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Zoned Out! Court Strikes Down Housing Element Overlay Zone

The California Court of Appeal, in a 97-page decision published on April 7, 2023, held that the City of Clovis' housing element did not substantially comply with state law even though it had been approved by the California Department of Housing and Community Development (HCD). In particular, *Martinez v. City of Clovis* (2023) 90 Cal.App.5th 193 held that use of an overlay zone to provide lower-income housing sites violates state law if the underlying zone allows densities below the minimum residential densities required by statute. The Court also found that violations of housing element law may violate fair housing laws.

The Overlay Zone Issue

Housing Element Requirements. When local agencies prepare housing elements, they must complete an inventory of existing sites zoned for housing. If insufficient sites are available at appropriate densities to meet the agency's regional housing needs allocation (RHNA), the city or county must rezone sites to meet its RHNA. Sites rezoned to accommodate a community's *lower*-income housing need must be zoned "with *minimum density* and development standards that permit at least 16 units per site at a density of at least [either 16 or 20] units per acre." (Gov't. Code § 65583.2(h)[1]; emphasis added.)

Case Facts. Clovis was required to provide sites with a minimum density of at least 20 units per acre to satisfy a "carryover" obligation because it had not zoned sufficient lower-income sites in the previous housing element planning period. (§ 65584.09.) The City proposed to meet this requirement in large part by placing an overlay zone allowing densities of 35 to 43 units per acre on sites where the underlying zoning was largely single-family. Owners had the option of developing at either the overlay zone densities of at least 35 units per acre or developing at single-family densities lower than 20 units per acre. HCD approved the overlay zone as consistent with section 65583.2(h).

Decision of the Court. A housing element approved by HCD has a rebuttable presumption of validity (§ 65589.3), and, in that case, the courts "generally will not depart from the HCD's determination unless 'it is clearly erroneous or unauthorized.'" Nonetheless, the Court of Appeal held that "[b]ecause development may occur at a density that is lower than the statutory minimum [of 20 units per acre], the RHN Overlay sites do not comply with section 65583.2(h)." While HCD's *Site Inventory Guidebook* supports the use of overlay zones, "HCD's informal interpretation of statutory requirements is not binding" on the California courts and "any deference that might be due the HCD's interpretation is overcome by the plain meaning of section 65583.2(h)."

The Court agreed that the housing element statute allows for the use of mixed-use zones that may allow 100 percent of the development to be nonresidential. However, if the underlying zone permits residences, those residences must be required to be built at a minimum density of 20 units per acre.

Implications for Agencies with Overlay Zones. HCD has approved many housing elements that use overlay zones

[1] All future references are to the Government Code.

similar to Clovis' to accommodate lower-income housing. An overlay zone complies with *Martinez* so long as the underlying zone either: 1) does not permit residences at all; or 2) requires residences to be constructed at a minimum density of either 16 or 20 units per acre, as applicable. An overlay zone also complies with state law if adopted to meet a community's moderate- or above-moderate-income housing need, regardless of the density of the underlying zone.

Local agencies with adopted housing elements should consider increasing the required density of residences in the underlying zone to either 16 or 20 units per acre, as applicable, when a site has been rezoned to be used for lower-income housing, and the underlying zone allows development at less than 16 or 20 units per acre. If housing elements or required rezonings have not yet been adopted, cities and counties should ensure that any proposed overlay zones conform to the standards established by the Court of Appeal.

Application of Fair Housing Laws

The Court also held that Martinez' complaint alleged sufficient facts to state a claim that an inadequate housing element may have a discriminatory effect or disparate impact on people of color and perpetuate segregation in violation of the fair housing laws (the federal Fair Housing Act, California's Fair Employment and Housing Act, and section 65008). While not deciding that Clovis had violated these fair housing laws, the Court remanded the case to the trial court for a trial on those issues.

Finally, the Court of Appeal ruled on an issue of first impression: the duty to affirmatively further fair housing ("AFFH") under section 8899.50. This statutory duty requires a local government to "administer its programs and activities relating to housing and community development in a manner to [AFFH] and take no action materially inconsistent with its obligation to [AFFH]." The Court ruled that violating housing element law, under the facts presented in this case, as a matter of law, violated the duty to AFFH. To meet the duty to AFFH, local governments must "take the type of actions that undo historic patterns of segregation and other types of discrimination."

For more information on *Martinez v. City of Clovis*, please contact Barbara Kautz, Dolores Dalton, Gabrielle Janssens, Erin Lapeyrolerie, Tommy Levendosky, or any other Goldfarb & Lipman attorney at 510-836-6336.