goldfarb lipman attorneys
1300 Clay Street, Ninth Floor
Oakland, California 94612
510 836-6336

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M David Kroot
John T. Nagle
Polly V. Marshall
Lynn Hutchins
Karen M. Tiedemann
Thomas H. Webber
John T. Haygood
Dianne Jackson McLean
Michelle D. Brewer
Jennifer K. Bell
Robert C. Mills
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Luis A. Rodriguez
Xochitl Carrion
Rafael Yaquian
Josh Mukhopadhyay

LAW ALERT

CITIES AND COUNTIES NEED TO AMEND LOCAL INCLUSIONARY ORDINANCES TO ADDRESS *PALMER V. CITY OF LOS ANGELES*

Many California communities have enacted local inclusionary housing ordinances to provide affordable housing. In *Palmer/Sixth Street Properties L.P. v. City of Los Angeles ("Palmer")*[1], the California Court of Appeal held that local inclusionary requirements applied to rental housing violate the Costa-Hawkins Act, the state law governing rent control. The *Palmer* decision has significant implications for local inclusionary ordinances. ***While the case only affects rental housing,*** communities should amend their local inclusionary ordinances to address *Palmer*. Below are a summary of the case, implications for local inclusionary requirements, and a discussion of changes in local inclusionary ordinances needed to address *Palmer*.

Palmer v. City of Los Angeles

Palmer arose out of the City of Los Angeles' specific plan for Central City West, which required developers to provide units for low-income households. As part of his 350-unit development, developer Geoffrey Palmer was required to replace 60 low-income units that had been previously demolished on the site or, alternatively, to pay an in-lieu fee of approximately $96,200 per low-income unit. The in-lieu fee was equal to the cost to the City of providing the affordable units.

The Costa-Hawkins Act (Civil Code §§1954.51-.535), adopted in 1995, allows landlords to set the initial rent for a new unit and to increase the rent to market levels whenever a unit is vacated (so-called "vacancy decontrol"). The Court concluded that the City's affordable housing requirement was "clearly hostile" to Palmer's right to set the initial rental rate for his units. The Court further found that, because the in-lieu fee was based on the number of affordable units required, the in-lieu fee was "inextricably intertwined" with the preempted rent control requirement and was therefore also preempted by Costa-Hawkins.

The restrictions of Costa-Hawkins do not apply to rental housing if: (1) the developer receives *direct financial assistance* or *any incentive of the type specified in density bonus law* (which includes a wide variety of regulatory relief), *and* (2) the developer agrees by contract to limit rents for BMR rental units. Palmer, however, had not received or requested any bonuses, incentives, or financial assistance.

Implications for Local Inclusionary Policies

Palmer has these implications for local inclusionary requirements:

- A requirement for affordable *rental* housing in newly created rental developments receiving no assistance from local government is likely *no longer permitted*.
- Rents may be limited *if* the builder receives either a financial contribution or a type of assistance specified in density bonus law (which includes a wide variety of regulatory relief) *and* agrees by contract to restrict the rents.
- ***Affordable housing requirements imposed on for-sale housing are not affected by Palmer.***

Changes Needed to Address *Palmer*

Communities that require a portion of new *rental* housing to be affordable should modify

[1] 175 Cal. App. 4th 1396 (2009).

Facsimile
510 836-1035
San Francisco
415 788-6336
Los Angeles
213 627-6336
San Diego
619 239-6336
Goldfarb & Lipman LLP

their ordinances and policies to address the *Palmer* decision. Cities and counties have taken some of the following approaches in response to *Palmer*:

Provisions applicable to rental housing. Some communities have decided not to apply their affordable housing requirements to rental housing in the wake of *Palmer*. Others have conducted "nexus" studies to determine the extent of any impacts created by new market rate rental housing on the need for affordable housing, and have then adopted impact fees based on those studies. This type of fee was not considered by the Court of Appeal when deciding *Palmer*.

Redefining rental and ownership housing. Most existing inclusionary ordinances and policies distinguish between units "offered" for rent and those "offered" for sale. In response to *Palmer*, communities have modified their ordinances to define an ownership project as one with a condominium or other subdivision map allowing units to be sold individually, and then have required the developer to provide for-sale housing as a condition of map approval.

However, State law gives a developer the option of providing the affordable units as rentals (Gov Code §65589.8). To achieve consistency between this provision and Costa-Hawkins, these communities allow the affordable units to be rentals *only if* the developer enters into an agreement with the locality agreeing to the limitation on rents in exchange for a regulatory or financial incentive.

Provisions regarding incentives. Communities *may* require affordable rental units if the developer receives either financial assistance or a regulatory incentive of the type included in density bonus law. Developers receiving redevelopment housing fund assistance or other financial assistance can clearly be required to provide affordable rental housing. Some communities have also limited certain regulatory and zoning incentives to projects where the developer agrees by contract to provide affordable rental housing.

Challenges to Existing Conditions of Approval

In general, developers must challenge conditions of approval within 90 days after adoption (Gov Code §65009(c)(1) for zoning approvals; Gov Code §66499.37 for subdivisions). There is a limited exception in the Mitigation Fee Act (Gov Code §66020) for fees and "other exactions." This provision allows developers to pay under protest for a 90-day period after receiving a statement that includes: 1) the amount of any fees and/or a description of any dedications, reservations, or other exactions; and 2) a notice that the 90-day protest period has started. In recent litigation, some developers have made the novel claim that both in-lieu fees and on-site inclusionary requirements are "exactions" and have attempted to challenge inclusionary requirements for projects under construction because this notice was never given.

However, agencies can start the 90-day protest period running by sending a letter to the applicant or including a condition of approval stating that the protest period has begun for every exaction included in the approval. While ideally the notice should be given *at the time of project approval*, so that the 90-day protest period runs concurrently with the usual limitations period, it may be given at any time.

For more information, please contact Barbara Kautz, Polly Marshall, Rafael Yaquian, or any other Goldfarb & Lipman attorney at (510) 836-6336.

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