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SUPREME COURT REFUSES TO HEAR *PALMER* CASE - ARE INCLUSIONARY ZONING PRACTICES DUE FOR CHANGE?

By James Pugh & Dave Lanferman

On October 22, 2009, the California Supreme Court decided not to review the Court of Appeal's decision in the landmark *Palmer/Sixth Street Properties v. City of Los Angeles* case. [See SMRH Blog 08/18/2009, for detailed discussion of *Palmer* decision.] This decision, although favorable for Palmer, could launch "inclusionary zoning" and similar affordable housing laws across the state into uncertain legal waters as municipalities attempt to enforce now-questionable inclusionary zoning requirements.

Two years ago, Palmer sued the City to avoid having to either provide units for low-income tenants or pay a substantial fee in lieu of providing rent-restricted units. In essence, Palmer challenged the City's inclusionary zoning requirements as applied to his Piero II project that included 350 residential units and 9,705 square-feet of commercial space. The City approved the project, but conditioned the approval on the developer either (1) providing 60 replacement low-income dwelling units and maintaining rent restrictions pursuant to the Specific Plan for at least 30 years, or (2) paying a fee units (approximately $5,770,930) in lieu of providing such rent-restricted units.

Palmer claimed that the City's conditions conflicted with the Costa-Hawkins Rental Housing Act (Civil Code § § 1954.51-1954.535). The Court of Appeal agreed that this state law pre-empted the City's attempt to regulate the initial rents of newly-constructed units. The Court rejected the City's argument that the option of paying an in-lieu fee should operate to exempt the ordinance from Costa-Hawkins, instead finding the in-lieu fee to be inextricably intertwined with the ordinance's exaction of rent-controlled units. The City petitioned for Supreme Court review. The Court, however, refused to hear the case and thereby rendered the appellate court's ruling final.

So, what does that mean for California's affordable housing laws? It is estimated that there are approximately 170 jurisdictions in California that have some form of inclusionary zoning laws. Thus, the effect of the *Palmer* case could be wide reaching.

First, it will likely require many jurisdictions that have similar inclusionary zoning policies (that regulate and lower the initial rents that may be charged on newly constructed rental housing units) to reconsider and

revise those ordinances to avoid violations of Costa-Hawkins.

Second, even though the City claimed that its inclusionary zoning requirements were enacted as land use regulations pursuant to the City's police power (like other forms of true zoning regulations) the Court held that state law limiting local rent-control measures was nevertheless applicable and pre-emptive. This aspect of *Palmer*, particularly if read in combination with the *BIACC v. City of Patterson* decision of March 2009, indicates that local inclusionary zoning practices are still subject to controlling state law notwithstanding efforts to characterize such regulations or exactions of housing units as "zoning" or "land use regulation."

Third, advocates of the existing form of inclusionary housing may seek new legislation to counteract the *Palmer* case. Several affordable housing groups submitted an amicus brief in support of the City's petition for Supreme Court review. While unsuccessful with the Court, it remains to be seen if those advocacy groups will pursue the issue with the Legislature.

Finally, *Palmer* reinforces the earlier holding of the *Patterson* case to the effect that local inclusionary zoning policies that require developers to provide new privately-subsidized housing units at below market rents or sale prices remain subject to controlling state law governing residential rent controls and demonstration of a reasonable relationship justification for such housing. It is likely that additional implications and effects of *Palmer* will be determined once the residential development market becomes more active.

For now, the *Palmer* case stands as significant precedent that will likely compel changes in the structure and application of inclusionary zoning practices in many communities throughout California.

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