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LAW ALERT

SCOTUS SAYS NO THANKS TO BIA'S PETITION TO REVIEW SAN JOSE'S INCLUSIONARY ORDINANCE

Following the California Supreme Court's decision in *California Building Industry Ass'n ("BIA") v. City of San Jose* upholding local governments' authority to enact inclusionary housing ordinances, the BIA petitioned the United States Supreme Court for review. On Monday February 29, the high court rejected the petition. The California Supreme Court's decision is now final.

Inclusionary ordinances require that a certain percentage of new housing be sold at affordable prices. The BIA had asserted that inclusionary ordinances could not be adopted without a nexus study demonstrating that market-rate housing creates a need for affordable housing. The California Supreme Court agreed with San Jose that inclusionary ordinances are a form of price control under the police power that do not need to be supported by a nexus study. With the U.S. Supreme Court's refusal to hear the BIA's challenge, cities and counties in California are now free to adopt new inclusionary ordinances and in lieu-fees without completing a nexus study. In-lieu fees may be used for more types of affordable housing than nexus-based fees.

However, under California's Costa Hawkins Act, communities still cannot adopt inclusionary ordinances requiring *rental* housing to be affordable. The only alternative under current law is to impose impact fees justified by a nexus study. *BIA v. San Jose* did not change that rule. Assemblymembers Mullin and Chiu have introduced AB 2502 to permit local governments to adopt inclusionary ordinances for rental housing, but it remains to be seen whether AB 2502 will be enacted.

Justice Clarence Thomas concurred with the Court's decision to deny the BIA's petition, but in so doing he appeared to invite future challenges. Justice Thomas noted that the Court's previous rulings in *Nollan v. California Coastal Comm'n*, *Dolan v. City of Tigard*, and *Koontz v. St. Johns River Water Management Dist.* have left courts divided about whether generally applicable legislative requirements can constitute a taking when the measure bears only a "reasonable relationship to the public welfare." Justice Thomas expressed an interest in extending the "nexus" and "rough proportionality" requirements of *Nollan* and *Dolan* to legislative as well as as-applied challenges, but agreed that *BIA v. San Jose* did not raise those issues. Another challenger could accept Justice Thomas's invitation to bring a different facial challenge to an inclusionary ordinance.

For more information about the *BIA v. San Jose* decision and its effect on state law, please see our previous law alert on the topic, available here.

If you have any questions, please contact Barbara Kautz, Lynn Hutchins, Caroline Nasella, Eric Phillips, Justin Bigelow, or any other attorney at Goldfarb & Lipman.

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