ARTICLE:
SAN JOSE SHOWS THE WAY: INCLUSIONARY HOUSING ORDINANCE SURVIVES FACIAL CHALLENGE

By Ahva Aflatooni[*]

On February 29, 2016 the United States Supreme Court denied certiorari in *California Building Industry Association v. City of San Jose, California, et al.*[1] The petitioner, the California Building Industry Association (CBIA), had appealed the California Supreme Court's unanimous decision rejecting a facial challenge to the City of San Jose's inclusionary housing ordinance on the grounds that it imposed an exaction triggering the unconstitutional conditions doctrine under the takings clauses of the federal and state Constitutions, and the stricter standard of review associated therewith. The California Supreme Court held that, contrary to CBIA's contention, San Jose's inclusionary housing ordinance was subject to the deferential standard of review applicable to land use regulations.

Both the California Supreme Court's decision and the United States Supreme Court's denial of certiorari came as victories for municipalities that have enacted or seek to adopt inclusionary housing ordinances. Indeed, the California Supreme Court's decision effectively provides municipalities with a roadmap for drafting inclusionary housing ordinances that pass facial constitutional challenges. However, even after the United States Supreme Court's denial of certiorari, various questions remain for developers and municipalities in California and other jurisdictions, suggesting that the battle over the constitutionality of inclusionary housing ordinances is far from over.

THE CALIFORNIA SUPREME COURT'S DECISION IN *CALIFORNIA BUILDING INDUSTRY ASSOCIATION V. CITY OF SAN JOSE*

The California Supreme Court released its decision in *California Building Industry Association v. City of San Jose* ("*City of San Jose*") with California's affordable housing crisis in full swing.[2] Chief

[*]Ahva Aflatooni is an associate in the firm of Miller Starr Regalia.

Justice Cantil-Sakauye, writing for the majority, noted that the problems arising from the scarcity of affordable housing "have reached what might be described as epic proportions in many of the state's localities."[3] This was the Court's assessment, despite a series of legislative enactments over the past half-century requiring and encouraging California cities and counties to address the housing needs of households at moderate- and low-income levels.[4]

At the time of the state Supreme Court's decision, more than 170 municipalities in California had adopted inclusionary housing programs, which generally require developers to allocate a certain percentage of housing units in a new development or redevelopment area for sale at an affordable housing price.[5]

In 2010, the City of San Jose (the "City") adopted a citywide inclusionary housing ordinance supported by a range of findings and declarations after conducting public outreach and receiving input from various sectors of the community.[6] The ordinance's primary purposes included: (1) the enhancement of "public welfare by establishing policies requiring the development of housing affordable to low and moderate income households in order to meet the City's regional share of housing needs" under California's Housing Element Law[7] and in recognition of the City's need for affordable housing; and (2) to disperse affordable housing units throughout the city and within neighborhoods containing market-rate units to obtain the benefits that emerge from economically diverse communities.[8]

Substantive Provisions of the Ordinance

The inclusionary housing ordinance adopted by the City of San Jose requires all developments creating 20 or more new, modified, or additional residential units to make 15 percent of the proposed on-site for-sale units available at an affordable housing price.[9] The ordinance provides residential developers with a variety of alternative compliance options in place of the 15 percent set-aside for on-site affordable housing. These include:

(1) constructing off-site affordable for-sale units;

(2) paying an in lieu fee based on the median sales price of a housing unit affordable to a moderate income family;

(3) dedicating land equal in value to the applicable in lieu fee; or

(4) acquiring and rehabilitating a comparable number of inclusionary units that are affordable to low or very low income households.[10]

However, to incentivize developers to provide the affordable housing units on site as opposed to choosing one of the four alternative compliance options, each of the alternative options raises the percentage of required inclusionary housing units to 20 percent of the total units in the development, as opposed to 15 percent required for on-site units.[11] In addition, any developer who makes affordable housing units available on-site instead of opting for one of the alternative compliance options is eligible to receive a variety of economic incentives, including:

(1) a density bonus;

(2) a reduction in the number of parking spaces required by the municipal code;

(3) a reduction in the minimum set-back requirements; and

(4) financial subsidies and assistance from the city in the sale of the affordable housing units.[12]

The ordinance also contains various provisions ensuring that the number of affordable housing units will be maintained upon resale.[13]

California Supreme Court's Legal Analysis

A. Conditions Imposed By The Ordinance Were Not Exactions

The California Supreme Court began its analysis by acknowledging municipalities' broad, constitutionally granted authority to regulate land use and development in furtherance of the public welfare.[14] Courts view land use regulations and restrictions

enacted by municipalities deferentially, subjecting such restrictions and regulations to rational basis review. So long as the land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is generally permissible for constitutional purposes.[15]

CBIA argued that rational basis review did not apply to the San Jose ordinance because the ordinance imposed an exaction triggering the unconstitutional conditions doctrine, which in turn imposes a stricter standard of review.[16] The unconstitutional conditions doctrine places restrictions on the government's authority to condition the grant of a privilege or benefit where a proposed condition requires the individual to forgo a constitutional right.[17]

In rejecting CBIA's argument, the California court analyzed decisions of the United States Supreme Court interpreting the unconstitutional conditions doctrine in the takings context, including *Nollan v. California Coastal Commission*,[18] *Dolan v. City of Tigard*,[19] and *Koontz v. St. Johns River Water Mgmt. Dist.*[20]

Nollan and *Dolan* both involved administrative decisions conditioning the grant of a permit to a property owner upon the property owner's agreement to dedicate a portion of his or her property to public use.[21] In both cases, the administrative authority failed to provide just compensation for the dedication of property required in exchange for the permit. *Nollan* and *Dolan* made clear that special scrutiny of government action is necessary "where the *actual conveyance of the property* is made a condition for the lifting of a land use restriction, since in that context, there is a heightened risk that the [government's] purpose is avoidance of the compensation requirement" of the takings clause.[22] *Koontz* extended this rule to situations where the government conditions its grant of a land use permit on the applicant's payment of money.[23]

Together, *Nollan*, *Dolan*, and *Koontz* establish that where the government requires dedication of property or payment of money as a condition of approving a developer's permit without paying

just compensation, such a condition constitutes an exaction, which may be upheld only if it withstands special scrutiny. Under the United States Supreme Court's formulation, the government must demonstrate an "essential nexus" and "rough proportionality" between (1) the required dedication or payment of money (the exaction), and (2) the projected impact of the proposed land use.[24]

The *San Jose* Court rejected CBIA's contention that the ordinance's requirement of a 15 percent set-aside constituted a required dedication of property under *Nollan* and *Dolan*.[25] The Court noted that, in order for an unconstitutional conditions claim to stand, the condition imposed by the governmental entity must be one that would have constituted a taking if it were imposed outside of the permit process.[26] In the Court's view, the requirement that a developer sell 15 percent of his on-site for-sale units at an affordable housing price would not have constituted a taking of property outside of the permit process. Nor did the ordinance require developers to pay money to the public.[27] Rather than an exaction of money or property, the Court found that the 15 percent inclusionary requirement was merely a land use regulation that imposed a "price control" on the sale of 15 percent of units in the project, a type of regulation that the Court found analogous to rent control.[28]

B. Ordinance Did Not Constitute a Physical or Regulatory Taking

Having concluded that the San Jose ordinance constituted a mere land use regulation, the Court next noted that a land use regulation generally does not violate the takings clauses of the state and federal constitutions so long as it "does not constitute a physical taking or deprive a property owner of all viable economic use of the property," or go so far as to constitute a regulatory taking.[29] The fact that the San Jose ordinance imposed price controls in order to meet its constitutionally permissible purposes did not constitute a physical taking.[30] The Court noted that price controls are a constitutionally permissible means of achieving a municipality's legitimate public purposes, so long as such controls are not confiscatory.[31] Price controls are confiscatory if they

prevent a property owner from obtaining a fair and reasonable return on his or her property. Noting the availability of economic incentives such as density bonuses, exemptions from parking requirements, and financial subsidies that would mitigate the loss incurred by developers who sold 15 percent of their units at an affordable housing price, the Court held that the ordinance's 15 percent set-aside was not confiscatory.[32]

The Court did not consider whether the price controls amounted to a regulatory taking, as the CBIA explicitly disclaimed any reliance on such a theory.[33]

Finally, noting that most land use regulations permissibly diminish the value of property in some way—for instance, by imposing set-backs or maximum building heights—the Court rejected the notion that the ordinance constituted a taking of the diminished portion of the 15 percent of units that would otherwise be sold at market rates.[34]

In sum, the Court found that the San Jose ordinance did not constitute a physical or regulatory taking, nor did it deprive the property owner of all economically viable use. Moreover, the use of price controls on 15 percent of the developer's on-site for-sale housing units was a constitutionally permissible method of achieving the City's legitimate purposes of (1) enhancing the public welfare by encouraging the development of affordable housing, and (2) dispersing affordable housing units throughout the city and within neighborhoods containing market-rate units.

Importantly, the Court noted *Koontz*'s finding that if a permitting authority offers at least one constitutionally permissible alternative means of satisfying a condition, no unconstitutional condition is imposed.[35] Because the San Jose ordinance's requirement that a developer set aside 15 percent of his on-site for-sale units for sale at affordable housing prices did not violate the takings clause, the Court found that the ordinance as a whole—including its four alternative compliance options—failed to impose an unconstitutional condition in violation of the takings clause.[36]

Moreover, the Court did not address the efficacy of the 15

percent inclusionary requirement or whether it would actually advance the stated policy objective of increasing availability of affordable housing, which many critics of such programs find problematic. Finding that the ordinance fell within the City's broad legislative discretion under its police power to regulate the use of real property to serve the legitimate interest of serving the public welfare, the Court upheld the ordinance under the deferential rational basis test for land use regulations rather than the stricter standard of review applicable to exactions.

C. Distinguishing *San Remo Hotel, L.P. v. City and County of San Francisco* and *Sterling Park, L.P. v. City of Palo Alto*

CBIA's facial challenge of the San Jose ordinance also rested on a passage in the California Supreme Court's decision in *San Remo Hotel, L.P. v. City and County of San Francisco* ("*San Remo*"),[37] which CBIA characterized as limiting affordable housing requirements to those that are reasonably related to the adverse impacts specifically attributable to the proposed developments subject to the ordinance.[38] The Court disagreed with CBIA's interpretation, noting that this passage was the Court's response to the particular circumstances presented in *San Remo*, and the plaintiff's contention therein that a permitting authority would use "purported mitigation fees—unrelated to the impacts of development—simply to fill its coffers."[39] The Court clarified that the passage applied to permit conditions that require the payment of monetary fees. Moreover, the passage applied only to development *mitigation* fees assessed to mitigate the impacts of a proposed development, not to "price controls or other land use restrictions that serve a broader constitutionally permissible purpose or purposes unrelated to the impact of the proposed development."[40]

The Court also rejected CBIA's contention that the California Supreme Court's decision in *Sterling Park, L.P. v. City of Palo Alto* ("*Sterling Park*")[41] supported its interpretation of the passage in *San Remo*. The Court noted that *Sterling Park* dealt with the procedural issue of which statute of limitations applied in that case.[42] The Court clarified that it did not intend to express any view in *Sterling Park* regarding the applicable legal test when

evaluating the validity of an affordable housing requirement imposed by an inclusionary housing ordinance.[43]

QUESTIONS REMAINING AFTER *CITY OF SAN JOSE*

Although the *City of San Jose* decision represents a decided victory for inclusionary housing advocates, the opinion leaves several issues unanswered. While providing significant guidance to municipalities drafting new, or amending existing, inclusionary housing ordinances to withstand facial constitutional challenges, the opinion sheds no light on the sorts of inclusionary housing ordinances that may be deemed unconstitutional as applied. Nor does it provide guidance regarding the circumstances in which an inclusionary housing ordinance may amount to a regulatory taking.

Moreover, the Court in *City of San Jose* noted that applying price controls on 15 percent of a development's on-sale units was not so confiscatory as to be constitutionally impermissible, in light of the availability of density bonuses, exemptions from on-site parking requirements, and financial subsidies from the City. However, there are numerous conceivable scenarios in which an inclusionary housing ordinance's price controls could be deemed confiscatory—perhaps where an inclusionary housing ordnance required a much higher percentage of units to be set aside for sale at affordable housing prices, or offered fewer economically advantageous incentives serving to mitigate the developer's loss. *City of San Jose* does not identify the line between inclusionary housing ordinances with price controls that produce a confiscatory result and those that do not.

HOME BUILDERS ASSOCIATION OF GREATER CHICAGO ET AL. V. CITY OF CHICAGO: A POTENTIAL GAP-FILLER?

The outcome of a recently filed lawsuit in Chicago, Illinois may provide some guidance on these issues.

A. Chicago's Affordable Requirements Ordinance

Home Builders Association of Greater Chicago et al. v. City of Chicago[44] ("*City of Chicago*"), a federal case currently pending in the

United States District Court for the Northern District of Illinois, involves both facial and as-applied challenges to Chicago's inclusionary housing ordinance, known as the Affordable Requirements Ordinance ("ARO").[45] The ARO requires developers to set aside 10 percent of every 10 units built in a residential development if the project meets any of the following criteria:

(1) has received a zoning change that permits a higher floor area ratio than would typically be permitted;

(2) has been rezoned from a nonresidential to a residential use;

(3) has received a zoning change that permits residential use on the ground floor where such a use would not otherwise be permitted;

(4) includes land purchased from the City of Chicago;

(5) receives financial assistance from the City of Chicago; or

(6) is part of a planned development in a downtown zoning district.[46]

Projects receiving financial assistance from the City of Chicago must increase the percentage of units for sale at affordable housing prices from 10 percent to 20 percent. Development projects with fewer than 10 residential units are not subject to the ARO.[47]

In addition, the ARO offers an alternative compliance option whereby developers may make an in lieu donation of $100,000 per required affordable housing unit to Chicago's Affordable Housing Opportunity Fund.[48]

B. Summary of Facts in *City of Chicago*

Plaintiffs Hoyne Development ("Hoyne") and the Home Builders Association of Greater Chicago brought suit against the City of Chicago after the city allegedly demanded that Hoyne set aside two of its fourteen new residential units for affordable housing.[49] Hoyne acquired a property on which it planned to build three allegedly separate projects: two developments, each consisting of six-unit condominiums, and a mixed-use retail project with two

apartment units situated above.[50] Hoyne conceived of these as three separate projects and did not anticipate that they would trigger the ARO, as each project contained fewer than 10 residential units.[51] Hoyne applied for and was granted a rezoning and a special use authorization to include residential units on the ground floor. The rezoning, coupled with the total number of residential units proposed, triggered the ARO.[52] Subsequently, the City of Chicago placed a hold on Hoyne's permits, demanding that Hoyne set aside two affordable housing units or pay an in lieu fee totaling $200,000. The City of Chicago construed the three projects as a single 14-unit project, of which 10 percent was required to be set aside for affordable housing. Pursuant to "department policy," the City of Chicago "rounded up" the affordable housing requirement from 1.4 to two units.[53] Hoyne ultimately paid the in lieu fee under protest before filing this suit alongside the Home Builders Association of Greater Chicago.

C. Comparison of Arguments and Ordinances in *City of Chicago* and *City of San Jose*

The arguments made in *City of Chicago* and *City of San Jose* contain several similarities. Like CBIA, the plaintiffs in *City of Chicago* have challenged the city's inclusionary housing ordinance based on the takings clauses of the state and federal constitutions. Specifically, the *City of Chicago* plaintiffs have rested their challenge of the inclusionary housing ordinance on an alleged violation of the unconstitutional conditions doctrine. Echoing CBIA's argument in *City of San Jose*, the plaintiffs in *City of Chicago* allege that, for the ARO to pass constitutional muster both facially and as applied to Hoyne, the City of Chicago must show (1) an "essential nexus" between the condition imposed for permit approval and a constitutionally permissible governmental purpose, and (2) that the condition is in "rough proportionality" to the new development's projected impacts.[54]

However, unlike CBIA in *City of San Jose*, the plaintiffs in *City of Chicago* have challenged the city's inclusionary housing ordinance as unconstitutional as applied. Specifically, the plaintiffs in *City of Chicago* assert that the ARO is unconstitutional as applied to

Hoyne because (1) the City of Chicago erroneously treated Hoyne's proposed development as a single project with 10 or more units; (2) the City impermissibly "rounded up" the number of affordable housing units required by a 14-unit project to two affordable housing units, with a corresponding $200,000 in lieu payment; and (3) the City's practice of "rounding up" was a confiscatory and thus unconstitutional price control.[55]

Moreover, while CBIA did not argue that the San Jose ordinance constituted a regulatory taking, the plaintiffs in *City of Chicago* have expressly reserved the argument that the ARO constitutes a regulatory taking.[56]

Although *City of San Jose* does not constitute binding authority in Illinois, there is no doubt that the case has direct relevance to the allegations raised in the complaint in *City of Chicago*. The *City of San Jose* opinion is also heavily referenced in the parties' briefings on the City of Chicago's motion to dismiss the plaintiff's complaint for failure to state a claim.[57]

The California Supreme Court's affirmation of the facial constitutionality of the San Jose ordinance will likely exert some influence on the U.S. District Court's decision regarding the constitutionality of the ARO. This is particularly true in light of the similarities between the ordinances. Both ordinances require a developer to set aside a specific percentage of new residential development for affordable housing, and both offer payment of an in lieu fee as an alternative compliance method. However, while the San Jose ordinance is triggered by any new residential development of 20 or more units, a developer only triggers the ARO when a project including 10 or more units receives a particular zoning change, receives land or financial assistance from the City of Chicago, or is part of a planned development. Thus, the ARO is only triggered when the developer avails itself of certain types of land use benefits or builds residential housing in a planned development, whereas the San Jose ordinance is broader because it generally applies to any new residential development of 20 or more units, regardless of whether the developer has received a zoning change or financial assistance from the city.

Moreover, the San Jose ordinance generally requires a larger percentage of units to be set aside for affordable housing than the ARO—15 percent versus 10 percent.[58] While the ordinances share similarities, the San Jose ordinance is, in some ways, arguably more onerous than the ARO.

If *City of Chicago* is decided on its merits, the court's decision may assist courts in other jurisdictions, including California, to fine-tune their analyses of the sorts of inclusionary housing provisions that are constitutionally permissible and those that are not.

D. Issues Remaining After *City of San Jose* That May Be Addressed in *City of Chicago*

City of Chicago may also help to "fill the gaps" in the *City of San Jose* decision by deciding issues left unaddressed by the California Supreme Court. As already stated, the *City of Chicago* decision includes an as-applied challenge to the ARO's constitutionality. Although *City of Chicago* is still in the pleadings stage, the papers filed thus far indicate that the U.S. District Court may have to grapple with the following issues, among others, in deciding whether the ARO is constitutional as applied to Hoyne:

(1) Whether the City of Chicago permissibly deemed Hoyne's proposed development as a single project with 10 or more units, rather than as three separate projects, each with fewer than 10 units;

(2) Whether the City of Chicago permissibly "rounded up" the number of affordable housing units required by a 14-unit project from 1.4 to two affordable housing units, and accordingly, a $200,000 in lieu payment; and

(3) Even if the City of Chicago's practice of "rounding up" is generally permissible, whether the practice was so confiscatory in Hoyne's case as to constitute an unconstitutional price control.[59]

City of Chicago also may shed light on the viability of a claim that an inclusionary housing ordinance requiring a certain percentage set-aside for affordable housing constitutes a regulatory

taking. As noted previously, CBIA expressly disclaimed any reliance on the regulatory taking theory in *City of San Jose*. However, the plaintiffs in *City of Chicago* explicitly claim that they "have not waived the argument that the ordinance amounts to a regulatory taking."[60]

CONCLUSION

City of San Jose has been hailed as a great victory for municipalities and affordable housing advocates, while its critics have condemned it as curtailing developers' property rights, deterring residential housing development, and even exacerbating the affordable housing crisis.[61] The case has significant implications for affordable housing programs nationwide, providing the groundwork for municipalities structuring affordable housing ordinances likely to pass constitutional muster. In fact, the *City of San Jose* decision has already proved so influential outside of California as to constitute a main source of contention in the parties' briefings on the motion to dismiss in *City of Chicago*.[62]

If decided on the merits, *City of Chicago* will likely provide municipalities and developers with further guidance on how to structure existing or anticipated affordable housing ordinances from a constitutional perspective, despite the fact that the case, like *City of San Jose*, does not constitute binding authority outside its jurisdiction. Of course, it is entirely possible that the court in *City of Chicago* will offer a different perspective than the California Supreme Court when interpreting the constitutionality of the challenged inclusionary housing ordinance. Whether it lends further support to the California Supreme Court's decision, detracts from it, or merely distinguishes it, the *City of Chicago* case appears to be next in line for shaping inclusionary housing jurisprudence.

ENDNOTES:

[1]*California Bldg. Industry Ass'n v. City of San Jose, Calif.*, 136 S. Ct. 928 (2016).

[2]*California Bldg. Industry Assn. v. City of San Jose*, 61 Cal. 4th

435, 189 Cal. Rptr. 3d 475, 351 P.3d 974 (2015), cert. denied, 136 S. Ct. 928 (2016) (*San Jose*).

[3]Id. at 441.

[4]Id. at 444-445.

[5]Id. at 441.

[6]Id. at 448-449.

[7]Gov. Code §§ 65580 et seq.

[8]Id. at 444-449.

[9]Id. at 449-450.

[10]Id. at 450-451.

[11]Id. at 451.

[12]Id. at 451.

[13]Id. at 451.

[14]Id. at 455.

[15]Id. at 455.

[16]Id. at 456.

[17]*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547–548, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005); Id. at 458.

[18]*Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[19]*Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[20]*Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

[21]*Nollan v. California Coastal Com'n*, 483 U.S. 825, 828, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 377, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[22]*Nollan v. California Coastal Com'n*, 483 U.S. 825, 841, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987), emphasis added.

[23]*Koontz v. St. Johns River Water Management Dist.*, 133 S. Ct. 2586, 2603, 186 L. Ed. 2d 697 (2013).

[24]Id. at 459.

[25]Id. at 461.

[26]Id. at 460.

[27]Id. at 461.

[28]Id. at 461.

[29]Id. at 462.

[30]Id. at 463.

[31]Id. at 464.

[32]Id. at 464.

[33]Id. at 465.

[34]Id. at 466.

[35]Id. at 468.

[36]Id. at 468–469.

[37]*San Remo Hotel L.P. v. City And County of San Francisco*, 27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002).

[38]Id. at 470.

[39]Id. at 470.

[40]Id. at 472.

[41]*Sterling Park, L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 163 Cal. Rptr. 3d 2, 310 P.3d 925 (2013).

[42]Id. at 480.

[43]Id. at 482.

[44]*Home Builders Association of Greater Chicago et al. v. City of Chicago*, No. 1:15-cv-08268 (N.D.Il. 2015) filed Sept. 21, 2015.

[45]The ARO has been amended effective October 2015, but the proposed changes apply only to projects submitted on or after October 13, 2015. The proposed changes include higher in-lieu fees in downtown and higher income areas, a requirement that one-fourth of the 10 percent of affordable units be provided on-site, and a density bonus for affordable units located near transit, among other changes. (Chicago Mun. Code, § 2-45-115.) The project that is the subject of the *City of Chicago* case was submitted prior to October 13, 2015 and is thus not subject to the proposed changes. Accordingly, in discussing *City of Chicago*, this article analyzes the ARO as it stood prior to the October 2015 amendment.

[46]Chicago Mun. Code, § 2-45-110.

[47]Chicago Mun. Code, § 2-45-110.

[48]Chicago Mun. Code, § 2-45-110.

[49]*City of Chicago* is still in the early stages of litigation. The parties are awaiting the court's decision on the city's motion to dismiss for failure to state a claim, filed December 31, 2015. As such, all facts recited herein are taken from the allegations in the complaint.

[50]Notice of Removal at Exhibit 1: Complaint, p. 4, *Home Build-*

ers Association of Greater Chicago et al. v. City of Chicago, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 1.

[51]Notice of Removal at Exhibit 1: Complaint, p. 4, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 1.

[52]Notice of Removal at Exhibit 1: Complaint, p. 4, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 1.

[53]Notice of Removal at Exhibit 1: Complaint, p. 5, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 1.

[54]Notice of Removal at Exhibit 1: Complaint, p. 7, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 1.

[55]See The City's Memorandum In Support Of Its Motion To Dismiss Plaintiffs' Complaint at 6-15, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 16-1; Plaintiffs' Response to Defendant's 12(B)(6) Motion to Dismiss at 3-6, 13-15, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 19; The City's Reply In Support Of Its Motion To Dismiss Plaintiffs' Complaint at 2-7, 12-15, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 25.

[56]See Plaintiffs' Response to Defendant's 12(B)(6) Motion to Dismiss at p. 5, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 19.

[57]See The City's Memorandum In Support Of Its Motion To Dismiss Plaintiffs' Complaint at p. 8, 10-11, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 16-1; Plaintiffs' Response to Defendant's 12(B)(6) Motion to Dismiss at p. 5-8, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 19; The City's Reply In Support Of Its Motion To Dismiss Plaintiffs' Complaint at 7-12, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 25.

[58]However, the ARO requires a 20 percent set-aside in cases where the developer receives financial assistance from the City of Chicago. The San Jose ordinance requires a 20 percent set-aside in cases where the developer chooses an alternative compliance option rather than providing the on-site units for sale at affordable housing prices.

[59]See The City's Memorandum In Support Of Its Motion To Dismiss Plaintiffs' Complaint at 6-15, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 16-1; Plaintiffs' Response to Defendant's 12(B)(6) Motion to Dismiss at 3-6, 13-15, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 19; The City's Reply In Support Of Its Motion To Dismiss Plaintiffs' Complaint at 2-7, 12-15, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 25.

[60]See Plaintiffs' Response to Defendant's 12(B)(6) Motion to Dismiss at p. 5, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 19.

[61]See, e.g., McIntyre, *Calif. Cities Gain Leverage In Affordable Housing Talks* (May 2, 2016) Law 360 http://www.law360.com/articles/772458 (as of May 27, 2016).

[62]See The City's Memorandum In Support Of Its Motion To Dismiss Plaintiffs' Complaint at p. 8, 10-11, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 16-1; Plaintiffs' Response to Defendant's 12(B)(6) Motion to Dismiss at p. 5-8, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 19; The City's Reply In Support Of Its Motion To Dismiss Plaintiffs' Complaint at 7-12, *Home Builders Association of Greater Chicago et al. v. City of Chicago*, Case No. 1:15-cv-08268 (N.D.Il. 2015), ECF No. 25.

