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U.S. Supreme Court Denies Review of California Supreme Court Decision Upholding San Jose Inclusionary Housing Ordinance

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February 29, 2016 was a notable leap year day for the United States Supreme Court. To the surprise of most in the courtroom that day, Justice Clarence Thomas asked his first question from the bench in more than 10 years. The Court also issued its first round of orders since the February 13 death of Justice Antonin Scalia, including a denial of certiorari in *California Building Industry Association v. City of San Jose*, 61 Cal. 4th 435 (2015).

As we wrote last year, the case was a unanimous California Supreme Court decision that rejected a challenge to San Jose's affordable housing ordinance on the grounds that it was an exaction and thus should have been subject to heightened scrutiny under *Nollan v. California Coastal Commission,* 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013). The California court concluded that San Jose's affordable housing ordinance is not an exaction because it does not require a developer to give up a property interest for which the government would have been required to pay just compensation outside the permit process. The court considered the ordinance instead to be a typical zoning restriction subject to rational basis review and not to the heightened scrutiny that applies to exactions.

Many observers anticipated that the California Building Industry Association would file a petition for writ of certiorari asking the U.S. Supreme Court to review the decision. On Sept. 15, 2015, CBIA did just that. CBIA described the issue as follows:

"A San Jose, California, ordinance conditions housing development permits upon a requirement that developers sell 15% of their newly-built homes for less than market value to city-designated buyers. Alternatively, developers may pay the city a fee in lieu. The California Supreme Court held that, even where such legislatively-mandated conditions are unrelated to the developments on which they are imposed, they are subject only to rational basis review . . .The question presented is: Whether such a permit condition, imposed legislatively, is subject to scrutiny and is invalid under the unconstitutional conditions doctrine as set out in *Koontz*; *Dolan*; and *Nollan*." (Citations omitted)

The Court scheduled the case for consideration three times in January, prior to Justice Scalia's death, but it was rescheduled each time. Such rescheduling is uncommon, and it suggests the Court was keenly interested in the case. Ultimately, however, the Court denied certiorari at the fourth conference on February 26, for reasons Justice Thomas identified in a written concurrence in the denial.

In explaining his concurrence, Justice Thomas wrote that the case "implicates an important and unsettled issue under the Takings Clause" given that lower courts are "divided over whether the *Nollan*/*Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one." He reiterated his long-held doubt about whether "the existence of a taking should turn on the type of governmental entity responsible for the taking." As he wrote cogently with the late Justice Sandra Day O'Connor in dissent from the court's denial of certiorari in *Parking Association of Georgia, Inc. v. City of Atlanta*, 264 Ga. 764 (Ga. 1994):

“It is hardly surprising that some courts have applied *Dolan's* rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.”

Addressing the *California Building Industry Association* case, Justice Thomas wrote that there are “compelling reasons for resolving this conflict at the earliest practicable opportunity.” But he also recognized that important procedural issues were not addressed in lower courts “that might preclude us from reaching the Takings Clause question. The City raises threshold questions about the timeliness of the petition for certiorari that might preclude us from reaching the Takings Clause question. Moreover, petitioner disclaimed any reliance on *Nollan* and *Dolan* in the proceedings below. Nor did the California Supreme Court’s decision rest on the distinction (if any) between takings effectuated through administrative versus legislative action.”

The court’s decision not to review *California Building Industry Association* is undoubtedly a relief to the more than 170 California municipalities that have adopted inclusionary zoning or housing programs. The state Supreme Court’s decision stands. And even though that decision was not based on the legislative/administrative distinction that troubles Thomas, legislatively imposed conditions such as inclusionary housing requirements will continue to only be subject to rational basis review in California.

Given Justice Scalia’s substantial role shaping and protecting property rights under the Takings Clause, and given that only four of nine justices are needed for the Court to hear a case, we can’t help but wonder if CBIA’s petition would have been granted if he were still on the court when the case was finally considered. However, with Justice Thomas’ invitation to property rights advocates to advance this issue in a procedurally proper case, the Court’s denial of certiorari likely represents a temporary setback. Pacific Legal Foundation attorney Brian T. Hodges, counsel of record for CBIA, wrote that “we will continue to challenge the contention that the Constitution’s prohibition on unjust land use conditions does not apply when those demands are imposed by legislative act, rather than through individualized regulations.” While the denial of certiorari completes the facial challenge to San Jose’s ordinance, “the issue remains very alive for future action … and will once again raise a live issue when implemented as a condition on permit approval.”

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