

Defending Inclusionary Housing Ordinances In Court

This description of cases involving inclusionary housing ordinances is created as a starting point for discussion purposes for the Panel on “Defending Legal Challenges” at the National Inclusionary Housing Conference in San Francisco on October 31, 2007. The cases will be referred to by the panelists in the presentation. These shorthand summaries are not comprehensive and, as with any general discussion of Law they is not a substitute for the advice of a lawyer.

Federal Cases

Agins v. City of Tiburon, 447 U.S. 255 (1980)

In *Agins*, the City of Tiburon adopted ordinances modifying existing zoning ordinances that allowed five units to be built without further land use approval and placed the owner’s property in a more restrictive residential planned development and open space zone. The modified zoning permitted single family homes, accessory buildings, and open space uses. Density restrictions would have permitted the property owners to build, with city approval, between one and five single family residences on their five-acre tract. The property owner never sought approval for development of their land under the zoning ordinance, deciding instead to file suit in state court alleging that the city’s action in adopting the ordinance amounted to a taking of their property in violation of the fifth and fourteenth amendments to the United States Constitution’s prohibition against government taking of property without just compensation. The owner contended that the city had “completely destroyed the value of their property for any purpose or use whatsoever. 447 US at 258

The United States Supreme Court rejected this argument. The Court stated that the application of a general zoning law to a particular property becomes a taking if the ordinance either:

- Does not substantially advance legitimate state interests. [or](#)
- Denies an owner economically viable use of his land. 447 U.S. at 260.

Since the city’s open space ordinances substantially advanced a legitimate governmental goal, that of discouraging premature and unnecessary conversion of open space to urban uses, and was a proper exercise of the city’s police power to protect its resident from the effects of urbanization, the Court held that no taking had occurred. The Court noted that although the ordinances limited development, “they neither prevent the best use of the land... nor extinguished a fundamental attribute of ownership.”

The first part of the Agins two pronged test was over ruled by the Supreme Court in Lingle v. Chevron USA, Inc. as discussed below.

Nollan v. California Coastal Commission, 483 U.S. 825 (1987).

In Nollan the California Coastal Commission approved the construction of a two-story beach front house, subject to the condition that the owner dedicate a public access easement across a portion of their property along the beach. The governmental interest purportedly justifying the dedication was facilitation of the public's viewing of the beach and assisting the public in overcoming a perceived "psychological barrier" to using the beach. The owner challenged the easement claiming that the condition violated the fifth and fourteenth amendments prohibition against taking private property for public use without just compensation.

The U.S. Supreme Court held that although protection of the public's ability to see the beach was a legitimate governmental interest, no nexus or connection existed between the identified impact of the project (obstruction of the ocean view) and the easement condition (physical access to the beach) Thus, the exaction constituted a taking of private property without just compensation. The Court did, however, state that requiring the dedication of a viewing spot on the Nollan property might have been legal since there was a nexus between that condition and the loss of public viewing of the beach.

One significant holding in the Nollan case is that exactions of the type described in *Nollan* are subject to a "heightened scrutiny" standard of review that greatly benefits the landowner. Some state courts have held that this standard does not extend to ordinances of general application ([e.g. a zoning ordinance](#)) but only to adjudicatory actions of regulatory bodies ([e.g. determination of whether to grant a permit for development](#)).

Dolan v. City of Tigard, 512 U.S. 374 (1994)

Property owner owned a plumbing business located in the business district of Tigard, Oregon along a creek, which flowed through the corner of the lot and along its western boundary. Dolan applied to the city for a building permit to further develop the site. Her proposed plans called for nearly doubling the size of the store and paving the 39-space parking lot. The planning commission granted Dolan's permit application subject to conditions imposed by Tigard's Community Development Code, which contained the city's Comprehensive Plan. The commission required that Dolan dedicate to the city the portion of her property lying within the 100 year flood plain for improvement of a storm drainage system and she was required to dedicate an additional 15-foot strip of land adjacent as a pedestrian/bicycle pathway. In support of these dedications, the commission made a series of findings concerning the relationship between the dedication conditions and the projected impacts of further developing on the Dolan property.

The United States Supreme Court held that the conditions imposed by the city did not meet the required nexus rule. In so doing, the Court established a two step process for evaluating taking claims. 512 U.S. at 386-87.

- First, the court must determine whether an “essential nexus” exists between the “legitimate state interest” and the permit condition exacted by the city.
- Second, if it finds that a nexus exists, a court then must decide whether the required degree of connection between the exactions and the projected impact of the proposed development can be shown. In an attempt to define the requisite degree of connection, the Court coined the term “rough proportionality” to describe the required relationship between the exactions and the projected impact of the proposed development.
- While no precise mathematical [no-calculation](#) is required, the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Applying this analysis to the facts at hand, the court found that the city had not met its burden of demonstrating the requisite degree of connection. After examining the findings upon which the city relied, the Court stated that the city had not shown the “required reasonable relationship” between the flood plain easement and the property owner’s proposed new building.

Lingle v. Chevron, USA, Inc., 125 S.Ct. 2074 (2005)

In the *Lingle* case, Chevron challenged an Hawaiian statute that capped the amount of rent it could charge to its lessee/dealers. The legislature made findings that the statute was needed to prevent gasoline price inflation. Chevron sued claiming that the Act affected a taking of its property in violation of the constitution’s prohibition against the taking of private property for public use, without just compensation and sought a declaratory judgment and an injunction against the application of the rent cap to its stations.

The Supreme Court in *Lingle* invalidated the first prong of the *Agins* test ([remind what the first prong was....](#)). The Court reviewed its prior decisions on takings and substantive due process, and determined that in *Agins* the court had mistakenly merged the two areas of law. The court declared that the first prong of the *Agins* test is not proper for reviewing takings claims but only substantive due process claims.

As a result of *Lingle*, there are four instances that will constitute a taking:

- A physical occupation of the property. (Example: A state law requiring landlords to permit cable companies to install cable facilities in apartment buildings *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419)
- A regulation that completely deprives an owner of ““all economically beneficial

use” of his property. (Example: a state regulation barring development of two beach front lots in a developed subdivision *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003).

- A regulatory taking that causes severe economic impact without adequate justification per the standards set forth in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104. ([can we summarize those justifications here briefly?](#))
- An exaction or required dedication of property so onerous as to constitute a physical taking. (The Nollan/Dolan rule)

Significant State Cases

California:

Homebuilders Association of Northern California v. City of Napa, 90 Cal.App. 4th 188 (2001)
Napa adopted an ordinance in 1999 that combined a housing trust fund, a housing impact fee on non-residential development and an inclusionary zoning/in lieu requirement for residential development. Prior to adoption the City conducted a jobs-housing nexus study. The city did not produce a nexus study for the in lieu fee option to the inclusionary housing requirement. The inclusionary housing ordinance requires that at least 10% of new housing be affordable to low and very low income households. Developers may meet the requirement in a number of ways.

- The developer may build the units.
- Through payment of an “in lieu” fee.
- The developer may propose an alternative equivalent action such as land dedication or building on an alternative site.
- The developer may seek waiver of the inclusionary requirement if they demonstrate that there is an absence of any reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement.

The Home Builder’s Association of Northern California sued the City of Napa, contending that the ordinance was facially invalid because it was an impermissible taking under both state and federal law. On Appeal the ordinance was affirmed as valid. The Court made the following significant findings.

- The ordinance was one of **general applicability** and thus was not subject to the heightened scrutiny standard of the *Nollan/Dolan* test which only applied when addressing land use “bargains” between an owner and a regulatory body.
- The court found concluded that “Since the City has the ability to waive the requirement imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking.
- The court rejected the “due process” challenge which is only tenable “ if the regulation will not permit those who administer it to avoid an unconstitutional

application of its terms.

Because the ordinance substantially advanced a legitimate state interest, it did not result in a taking.

North State Building Industry Association v. County of Sacramento (Sacramento County Superior Court, Action No. C052814)

In December 2004, Sacramento County enacted an inclusionary housing ordinance that required, generally, that developers of new residential rental properties to set aside 15 percent of the units for lower income households, or provide the equivalent via land dedication or “in lieu” fees. Notably, the 15 percent set aside includes a 3 percent for extremely low-income households or the poorest of the poor. Following the lead of the court of appeal in the *Napa* case, the ordinance granted several options for the developer to achieve the inclusionary goals and included a procedure for waiving the requirement if the builder could show [\(finish the sentence here\)](#)

In March 2005, Plaintiff North State Building Industry Association (“BIA”) filed an action in Sacramento Superior Court challenging the ordinance as an unconstitutional taking of property under the U.S. and California constitutions. The suit presented a “facial” challenge to the Ordinance (a challenge to its mere enactment) since the Ordinance had yet to be applied.

~~The BIA claimed that: 1) the ordinance was an unconstitutional taking because thrust of the claims was that the County failed to establish a reasonable relationship or nexus between the development of market rate housing and the need for affordable housing in the County and 2) In additional claims, the the ordinance violated BIA alleged a violation of state laws against improper taxation and mitigate fees. In May 2005, low-income residents of the County who were potential beneficiaries of the Ordinance and various local and state affordable housing and community advocacy groups successfully moved to intervene in the action. Shortly thereafter, the state Attorney General’s office intervened as well. All interveners came in to defend the Ordinance.~~

~~In December 2005, relying on the U.S. Supreme Court decision in *Lingle v. Chevron* 544 U.S. 528 (2005), which clarified the takings standard in such a way as to invalidate plaintiff’s takings theory, interveners moved for Judgment on the Pleadings on the basis that it was without merit.~~

~~In response to a motion filed by low-income residents, the Attorney General’s office, and various local and state affordable housing advocacy groups, In January 2006, the court, in January 2006, granted intervener’s motion ordering the dismissal of the BIA complaint in its entirety and denying BIA’s any opportunity to amend the complaint. Specifically, the court found:~~

- ~~Not a Special Tax -- That~~ the Ordinance was not a special tax, let alone one that was illegally imposed and found that the [state](#) mitigation statutes BIA relied on did not apply.
- ~~Not an Unconstitutional Taking --~~ The court, relying primarily on the factually similar *Home Builders Association of Northern California v. City of Napa* 90

Cal.App. 4th 188 (2001), found that the Ordinance, on its face, did not work an unconstitutional taking. The court reasoned that as in the *Napa* case, the Sacramento Ordinance enabled developers, in certain circumstances, to obtain a waiver from the Ordinance's requirements. Therefore, logically, the Ordinance could not, by its mere existence before it had been applied to any proposed development, effect a taking.

In June 2006, NSBIA appealed the Superior Court's decision. The appeal was never heard because in August 2007, NSBIA and County defendants settled the case. Though, to the individual and housing advocacy interveners' dismay, the settlement agreement caused some parts of the Ordinance to be amended, the primary provisions of the Ordinance, including the 15 percent overall set aside and 3 percent set aside for the lowest income households, remained intact.

San Diego Case ??? Waiting for Valerie's materials

Colorado

Town of Telluride v. Lot Thirty-Four Venture LLC, 3P.3d30 (Colo. 2000)

The City of Telluride Colorado enacted an "affordable housing mitigation" ordinance that required developers to create affordable housing for forty percent of the employees generated by the new development. The property owner could comply with the ordinance by constructing new housing units with fixed rental rates, by imposing deed restrictions on free market units in order to fix rental rates, by paying fees in lieu of housing, or by conveying land to the Town for affordable housing.

The Colorado Supreme Court struck down the rental requirement portion of the ordinance because Colorado has enacted a state law barring rent control. As a result, the Inclusionary ordinances in Denver, Longmont, Lafayette, and Boulder are all "voluntary" for rental developments, [except for rental developments on annexed land in Longmont](#).

In any effort to enact inclusionary housing laws it is important to conduct a comprehensive review of laws where a conflict may occur. It may have been possible to enact an ordinance in Colorado that avoided the conflict.

Virginia:

Board of Supervisors of Fairfax County v. Degroff Enterprises, Inc. 198 S.E.2d 600 (Va 1973)

This case was heard in the Supreme Court of Virginia in 1973. Fairfax County had issued an amendment to its zoning ordinance requiring property developers to set aside at least 15 % of their residential units for affordable housing. This amendment applied to developers of 50 or more residences in five specific zoning districts in the county. The amendment did not provide

any benefits to the developers, such as density bonuses or expedited permitting. Although the court found that providing low and moderate income housing serves a legitimate state purpose, it still held the ordinance amendment invalid for two reasons:

- [No Enabling Authority --](#) The amendment was improper because it constituted ““socio-economic zoning.”” According to the court, the county had been enabled by statute to control only traditional zoning requirements directed to physical characteristics of the land. VA is a non-home rule, strict Dillon’s Rule state, so counties possess only the powers specifically granted to them by the state.
- [An Unconstitutional Taking --](#) The amendment was improper because it violated the Virginia Constitution, which states that no property can be taken for public purposes without just compensation. The court stated that this violation arose because the amendment required rental and sale prices that were not fixed by the free market.

Although the amendment was held invalid, two important parts of the decision should be noted.

1) First, the amendment provided for no benefits whatsoever to the developers for complying with the amendment. Without density bonuses or any other incentives, developers were not receiving any compensation for setting aside 15% of the units as affordable.

2) Second, the court limited its opinion to the zoning authority given to the county under a Virginia enabling statute and the Virginia Constitution. As stated above, VA is a strict Dillon’s Rule state. ~~Illinois, on the other hand, is a home-rule state where home-rule units enjoy extremely broad, constitutionally granted powers that are to be liberally construed. which means that local governmental jurisdictions only possess the authority that has been granted to them by the state legislature or the state constitution.~~

Since Degroff, Virginia passed a state enabling statute to allow non-home rule counties to pass Inclusionary Zoning Ordinances and Fairfax County implemented another Inclusionary Housing Program that includes incentives for developers, such as density bonuses. This program has operated successfully producing over 2,000 affordable units since 1991 without legal challenge.

New Jersey

In re Egg Harbor Associates 464 A.2nd 1115 (N.J. 1983)

In re Egg Harbor Associates was decided by the New Jersey Supreme Court in 1983. This case involved a condition on a development permit imposed not by a municipality or county, but rather by the Division of Coastal Resources, an environmental agency, under the New Jersey Coastal Area Facility Review Act. This Act gave the agency authority to approve proposed developments within the coastal zone of New Jersey, as defined in the statute. By this authority,

the Division required the specific developer, Egg Harbor Associates, to set aside 20 percent of its proposed 1,530 residential units for low- and moderate-income housing. The court upheld this condition for two reasons:

- [Enabling Authority --](#) The court held that the Act gave the Division authority to require set-asides because the Act as expressly stated, was passed to promote the public health, safety and welfare and to advance the best long-term interest of all people in New Jersey. The court found that the set-asides fell within this purpose.
- [Not an Unconstitutional Taking --](#) The court found that the set-aside did not constitute an unconstitutional taking of private property without just compensation because it still allowed the developer to obtain a ““just and reasonable return”” on his investment. There is no mention of off-sets in the case so it is unlikely off-sets were provided to the developer.

In Degroff ([Fairfax County](#)), a non-home rule county attempted to impose an Inclusionary Housing requirement without express statutory authority. Here, a government entity with a specific grant of authority imposed the requirement.

Massachusetts:

Dacey v. Town of Barnstable No. 00-53 (Barnstable Sup. Ct. 2000) available at http://www.mhpfund.com/termsheets/dacey_vs_barnstable.pdf .

The case in the Massachusetts Superior Court focused on the specific provisions of an Inclusionary Zoning Ordinance that required all applicants for a subdivision of land under 10 acres, or for a building permit for developments fewer than 10 units, pay a fee to Barnstable’s Inclusionary Housing Fund. If the development was to have 10 or more units, the developer had to set-aside 10% of the units as affordable. As in Degroff, developers did not receive any benefit for complying with the ordinance.

The 10% set-aside requirement was not challenged in court and thus still exists as part of the Barnstable Ordinance to this day. Instead, the focus of the court’s decision was on the fee applied to developments with fewer than 10 units or less than 10 acres. The court stated there was a difference between a fee, which the municipality could legally apply, and a tax, which the municipality could only apply if granted the specific authority by the state legislature. [In this case, there was no state statute enabling local jurisdictions to enact an affordable housing tax and without that state enabling statute, local jurisdiction in Massachusetts do not possess this power. The court’s decision turned on whether the requirement to pay the fee amounted to a “tax” or a “fee”.](#) The court held that the ordinance was not a permissible fee, rather it constituted an illegal tax on applicants for three reasons:

- The applicants were not the sole or primary beneficiaries of affordable housing and therefore should not, as a limited group, have to share this cost.
- The charges were not associated with optional services and benefits which developers could voluntarily pursue.
- The charges were not intended to compensate Barnstable for services provided, but to fund affordable housing.

Again, there are threetwo important aspects specific to the facts of this case that should be noted.

1) No Enabling Authority. First, the court focused on the specific nature of one of the requirements in the ordinance — the required payment of a “tax” by some developers, a tax which the municipality did not have the power to levy. By contrast, in Illinois, home rule units possess broad authority which is liberally construed to impose taxes and raise revenues. Once again, the specifics of underlying state law determined this issue.

2) No Offsets or Incentives. Second, as in Degroff, no benefits were provided to applicants for contributing to the affordable housing fund. This lack of any benefit to the applicants seemed to play a large part in the court’s reasoning.

3) No Challenge to the Inclusionary Housing Provision. The requirement for developments of 10 or more units to include 10% affordable housing was not challenged.

Florida

Tallahassee Case (Florida) (I have not had time to track this down)

Wisconsin

Apartment Association of South Central Wisconsin v. City of Madison --2006 WI APP 192

In a fact pattern very similar to the *Telluride* case discussed above, the Wisconsin appellate court invalidated the rent restriction portion of the City of Madison’s 2004 inclusionary housing ordinance because it was found to violate a statewide ban on rent control. The ordinance required that 15% of new housing in developments of 10 or more units be affordable to people at 60% of the areas median income. The ordinance included both incentives for development of the inclusionary units, in lieu fees, dedication or waiver as an owner’s option to meet the inclusionary requirements. Rental unit affordability restrictions were made conditions of the development agreement.

The Appellate court struck down the rent restriction portions of the inclusionary housing ordinance because they found that it directly violated the states statute that withdrew local

jurisdictions power to enact rent control. The Wisconsin State Supreme Court refused to hear the City of Madison's appeal from the 4th District Court of Appeals.

Lessons learned-Lessons Learned from Existing Court Cases

- Broad Application. Enacting an ordinance of general applicability may avoid the strict scrutiny of the Nollan/Dolan test (and any corresponding test at the state level) and be more easily defended.
- Flexibility for Compliance. Ordinances that create a number of options for the owner of the property to build, dedicate land, or pay in lieu fees have a better chance of surviving a legal challenge.
- Appeal/Waiver Provisions. Tightly drafted waiver and appeal provisions allow most ordinances to withstand a “facial challenge to their constitutionality.
- Offsets/Incentives. Providing offsets and incentives to developers helps to deflect claims that the ordinance amounts to an unconstitutional taking of private property without just compensation.
- Findings and Justifications. In case an ordinance or program is challenged, it always helps to have some sort of study or “findings” to justify the affordable housing requirements. This does not mean that every town must complete a full-blown “nexus study” but there should be careful and serious documentation of the affordable housing crisis in the community, its negative effects on the community’s well-being, and the connection between private development and the lack of affordable housing.
- Talk to a Lawyer
- Enabling Authority. You always want to be sure that the local jurisdiction has the authority to enact an inclusionary zoning ordinance – by way of the state constitution bestowing home rule authority on local jurisdictions or way of a state statute empowering local jurisdictions to enact inclusionary housing programs or provisions.