

Inclusionary Housing Requirements: Still Possible?



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Need for Affordable Housing

- **Increase in price of housing and rentals**
 - \$3000/mo. in NoCal.
 - New projects higher
- **Booming economy raising rents**
 - E.g., Google shuttle in SF
- **RHNA numbers**
 - Generally only a fraction available
 - Particularly after the demise of RDAs



Affordable Housing Mandates

- **California**
 - Housing Element, **Gov. C. 65583**
 - Density Bonus Law, **Gov. C. 65915**
 - Findings needed to deny, **Gov. C. 65589.5**
 - Fair Employment and Housing Law, **Gov. C. 12900**
- **Federal**
 - Fair Housing Act, **42 U.S.C. 3601**

What is Inclusionary Housing?

- **Idea is to spread out housing**
 - Incorporate into new developments
 - Less stigmatizing
 - Economic inclusiveness
 - Reduce racial/ethnic segregation
 - Better public education (“Housing Policy is School Policy”)
- **Debate: versus collecting fees**
 - More efficient use of resources
 - Concentrate BMR units in affordable projects (But: The “Projects”?)

Napa and Trinity Park Imprimatur

- Napa case

- Upheld public purpose
- Can't be attacked facially
- Home Builders Assn v. City of Napa (2001) 90 Cal.App.4th 188



- Trinity Park

- Sixth District said inclusionary housing isn't an "other exaction" under the MFA, since not a "public facility"
Trinity Park, L.P. v. City of Sunnyvale (2011) 193 Cal. App. 4th 1014

Trinity Park v. Sunnyvale





Recent problems

- The demise of Redevelopment Agencies in 2012.
- The redefining of “exactions” by the California Supreme Court in the Sterling Park case.
- The granting of review by the California Supreme Court in the San Jose inclusionary housing case.
- (Possible) ramifications of the decision of the U.S. Supreme Court in the 2013 Koontz case.

Sterling Park v. Palo Alto

- **10 of 96 units to be affordable, plus fees**
- **“The question concerning section 66020's applicability comes down to this: Are the requirements at issue “any fees, dedications, reservations, or other exactions” under section 66020, subdivision (a)? The Court of Appeal held that they are not.”**

Sterling Park, L.P. v. City of Palo Alto (2013) 57 Cal.4th 1193



Sterling Park 2

- **Williams**: Assessment for laying cable in conduit is an “other exaction” under MFA.

Or . . .

- **Fogarty**: Restriction on number of units is not.

Williams Communications v. City of Riverside (2003) 114 Cal.App.4th 642; Fogarty v. City of Chico (2007) 148 Cal.App.4th 537

Sterling Park 3

“In combination, *Williams* and *Fogarty* indicate that the term ‘other exactions’ under section 66020 at least includes actions that divest the developer of money or a possessory interest in property, but it does not include land use restrictions. “

Sterling Park 4

“Compelling the developer to give the City a purchase option is an exaction under section 66020. Because of this conclusion, we need not decide whether forcing the developer to sell some units below market value, by itself, would constitute an exaction under section 66020.”

(Emphasis added)

San Jose Inclusionary Ordinance

- **Passed in 2010, not in effect yet**
- **15% inclusionary requirement**
- **In lieu fees, but no real property dedication**
- **Police Power justification**
- **Facial challenge by CBIA**



CBIA v. S.J. – Trial Court

- You are not only stupid, but ugly as well.



CBIA v. S.J. – 6th Dist. Court of Appeal

- Not stupid, not ugly
- Clear exercise of the Police Power
 - Not an MFA “other exaction”
- CBIA burden to show facial invalidity.



Justice Franklin Elia

California Building Industry Assn. v. City of San Jose (2013) 2013 Cal. App. LEXIS 447, 2013 WL 2449204, *formerly published at* 216 Cal. App. 4th 1373

CBIA v. S.J. – CA Supreme Court

- “Review Granted”
- Briefed, pending argument



Palmer and Rental Housing



Palmer and Rental Housing

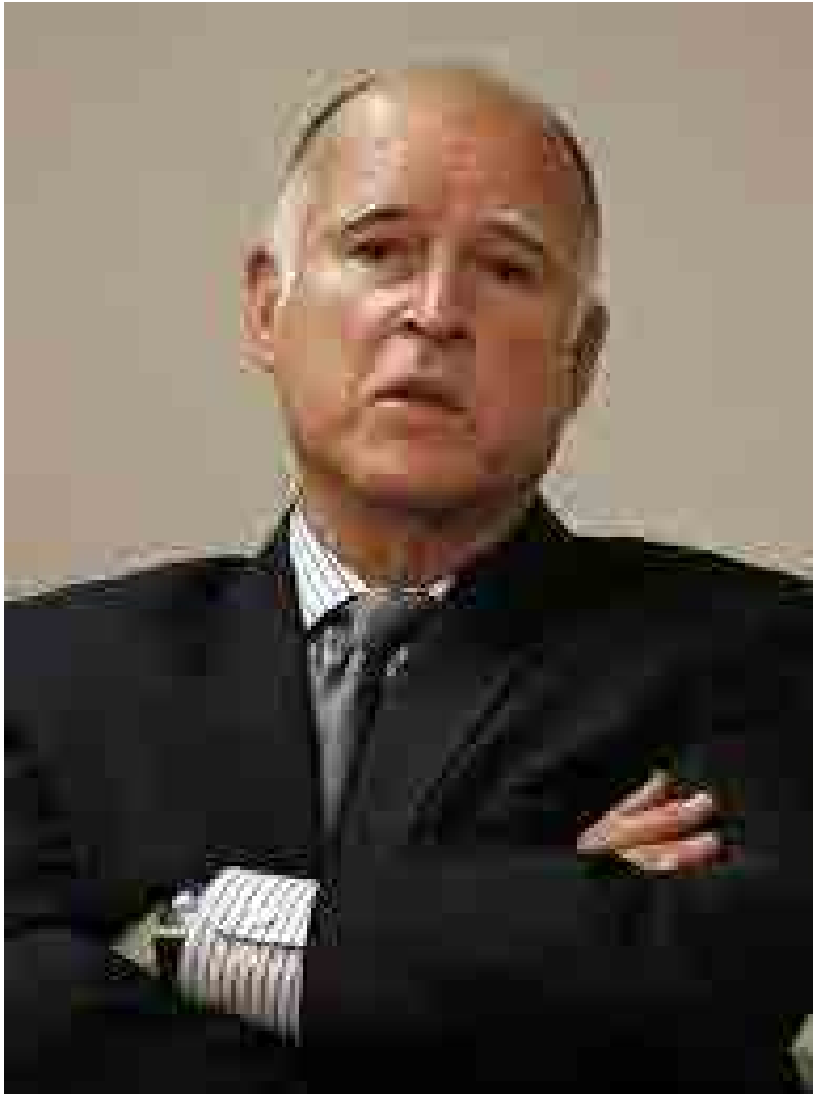
Palmer/Sixth Street Properties L.P v. City of Los Angeles (2009) 175 Cal.App.4th 1396:

- Inclusionary housing for rental units violated the Costa-Hawkins Act of 1995, Civ. Code Section 1954.50, *et seq.*, which outlawed traditional rent control in new buildings in the state.

Responses to Palmer

- **Inaction**
- **Suspend requirement until clarified**
- **Nexus fee for rental housing**
- **Legislative solution**

AB 1229 Vetoed by Governor



AB 1229 Veto Message

- **“As Mayor of Oakland, I saw how difficult it can be to attract development to low and middle income communities. Requiring developers to include below-market units in their projects can exacerbate these challenges, even while not meaningfully increasing the amount of affordable housing in a given community.”**
- **“The California Supreme Court is currently considering when a city may insist on inclusionary housing in new developments [*the San Jose case*]. I would like the benefit of the Supreme Court’s thinking before we make adjustments in this area.”**

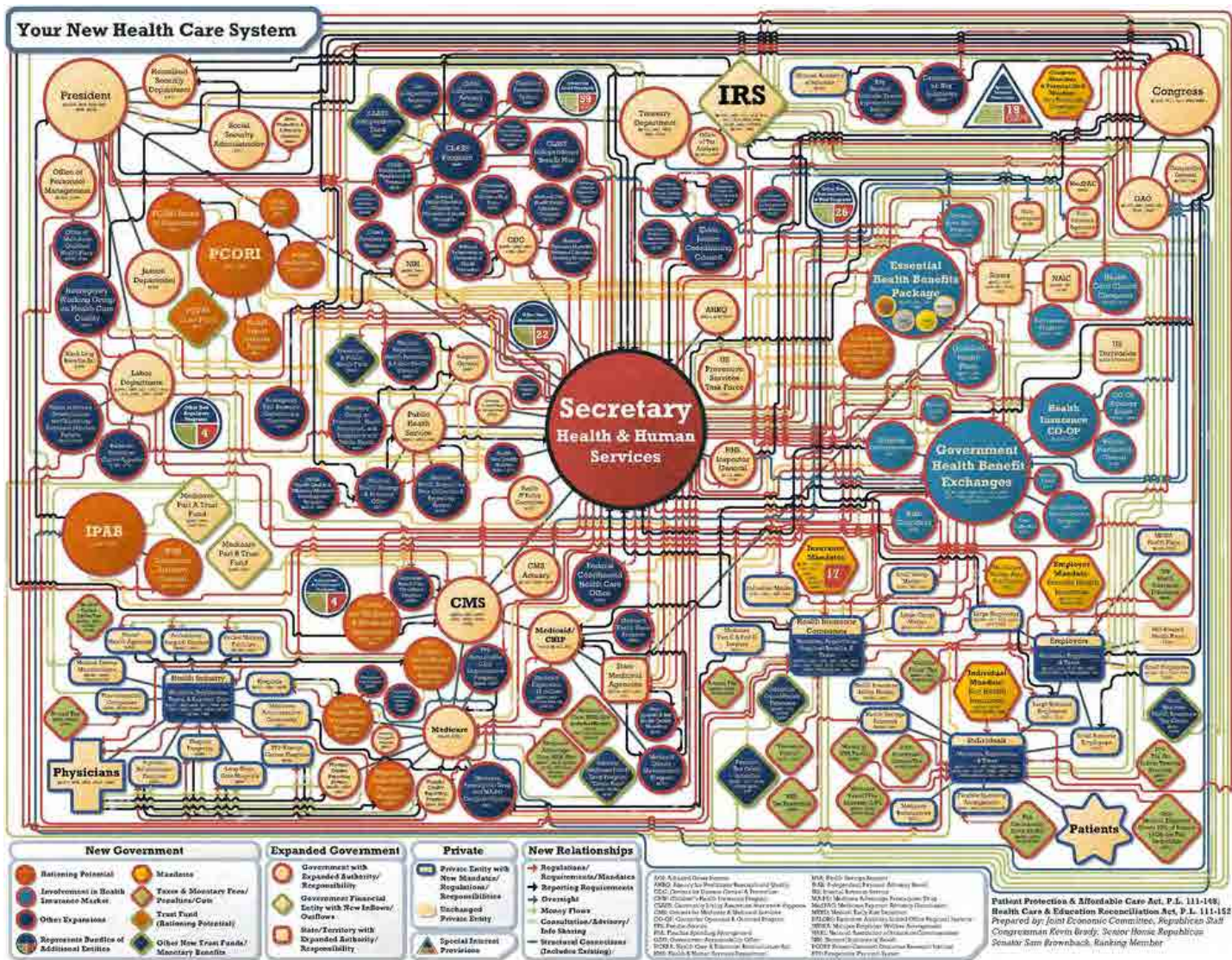
Veto Message of AB 1229, Oct. 13, 2013

Approaches to Inclusion

- **Rely on Police Power**
- **Nexus study for inclusionary housing**
- **Nexus study for fees**
 - Residential fees
 - Commercial linkage fees
- **Zoning for affordability**
 - Micro-units
 - Senior housing
- **Other financial approaches**

Nexus Study

- **Ties production of new housing units to the need for affordable housing**
- **Would satisfy Mitigation Fee Act requirements for an impact fee**
- **Gov. C. 66001:**
 - **Purpose of fee**
 - **Need caused by development**



No, not affordable Health Care, affordable Housing!

Nexus Study Methodology

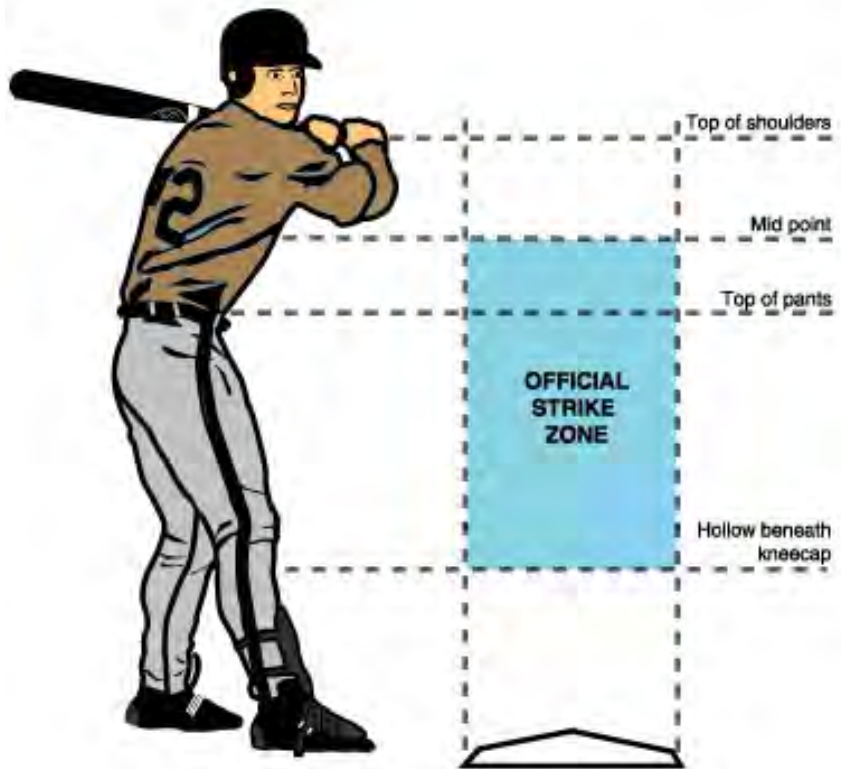
- **Analyze hypothetical project: 100 units.**
- **New residents have disposable income.**
- **Spending creates a variety of jobs for new workers.**
- **New workers need affordable housing.**
- **Subsidies are required to build affordable housing.**
- **Fee is set per sq. foot or per unit.**

Koontz Case



Koontz v. St. Johns River Water Management Dist. (2013) 133 S. Ct. 2586

A “Balls and Strikes” Opinion?



Justice Alito, not Roberts

The New Extended Strike Zone

Nollan/Dolan (“nexus” and “rough proportionality”) apply to:

- **Permit Denials (even though there is no “taking”) (Vote 9-0)**
- **Demands for Money, not just property (Vote 5-4)**

Dolan v. City of Tigard (1994) 512 U.S. 374; Nollan v. California Coastal Commission (1987) 483 U.S. 825

Application to Monetary Demands

- Has been the law in CA since 1996 (Ehrlich v. City of Culver City)
 - Hasn't really been a problem
 - Koontz: “Yet the ‘significant practical harm’ the dissent predicts has not come to pass.”
- Dissenters worried about it
 - But most of the opinion deals with the denial problem, even though they agree with that

Ehrlich v. City of Culver City (1996) 12 Cal.4th 854

Application to Legislative Enactments? - 1

Nollan/Dolan: Potentially coercive bargaining over ad hoc conditions



Application to Legislative Enactments? - 2

Big question: Do Nollan/Dolan apply to legislatively enacted fees or inclusionary requirements?



Application to Legislative Enactments? - 3

Justice Kagan (dissent) warns that majority's views are unknown

- She and 3 other justices see a difference
- Most lower courts agree, e.g. Ehrlich v. City of Culver City
 - Political remedy
 - Public process
 - Not subject to arm-twisting

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