

Non-Profit Housing Association of Northern California
San Francisco, California
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Protecting Inclusionary Requirements

Presented by:

Barbara Kautz
Goldfarb & Lipman LLP
1300 Clay Street, Eleventh Floor
Oakland, CA 94612
510 836-6336
bkautz@goldfarblipman.com

ISSUE ONE: EXACTION OR LAND USE REQUIREMENT?
(*CBIA v. San Jose; Patterson; Sterling Park; also Koontz*)

**1. Standard of review is in a state of flux. Exaction (impact fee/dedication)?
Land use requirement?**

- Take the most conservative approach: assume it is an exaction.
- Consider preparing *now* for a possibly unfavorable decision in *CBIA v. San Jose* and do a nexus study. Can be used to justify impact fees, in-lieu fees, and on-site for-sale requirements.
- Do a nexus study if *any* changes are proposed in ordinances or adopted policies.

2. Advice for impact fees:

- Don't be aggressive; methodology is very indirect.
- Include an economic feasibility study.
- Allow for waivers & individual calculations.
- Consider a Countywide or subregional study.
- Note that impact fees must be used for housing benefitting low-wage *employees*.
- Much more flexible source of funds than RDA, other grant funds.

ISSUE TWO: LATE PROTESTS TO INCLUSIONARY REQUIREMENTS
(Sterling Park; Gov't Code Section 66020)

1. Section 66020 protest rights:

- Cities and counties must give notice of amount of fees and other dedications and exactions, ***including right to protest within 90 days.***
- To protest, developer must pay in full or provide "satisfactory" evidence of arrangements to pay fee when due or ensure performance of conditions; and must file written protest notice.
- Any lawsuit must be filed within 180 days after city/county gave notice.
- Developer may continue with project unless agency finds that protest involves construction of certain improvements attributable to the project, and construction is required for the public health, safety, and welfare.

2. If do not provide notice of right to protest fees, dedications, and exactions, protests may arguably be made even after construction begins.

- Add a standard condition to *all* planning approvals of right to protest fees, dedications, and exactions.
- Provide as much detail as possible at initial approval:
 - Estimate in-lieu and impact fees, sales prices.
 - Attach developer and regulatory agreements.
- Provide additional notice of right to protest if fees increase, sales prices decrease, or other requirements are added.

3. Advice for outstanding approvals:

- If *CBIA* is decided unfavorably, developers with approved projects may file protests.
- So provide notice of protest rights ASAP.

ISSUE THREE: INCLUSIONARY AND RENTAL HOUSING
(Palmer)

- Only an impact fee, justified by a nexus study, can be *required*. (And that has not been tested.)
- Or comply with Costa Hawkins: enter into *contract* with developer in exchange for regulatory incentive or monetary assistance. (Voluntary compliance without a contract or not in exchange for regulatory incentive may not be enforceable.)
- Make clear it is not a disguised attempt at rent control (for rental impact fees).

ISSUE FOUR: INCLUSIONARY AND DENSITY BONUSES
(LUNA v. County of Napa)

- Must give a density bonus for inclusionary units that meet standards of density bonus statute.
- Not necessary to amend ordinances immediately if existing provision not enforced.

ISSUE FIVE: NEGOTIATING FOR MORE AFFORDABLE HOUSING
(Koontz v. St. Johns River Water Mgmt. Dist.)

1. Koontz and negotiated benefits.

- Koontz and water district could not reach agreement on extent of wetlands mitigation needed.
- District suggested several options but never imposed any; finally denied project.
- U.S. Supreme Court agreed unanimously that if an agency denies a permit because an owner will not agree to an unconstitutional condition, the owner is entitled to have the condition removed and may be entitled to damages.

2. Cautions in negotiating for affordable housing in exchange for development approvals.

- Could be viewed as effort to impose an unconstitutional condition.
- Best to define tiers of development allowed in exchange for defined benefits.