public impact of the development."

The court of appeals reversed and remanded, ruling that the takings standard of review used by the trial court was "inapposite." The correct standard to be applied in determining the ordinance's validity relates to City's police powers under Cal Const art XI, §7. The court of appeals held that a land use ordinance such as the one here is a "valid exercise of the police power if it bears a reasonable relationship to the public welfare." Courts give substantial deference to land use ordinances that are challenged as exceeding the municipality's police powers. As such, in reviewing a local government's legislative function, a court can invalidate an ordinance only if the action is "arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair." The court remanded the matter to be reviewed under the proper standard to determine whether the ordinance is "reasonably related to the City's

legitimate public purpose of ensuring an adequate supply of affordable housing to the community."

THE EDITOR'S TAKE: I would not want to be the trial judge taking this matter back after appellate remand. Having previously concluded that he could find no reasonable relationship between an ordinance requiring residential developers to include affordable housing set-asides or pay in lieu fees and any deleterious public impact caused by such new residential development, he is now instructed by the appellate court that he was incorrect in looking for that kind of linkage. Instead, he should have asked whether the inclusionary requirements were reasonably related to the municipal interest in ensuring an adequate supply of affordable housing, period.

According to the decision, a judge is not to ask whether the demand on developers has any relationship to the needs created by new developments, but rather, whether a demand for affordable housing has any relationship to the need for affordable housing. If that is the only connection required, it is not going to be hard to find. Indeed, when would such a connection ever not exist? Has meaningful linkage just evaporated?

After I had finished my own brief remarks on this case, I sent them to David L. Callies, the Kudo Professor of Law at the University of Hawaii's William S. Richardson School of Law, who had co-authored with me a Midcourse Corrections column on this same problem (*Exactions or Extortions?*, 32 CEB RPLR 73 (May 2009)). Here is David's response:

In *California Bldg. Indus. Ass'n v. City of San Jose* (2013) 216 CA4th 1373, the court of appeals overturned the trial court, which had applied a nexus standard to strike down a mandatory affordable housing requirement imposed by the city on a residential development. According to the court of appeals, the standard is whether the housing set-aside requirement was justified under the general welfare clause of the city's police power - like a traditional zoning ordinance - not whether there was a nexus (reasonable relationship) between the housing requirement and any need or problem generated by the market-price housing development.

The court looked to California's Housing Accountability Act, which recognizes lack of housing as a critical problem and requires local government to address regional housing needs by implementing housing elements in a community general plan. This the city did by passing the challenged inclusionary housing ordinance, with "incentives" for affordable housing constructed on site and waivers if there was no reasonable relationship between the impact of the proposed residential development and the affordable housing set-asides required by the ordinance.

This case is at odds with another district's decision in *City of Patterson v. Building Indus. Ass'n* (2009) 171 CA4th 886, which could find no reasonable relationship between a large affordable housing mitigation fee and a market-price residential development,

and also arguably with the Ninth Circuit Court of Appeals decision in *Commercial Builders v. Sacramento* (9th Cir 1991) 941 F2d 872, reported at 14 CEB RPLR 308 (Nov. 1991), which found such set-asides valid for commercial developments (to house low-paid workers) but only after studies showing the need for workforce housing generated by the commercial development. Indeed, this case does not cite Commercial Builders at all.

However, the San Jose court is at pains to point out that the attack on the San Jose ordinance is facial, whereas the Patterson case was an as-applied attack, and the plaintiffs in San Jose particularly eschewed any regulatory takings claims. Thus, there may yet be a way to distinguish this decision, which otherwise so wrongly equates (1) a traditional land use regulation passed pursuant to the police power that restricts what a landowner may otherwise do with the subject property with (2) a mandatory set-aside of a percentage of workforce/affordable housing in a market-price residential development merely because a local plan element correctly identifies the lack of affordable housing as a local welfare issue. If that is the test - and the Patterson case correctly concludes that it is not - then it will be, as Roger suggests, virtually impossible to raise any defense to such affordable housing set-asides. Surely, this is the out-and-out extortion against which the U.S. Supreme Court railed in its landmark decision in *Nollan v. California Coastal Comm'n* (1987) 483 US 825, 107 S Ct 3141, reported at 10 CEB RPLR 138 (Aug. 1987). - David L. Callies

After David and I had completed our comments on this case, the United States Supreme Court, in *Koontz v. St. John's River Water Mgmt. Dist.* (2013) ___ US ___, 133 S Ct 2586, held 5-4 that "the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." As the majority saw the issue, otherwise "it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*"; accordingly, "so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." For the dissenters, that decision "extends that Takings Clause, with its notoriously 'difficult' and 'perplexing' standards, into the very heart of local land-use regulation and service delivery." Which horrible is more threatening will, hopefully, be covered in our next issue.

PS - I spoke to Dave Lanferman, of Rutan & Tucker in Palo Alto, who represents the CBIA in the San Jose case. He tells me his firm petitioned for a rehearing in that case several days before *Koontz* was decided - and is now filing a supplemental brief to include *Koontz* as additional ground for rehearing-because it sees the complete inconsistency between the police power logic in San Jose and the exaction principles of *Koontz*. - Roger Bernhardt