

SUPERIOR COURT OF CALIFORNIA

County of San Diego

DATE: May 24, 2006

DEPT. 61

REPORTER A: NOT REPORTED

CSR# ----

PRESENT HON. JOHN S. MEYER

REPORTER B:

CSR#

JUDGE

CLERK: P. Burke-Jennings

BAILIFF: _____

REPORTER'S ADDRESS: P.O. BOX 120128

SAN DIEGO, CA 92112-4104

GJC817064

**BUILDING INDUSTRY ASSOCIATION
OF SAN DIEGO COUNTY, INC., etc.,
Petitioner/Plaintiff,**

Vs.

**CITY OF SAN DIEGO, et al.,
Respondents/Defendants.**

Ruling on Submitted Matter
(Submitted May 19, 2006)

The City of San Diego enacted an inclusionary zoning ordinance in an effort to help resolve the affordable housing crisis existing in San Diego. The ordinance requires that developers either set aside a share of their projects for lower-or moderate-income households, or pay an "in lieu" fee to the City.¹ [See SDMC §§142.1301-1312]

Although a developer may obtain a waiver of the requirements, section 142.1305(d) provides:

No waiver shall be issue to an applicant unless: (1) Special circumstances, unique to that development justify the grant of the waiver; (2) The development would not be feasible without the waiver; (3) A specific and substantial financial hardship would occur if the waiver were not granted; and (4) No alternative means of compliance are available which would be more effective in attaining the purposes of this Division than the relief requested.

The ordinance enacted by the City of San Diego is similar to those in other areas of California, including the ordinance addressed in *Home Builders Association of Northern California v. City of Napa* (2001) 90 Cal.App.4th 188.

¹ SDMC §§142.1301-1312 do not expressly state where the "in lieu" fee funds are to be deposited, unlike, e.g., the fees collected under the "for sale unit" option of the ordinance [see §142.1309(c)(4)]. The ordinance also does not expressly require reporting of the amount of funds paid as "in lieu" fees [see reporting requirements at §142.1312]. As an aside commentary, without tracking this information, it is difficult to understand how the City can determine whether the ordinance, in fact, results in an effect on the level of affordable housing. On its face, it appears that the fees could be deposited into the City's general fund (as opposed to the Inclusionary Housing Fund), resulting in no direct impact on affordable housing.

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In *Home Builders*, the Court set forth the appropriate test to determine whether "economic legislation that is generally applicable to all development," such as the subject inclusionary zoning ordinance, survives a facial constitutional challenge.

After determining that the ordinance substantially advanced legitimate state interests, the *Home Builders* court concluded that not only was there no "taking," but also that the petitioners could not show a facial challenge based upon the due process clause.

Second, and more importantly, HBA's facial due process challenge must necessarily fail. As we have said, "A claim that a regulation is facially invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional application to the complaining parties. . . ." (*San Mateo County Coastal Landowners' Assn. V. County of San Mateo, supra*, 38 Cal. App. 4th at p. 547, citation omitted.) When an ordinance contains provisions that allow for administrative relief, we must presume the implementing authorities will exercise their authority in conformity with the Constitution. (See *Fisher v City of Berkeley, supra*, 37 Cal. 3d at p. 684.)

Here, as we have noted, City's ordinance includes a clause that allows 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." Since City has the authority to completely waive a developer's obligations, a facial challenge under the due process clause must necessarily fail. [*Id.*, at 199]

In *Home Builders*, the "complete waiver" allowed the City of Napa to avoid an unconstitutional application by a determination of an "absence of any reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement." In other words, the waiver provision set forth an out for a developer when the basic constitutional connection is lacking. The waiver provision in the San Diego ordinance is not the same as the one contained in the Napa ordinance.

The waiver provision enacted by the City of San Diego permits a waiver only upon the determination of four separate findings, all of which must be made.

Accordingly, on its face, the ordinance does not provide for the granting of a waiver solely because of an absence of any reasonable relationship or nexus between the impact of the development and the inclusionary requirement. The City can, therefore, impose the inclusionary requirement on a development not reasonably related to the need for that requirement.

Inasmuch as the waiver provision enacted by the City of San Diego does not allow the City to avoid the unconstitutional application of the ordinance, the ordinance on its face results in an unconstitutional taking.

Petitioner also attacks the ordinance on the grounds that on its face it violates the Subdivision Map Act, improperly delegates decisions to the Staff, and strips rights of lien holders. The Court has considered the arguments presented on those issues and denies relief to petitioner without prejudice. With regard to those issues and contrary to the waiver issue, the ordinance on its face does not preclude an unconstitutional application.

Counsel for Petitioner Building Industry Association is hereby directed to prepare a judgment granting a writ a mandate, setting aside the subject ordinance, and remanding the matter to the San Diego City Council in accordance with the views expressed herein.

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SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

BUILDING INDUSTRY ASSOCIATION OF SAN DIEGO COUNTY, INC., etc.)	CASE NO. GIC 817064
)	
Plaintiffs,)	PROOF OF SERVICE RE: EX PARTE MINUTE ORDER
)	
v.)	Judge: Hon. John S. Meyer
)	Dept.: 61
CITY OF SAN DIEGO,)	
)	
Defendant.)	

PROOF OF SERVICE—CIVIL (Code of Civ. Proc., §§ 1011, 1013, 1013a, 2015.5)

1. At the time of service I was over 18 years of age and not a party to this action.
2. My business address is: 330 West Broadway, San Diego, CA 92101.
3. On May 24, 2006 I served the following documents (specify): **MINUTE ORDER**
4. I served the documents on the persons below, as follows:
 - Richard A. Schulman, Esq.
619.232.6828
 - Michael J. Aguirre, City Attorney
619.533.6582

1 5. The documents were served by the following means:

2 By fax transmission. Based on an agreement of the parties to accept service by fax
3 transmission, I faxed the documents to the persons at the fax numbers listed in item 4. No error was
4 reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed
5 out, is attached.

6 I declare under penalty of perjury under the laws of the State of California that the foregoing is
7 true and correct.

8
9 Dated: May 24, 2006



Skye Resendes

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