

## **Failure to Challenge Affordable Housing Condition Barred Subsequent Claim of Invalidity of Enabling Ordinance under Costa-Hawkins Act**

While acknowledging that the City's affordable housing ordinance was no longer enforceable under the Costa-Hawkins Act, an appellate court dismissed a challenge to a permit condition requiring compliance with the ordinance because the owner failed to seek timely review of the permit condition through administrative mandamus. *City of Berkeley v. 1080 Delaware, LLC*, 234 Cal.App.4th 1144 (2015). In 2004, the City issued a conditional use permit for construction of 51 residential rental units. One of the permit conditions required that 20% of the units be rented at rates affordable to below-median-income households pursuant to the City's affordable housing ordinance. Market conditions delayed construction of the building for several years, after which the owner declared bankruptcy and the property was acquired by 1080 Delaware through foreclosure. In the interim, the court in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009), invalidated an affordable housing ordinance similar to the City's under the Costa-Hawkins Act, which generally precludes cities from restricting the initial rents that may be charged by landlords.

After 1080 Delaware notified the City that it viewed the affordable housing requirements as unenforceable in light of *Palmer/Sixth Street*, the City filed suit seeking a declaratory judgment that the permit condition remained valid and enforceable. In response, 1080 Delaware argued that the invalidity of the ordinance on which the permit condition was based necessarily rendered the condition itself invalid.

The appellate court disagreed. Although both parties agreed that the City's affordable housing ordinance was preempted under Costa-Hawkins insofar as it applied to rental units, the court held that 1080 Delaware was precluded from challenging the condition because the prior owner had failed to file a timely administrative mandate action seeking judicial review of the condition. The court relied on prior decisions holding that administrative mandamus is the exclusive method of challenging the validity of a permit condition, and failure to seek mandamus review within the applicable 90-day statute of limitations bars the developer from challenging the validity of the condition in a subsequent action. The court also ruled that the permit condition remained enforceable against a subsequent owner of the property despite the intervening decision invalidating the enabling ordinance. The original owner waived the right to seek review of validity of the condition by failing to mount a timely mandamus challenge, and 1080 Delaware acquired the property with the same limitations and restrictions that bound its predecessor in interest.

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