

## Court Invalidates San Jose Affordable Housing Ordinance

The [California Building Industry Association](#) scored a major victory recently when a San Jose judge threw out the city's requirement that residential developers sell or rent a specified portion of newly-built homes to lower-income households. The court ruled the city had not shown a reasonable linkage between the impact of new development and the need for affordable housing. [California Building Industry Assoc. v. City of San Jose](#).

The [ordinance](#), adopted in January, 2010 required developments with 20 or more units to make 15% of their units affordable to very low, low and moderate income buyers or to pay a hefty in-lieu fee: \$122,000 per unit. Projects with rental units had to rent out 9% of their units at rates affordable to moderate income households and 6% at rates affordable to very-low income households.

In its challenge to the ordinance, the CBIA pointed to the absence of any evidence in the record showing how new residential development projects of 20 or more units would create a need for additional, subsidized housing. It argued the affordable housing set-aside requirement was an exaction, and the city had failed to support it by making the required showing of a reasonable relationship between the burden of new development and that exaction. CBIA acknowledged the significant need for affordable housing, but challenged the fundamental premise that new development caused or contributed to that need.

The city responded that the ordinance was not an exaction because nothing in it required developers to give anything to the city. Rather, it was a development restriction or condition, similar to rent control.

The court didn't buy the argument.

"This is not a rent control case," the court stated. It is a case in which the city had to "demonstrate its legal ability to require that a developer sell a home at a level which may be potentially below its costs in building that home." The city had not done so, the court found, because nothing in the record disclosed a "reasonable relationship between deleterious public impacts of new residential development" and the requirements of the ordinance. The court declared the ordinance invalid on its face and enjoined the city from enforcing or implementing it.

San Jose's [City Attorney](#), Rick Doyle, has said he will recommend an appeal.

The decision is the latest chapter in a statewide debate over a difficult question: what exactly is an affordable housing mandate? Is it akin to zoning or other development controls or is it more like a fee or exaction? It's a knotty issue. Developers are required to expend – or give up -- a lot in order to comply with zoning and subdivision requirements, some of which are deemed exactions and some not. Size, density, height, lot size, setbacks and other restrictions on development can be costly, but are not considered exactions. By contrast, requirements to provide infrastructure and fund parks, fire stations and schools qualify as exactions.

Both sides of the debate agree that the lack of affordable housing in California is a major social problem, but they differ on the solution. Cities contend developers need to build more affordable housing, either of their own volition or as a condition of developing at all. Developers point to the high cost of land and of complying with development requirements, and cite data showing that housing cannot be produced at rates affordable to

lower income Californians and still generate a reasonable return. They also question the assumption that providing housing leads to a need for more housing, affordable or otherwise.

It's a debate the legislature has chosen not to join. Cases such as this one may ultimately determine who wins that debate.

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