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GHA
Planning Commission

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William F. Barnum

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Legal Assistant

April 30, 2009

VIA HAND DELIVERY

Jeff Smith, Chairman
Humboldt County Planning Commission
Humboldt County Courthouse
825 Fifth Street
Eureka, California 95501

Re: Meaning of the Decision in *BIACC vs. City of Patterson*

Dear Planning Commission Members:

I represent the Northern California Association of Home Builders ("NCHB"), which is a membership organization composed of some 80 builders and materials suppliers doing business in Humboldt County.

As we enter the last months of a 10-year General Plan Update Process, conclusions are forming and policy options have narrowed. Your Planning Commission has encouraged public input on many issues, including the controversial proposal to institute Inclusionary Zoning in the Housing Element and related policies. The Planning Staff refer to it as a "tool" they intend to apply in order to increase the supply of affordable housing.

Recently your Deputy County Counsel, Carolyn Ruth was quoted as saying that the recent 5th District Court of Appeals decision in ***BIACC vs. City of Patterson***; (2009) 171 Cal.App.4th 886, has "nothing to do with Inclusionary Zoning."

I want to write you to demonstrate that opinion is incorrect.

Attached please find the following:

1. The 4-page modified opinion in the ***City of Patterson*** case, filed March 20, 2009. This is a short read. You probably already know the background facts of the case, but a summary is this: The City of Patterson entered into an inclusionary zoning in-lieu fee program to help finance "leveraged" construction of affordable housing. When a developer proposed a 3-subdivision plan with 214 market rate housing lots, the City entered into a

Development Agreement with that developer which provided that the City could change the amount of the in lieu fee, provided the change was "reasonably justified." A nexus study was later prepared showing the City needed some 642 affordable housing units to close a claimed shortage. To pay for the work the City increased its in lieu fees from under $1,000 to more than $20,000 per lot. The litigation ensued.

The Court of Appeal concluded that the fees were not reasonably justified under its application of the reasoning from a prior California Supreme Court decision in ***San Remo Hotel vs. City and County of San Francisco***; (2002) 27 Cal.4th 643.

The gist of the decision is this: whenever a local government intends to adopt a legislative program (Inclusionary Zoning) by ordinance to require all development projects to pay in lieu fees, then the local government must meet what the court called the "means/end test." That is, the means (Inclusionary Zoning in lieu fees) must advance the lawful ends (provision of affordable housing), and demonstrably relate to the "deleterious effect of the project."

The court concluded on this point as follows:

> "The record in this matter reveals no reasonable relationship between the extent of City's affordable housing need and development of either (1) the 214 residential lots that constitute the two subdivisions owned by Developer or (2) the 3,507 unentitled lots identified in the Fee Justification Study. Instead, the Fee Justification Study reveals that the in-lieu fee of $20,946 per market rate unit was calculated based on an allocation to City of 642 affordable housing units, out of the total regional need for affordable housing identified in the 2001-2002 Regional Housing Needs Assessment for Stanislaus County. **No connection is shown, by the Fee Justification Study or by anything else in the record, between this 642-unit figure and the need for affordable housing associated with new market rate development.** Accordingly, the fee calculations described in the Fee Justification Study and Moran's declaration do not support a finding that the fees to be borne by Developer's project bore any reasonable relationship to any deleterious impact associated with the project." (emphasis added).

2. The attorney for the plaintiffs in the ***BIACC vs. City of Patterson*** case is Kenneth Bley of Cox, Castle & Nicholson in Los Angeles. He has written a brief memo on the meaning of the published decision. A copy is attached for your review.

3. The California Department of Finance lists Humboldt County's housing stock in excess of 58,939 residential units as of January 1, 2006, with another 467 units coming on through permits county-wide during 2006. Clearly we have more than 60,000 residential units in the county today.

Local housing advocacy group "Housing for All" has claimed in support of adoption of Inclusionary Zoning that Humboldt County is 2,200 units short of affordable housing. Without debating the accuracy of that claim, we want you to know that Humboldt County cannot charge in lieu fees against new market rate housing to satisfy that pre-existing economic condition. A copy of Government Code §66001 is attached. Please read the final paragraph of the section (1)(g), which reads as follows:

> "(g) A fee shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan."

The ***San Remo*** decision by the State Supreme Court applied the "means/end test" to in lieu fees applied to the hotel conversion of residential units from low income tenants to tourist-serving hotel rooms, finding the imposition of a housing relocation fee reasonable. The hotel conversions were shown to demonstrably affect the existing housing stock of affordable units. But in so concluding, the Supreme Court made it clear that the means/end test will be applied in cases of in lieu fees, stating, "As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development."

From prior case law (***Nollan/Dollan/Ehrlich***) we know that when property exactions are involved, the level of constitutional takings scrutiny is "heightened," meaning more deference is afforded to exactions of fees than of property. It follows that non-monetary exactions of land or lots to cure pre-existing shortfalls of affordable housing in our county will be similarly scrutinized.

Thank you for considering these positions as you ponder the inappropriateness of Inclusionary Zoning for Humboldt County.

Very truly yours,

William F. Barnum

WFB:b
cc: Client
Wfb letter to Planning Commission April 30. 2009

Westlaw Delivery Summary Report for BARNUM,WILLIAM F

Your Search:	TI(CITY /5 PATTERSON)
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--- Cal.Rptr.3d ----

--- Cal.Rptr.3d ----, 2009 WL 725103 (Cal.App. 5 Dist.), 09 Cal. Daily Op. Serv. 3636

(Cite as: 2009 WL 725103 (Cal.App. 5 Dist.))

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Only the Westlaw citation is currently available.

Court of Appeal, Fifth District, California.

BUILDING INDUSTRY ASSOCIATION OF CENTRAL CALIFORNIA et al., Plaintiffs and Appellants,

v.

CITY OF PATTERSON, Defendant and Respondent.

No. F054785.

March 20, 2009.

ORDER MODIFYING OPINION, AND DENYING REHEARING

THE COURT.

*1 It is ordered that the opinion filed herein on January 30, 2009, and modified on March 2, 2009, be further modified as follows:

1. On page 12 of the opinion filed January 30, 2009, in the second full paragraph beginning "Based on this interpretation" delete the second sentence.

2. Omit item No. 7 of the modification filed March 2, 2009.

3. Beginning on page 12 and continuing to page 14 of the opinion filed January 30, 2009, delete the subheading, paragraphs and footnotes of part III.D. and insert the following subheading, paragraphs and footnotes, which will require renumbering of subsequent footnotes:

D. Applicable Legal Requirements

In *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 663-664(*San Remo*), owners of a hotel sued to invalidate a San Francisco ordinance limiting the conversion of residential hotel rooms (usually occupied by low-income tenants) to tourist hotel rooms. The purpose of the ordinance was to preserve the availability of residential hotel rooms for the city's low-income residents who, otherwise, would have had no viable housing options. To achieve that goal, the ordinance required a hotel converting a residential hotel unit into a tourist unit to replace the residential unit elsewhere, pay a fee in-lieu of providing the replacement unit, or take other action that would further replacement. Pursuant to the ordinance, the city issued the hotel owners a conditional use permit authorizing the conversion of hotel rooms only upon compliance with one of those alternatives.

The hotel owners filed suit, alleging the ordinance was unconstitutional because it violated the state takings clause. They argued that *Nollan/Dolan/Erhlich*[FN12] scrutiny applied to the court's review of the replacement in-lieu fee. The *Nollan/Dolan/Erhlich* heightened level of constitutional scrutiny inquires whether an "essential nexus" and "rough proportionality" are shown between an ad hoc exaction, imposed as a condition of development, and the impact of that development. (*San Remo, supra,* 27 Cal.4th at pp. 665-667, 671.) The *San Remo* court refused to apply this heightened level of scrutiny to the San Francisco ordinance, stating:

> FN12. *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391; *Nollan v. California Coastal Com.* (1987) 483 U.S. 825, 837; *Erhlich v. City of Culver City* (1996) 12 Cal.4th 854.

"Nor are plaintiffs correct that, without *Nollan/Dolan/Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. (Gov.Code, § 66001; *Ehrlich, supra,* 12 Cal.4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640.) ...While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees subject to *Ehrlich,* the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster."(*San Remo, supra,* 27 Cal.4th at p. 671 .) [FN13]

> FN13. The statutory provision referenced in this quote states its test this way: "In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed."(Gov.Code, § 66001, subd. (b).) We note that

section 66001 expressly applies to fees imposed to mitigate the effects of development on "public facilit [ies]." We express no opinion on the question whether section 66001, or the Mitigation Fee Act in general (see Gov.Code. § 66000.5), applies to affordable housing in-lieu fees.

*2 Similarly, the court in *Action Apartment Assn. v. City of Santa Monica* (2008) 166 Cal.App.4th 456, refused to apply the *Nollan/Dolan/Ehrlich* test when analyzing the facial validity of an ordinance of general application that required construction of affordable multifamily housing as a condition to development of multifamily ownership projects. (*Action Apartment Assn. v. City of Santa Monica*, at pp. 469-471.)[FN14]

FN14. We note that the court in *Home Builders Association v. City of Napa* (2001) 90 Cal.App.4th 188 (Home Builders) considered a takings clause challenge to the facial validity of an inclusionary zoning ordinance and upheld its validity. In this appeal, Developer has attempted to distinguish Home Builders by arguing that case did not involve a development agreement, vested rights or judicial review in an "as applied" context. Because Developer has not argued that the affordable housing in-lieu fee is facially invalid, we do not decide the question of facial invalidity here. We also note that Home Builders was decided about nine months before the California Supreme Court decided San Remo.

Upon examination, it appears that the affordable housing in-lieu fee challenged here is not substantively different from the replacement in-lieu fee considered in *San Remo*.Both are formulaic, legislatively mandated fees imposed as conditions to developing property, not discretionary ad hoc exactions. (*San Remo, supra*, 27 Cal.4th at p. 671.) We conclude, for this reason, that the level of constitutional scrutiny applied by the court in *San Remo* must be applied to City's affordable housing in-lieu fee and is one of the legal requirements incorporated into the Development Agreement.

Accordingly, we conclude that the increase in the fee is not "reasonably justified" as required by the Development Agreement unless there is a reasonable relationship between the amount of the fee, as increased, and "the deleterious public impact of the development."(*San Remo, supra*, 27 Cal.4th at p. 671.)

City, we note, argues for no different test. Instead, without being more specific or explaining the point in any way, City merely states that the Fee Justification Study "clearly shows the need for affordable housing generated by the new construction."Despite the lack of an argument from City addressed to the reasonable relationship test, we have examined the cited Fee Justification Study in detail, as well as Moran's declaration and other documents, to determine whether the test is satisfied by the information provided. In the process, we have located nothing that demonstrates or implies the increased fee was reasonably related to the need for affordable housing associated with the project.

The record in this matter reveals no reasonable relationship between the extent of City's affordable housing need and development of either (1) the 214 residential lots that constitute the two subdivisions owned by Developer or (2) the 3,507 unentitled lots identified in the Fee Justification Study. Instead, the Fee Justification Study reveals that the in-lieu fee of $20,946 per market rate unit was calculated based on an allocation to City of 642 affordable housing units, out of the total regional need for affordable housing identified in the 2001-2002 Regional Housing Needs Assessment for Stanislaus County. No connection is shown, by the Fee Justification Study or by anything else in the record, between this 642-unit figure and the need for affordable housing associated with new market rate development. Accordingly, the fee calculations described in the Fee Justification Study and Moran's declaration do not support a finding that the fees to be borne by Developer's project bore any reasonable relationship to any deleterious impact associated with the project.

*3 For this reason, we are persuaded that the increased fee of $20,946 violated section 4.5(d)(ii) of the Development Agreement because it was not "reasonably justified" within the meaning of that provision.[FN15]

FN15. The record in this case appears fully developed as to the reasoning process City used when increasing the fee. Thus, this is not a case where the question whether the increase was "reasonably justified" was resolved based on the sufficiency of the proof. In other words, the actual reasoning process City used does not satisfy the contractual standard set by the parties.

There is no change in the judgment.

Respondent's petition for rehearing is denied.

WE CONCUR: VARTABEDIAN, Acting P.J., and CORNELL, J.

Cal.App. 5 Dist.,2009.
Building Industry Ass'n of Cent. California v. City of Patterson
--- Cal.Rptr.3d ----, 2009 WL 725103 (Cal.App. 5 Dist.), 09 Cal. Daily Op. Serv. 3636

END OF DOCUMENT

SEARCH

Publications

Court Holds That Affordable Housing in Lieu Fees Must be Reasonable Related To The "Deleterious Impact" Caused By New Market Rate Housing

Publication: Client Alert
03.03.09

Authors: Kenneth B. Bley, Andrew K. Fogg

In *Building Industry Association of Central California v. City of Patterson*, a decision modified and ordered published on March 2, 2009, the California Court of Appeal for the Fifth Appellate District has made it clear that, in order to meet statutory and constitutional takings principles, affordable housing in-lieu fees must have a reasonable relationship between the amount of the fee imposed and the deleterious public impact caused by the development - the new market rate housing.

The City of Patterson approved a development agreement and tentative subdivision maps for two residential subdivisions in the City, at which time, the City allowed developers to pay a fee of $734 per home in lieu of constructing affordable housing. The development agreement acknowledged that the City was in the process of updating its affordable housing in lieu fee, and the developer agreed that it would comply with the updated fee if "reasonably justified." Three years later, the City raised the affordable housing in lieu fee to $20,934 per home, which the developer challenged as not reasonably justified.

In ruling in favor of the developer, the Court of Appeal concluded that the term "reasonably justified" incorporated legal standards generally applicable to such fees. The Court noted that the evidence showed that the City appeared to have established the in lieu fee by dividing the projected cost, approximately $73.5 million, of developing the City's share of the regional affordable housing needs, 642 affordable units, by the then total number of unentitled housing units in the City, with the result being a per unit fee of $20,946.

The Court concluded that the new in lieu fee violated established statutory and constitutional principles because there was no showing of a reasonable relationship between the amount of the fee and the deleterious public impact of the to be constructed market rate units. Specifically, the Court stated, "No connection is shown, by the Fee Justification Study or by anything else in the record, between this 642-unit figure and the need for affordable housing associated with new market rate development. Accordingly, the fee calculations described in the Fee Justification Study ... do not support a finding that the fees to be borne by Developer's project bore any reasonable relationship to any deleterious impact associated with the project."

Although decided in the context of the language of the development agreement, the Court's reasoning, based on existing statutory and constitutional law, makes the opinion applicable whenever a city or

county seeks to impose affordable housing conditions. Thus, the Patterson decision provides a powerful new tool for developers to use in challenging affordable housing in lieu fees. Even for fees that are established legislatively and applied using a formulaic methodology, cities or counties must show that the fees are reasonably related to impacts being created by the new market rate development rather than calculated based solely on the cost of providing a certain level of affordable housing in a particular jurisdiction or region.

Cox, Castle & Nicholson LLP represented the California Building Industry Association (CBIA) and the Building Industry Legal Defense (BILD) Foundation before the Court of Appeal in seeking to have the *Patterson* decision published in the Official Reports. By deciding to publish the decision, the Court of Appeal has permitted the *Patterson* case to be cited to courts throughout California.

Lawyers

- Kenneth B. Bley
- Andrew K. Fogg

Practice Area

- Land Use & Natural Resources

West's Ann.Cal.Gov.Code § 66001

Effective: January 1, 2007

West's Annotated California Codes Currentness
Government Code (Refs & Annos)
Title 7. Planning and Land Use (Refs & Annos)
Division 1. Planning and Zoning (Refs & Annos)
Chapter 5. Fees for Development Projects (Refs & Annos)

→§ 66001. Fee as condition of approval; agency requirements; public facilities

(a) In any action establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency, the local agency shall do all of the following:

(1) Identify the purpose of the fee.

(2) Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification may, but need not, be made by reference to a capital improvement plan as specified in Section 65403 or 66002, may be made in applicable general or specific plan requirements, or may be made in other public documents that identify the public facilities for which the fee is charged.

(3) Determine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed.

(4) Determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.

(b) In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed.

(c) Upon receipt of a fee subject to this section, the local agency shall deposit, invest, account for, and expend the fees pursuant to Section 66006.

(d)(1) For the fifth fiscal year following the first deposit into the account or fund, and every five years thereafter, the local agency shall make all of the following findings with respect to that portion of the account or fund remaining unexpended, whether committed or uncommitted:

(A) Identify the purpose to which the fee is to be put.

(B) Demonstrate a reasonable relationship between the fee and the purpose for which it is charged.

(C) Identify all sources and amounts of funding anticipated to complete financing in incomplete improvements identified in paragraph (2) of subdivision (a).

(D) Designate the approximate dates on which the funding referred to in subparagraph (C) is expected to be deposited into the appropriate account or fund.

(2) When findings are required by this subdivision, they shall be made in connection with the public information required by subdivision (b) of Section 66006. The findings required by this subdivision need only be made for moneys in possession of the local agency, and need not be made with respect to letters of credit, bonds, or other instruments taken to secure payment of the fee at a future date. If the findings are not made as required by this subdivision, the local agency shall refund the moneys in the account or fund as provided in subdivision (e).

(e) Except as provided in subdivision (f), when sufficient funds have been collected, as determined pursuant to subparagraph (F) of paragraph (1) of subdivision (b) of Section 66006, to complete financing on incomplete public improvements identified in paragraph (2) of subdivision (a), and the public improvements remain incomplete, the local agency shall identify, within 180 days of the determination that sufficient funds have been collected, an approximate date by which the construction of the public improvement will be commenced, or shall refund to the then current record owner or owners of the lots or units, as identified on the last equalized assessment roll, of the development project or projects on a prorated basis, the unexpended portion of the fee, and any interest accrued thereon. By means consistent with the intent of this section, a local agency may refund the unexpended revenues by direct payment, by providing a temporary suspension of fees, or by any other reasonable means. The determination by the governing body of the local agency of the means by which those revenues are to be refunded is a legislative act.

(f) If the administrative costs of refunding unexpended revenues pursuant to subdivision (e) exceed the amount to be refunded, the local agency, after a public hearing, notice of which has been published pursuant to Section 6061 and posted in three prominent places within the area of the development project, may determine that the revenues shall be allocated for some other purpose for which fees are collected subject to this chapter and which serves the project on which the fee was originally imposed.

(g) A fee shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan.

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