

## **Court Held That Obligation to Further Fair Housing Requires More**



A court addressed the City of Clovis' repeated failures to accommodate lower-income housing needs. Disagreeing with the Department of Housing and Community Development's (HCD's) determination that the City's Housing Element complied with Housing Element Laws, it held the City failed to meet minimum density requirements for certain housing sites and remanded for further proceedings under the federal Fair Housing Act, the California Fair Employment and Housing Act, and Government Code section 65008, which prohibits discrimination against residential development based on income levels. It also held that the statute imposing an

affirmative duty to further fair housing requires more than an absence of discrimination, and ruled that judgment should be entered in petitioner's favor on the portion of her fair housing claim that was based on the City's violations of the Housing Element Law. *Martinez v. City of Clovis* 90 Cal. App. 5th 193 (2023).

In 2016, Clovis adopted its fifth cycle housing element for the planning period from 2015 to 2023. The housing element purported to accommodate the City's Regional Housing Needs Allocation (RHNA) by including some carryover sites that had been identified in the fourth cycle housing element but had not been built out and sites that would be rezoned to accommodate housing. It included Program 4, which stated the City would "[p]rovide adequate zoning on at least 221 acres of land by December 31, 2016, to cover the unaccommodated need." HCD found the City's housing element was in substantial compliance with Housing Element Law, conditioned upon compliance with certain items including implementation of Program 4.

By 2018, the City had not implemented Program 4. HCD found that the housing element was then out of compliance. The City responded by proposing two zoning actions: (1) allow multi-family housing in the Public Facilities (P-F) zoning district, and (2) create a City-wide overlay zoning district to allow multi-family housing on properties that met certain standards. HCD was not satisfied that the proposal to enact zoning implemented Program 4, and revoked its finding of substantial compliance.

The City subsequently adopted the proposed zoning actions. At the request of HCD, it also amended its housing element to incorporate a revised site inventory for the parcels subject to the two zoning actions. In 2019, HCD found the amended housing element substantially complied with Housing Element Law.

Denise Martinez, a Clovis resident, sued, alleging numerous claims under the Housing Element Law, anti-discrimination laws, and the statutory duty to further fair housing.

*Housing Element Law.* Government Code section 65583.2(h) requires that certain parcels "shall be zoned with minimum density and development standards that permit at least" 20 units per acre in suburban jurisdictions such as Clovis. The court held that the City violated this law by using a zoning overlay that required at least 20 units per acre, but keeping in place the base zoning districts that allowed lower densities. It noted that HCD's finding of substantial compliance was not dispositive as it created only a rebuttable presumption of validity, and rejected the City's argument that the statutory language should be construed to require only that the zoning allow the required density.

The petitioner also challenged nonvacant sites subject to the revised P-F zoning, claiming the City failed to establish that existing public facilities would be redeveloped into housing. The court noted that section 65583.2(g) requires the City to "specify the additional development potential for each [nonvacant] site . . . and provide an explanation of the methodology used to determine the development potential." It held that this information need not be included in the housing element itself, and upheld the City's inclusion of these parcels in the site inventory based upon information in letters the City sent to HCD. It also rejected petitioner's argument that the City was required to address expressly each factor that must be considered in assessing development potential. HCD could reasonably infer that certain factors were absent based on the lack of any mention of those factors in the City's letters.

*Federal Fair Housing Act (FHA).* The FHA prohibits housing discrimination based on race, color, religion, sex, familial status, or national origin. Petitioner argued that the City's failure to provide affordable housing adversely affected people of color.

The court relied on federal regulations establishing that liability under the FHA may be based on discriminatory effect, which is established when the action actually or predictably results in a disparate impact or perpetuates segregated housing patterns. The court held that allegations of the City's continuing failure to implement Program 4 and its failure to comply with the Housing Element Law sufficiently identified the specific practices

being challenged. It found allegations of statistical facts about income and housing burdens within the area sufficient to allege a disparate impact, and that the historical perspective the petition provided was "sufficient to adequately allege [that] the City's practice of noncompliance with the Housing Element Law during the fourth and fifth planning periods perpetuated segregated housing patterns."

*California Fair Employment and Housing Act (FEHA)*. The FEHA makes it illegal to discriminate through public land use regulations, including those that make housing opportunities unavailable, based on protected characteristics that include race and source of income. The court ruled that violations of the Housing Element Law are sufficient to establish a violation of the FEHA, provided the challenger establishes that the failure to comply makes housing unavailable. Petitioners' allegations of a discriminatory effect were sufficient to establish that housing was made unavailable.

The court also rejected the City's immunity argument, noting that the immunity granted by the Government Claims Act applies only to claims for damages, and not to petitioner's claims for a writ, declaratory relief and injunctive relief.

*Discrimination Under Government Code § 65008*. Section 65008 prohibits discrimination based on the fact that residences are intended for very low-, low- or moderate-income residents. The court held that section 65008 encompasses actions that have a discriminatory effect. A violation may be established by proving a disparate impact on developments intended for occupancy by lower income families, even where there is no denial of a particular development. However, a violation of the Housing Element Law would not automatically constitute a violation of section 65008, as the petitioner must also prove a discriminatory effect, intentional discrimination, or a combination of the two. *Affirmative Duty to Further Fair Housing Under Government Code § 8899.50*. Section 8899.50 requires cities to administer programs relating to housing in a manner that affirmatively furthers fair housing. The court interpreted this statute to do more than prohibit discrimination; it requires meaningful action. The court concluded as a matter of law that the violations established regarding petitioner's first three causes of action – regarding rezoning requirements, zoning at the required density and with adequate capacity to accommodate the RHNA carryover, and failing to implement Program 4 – established that the City failed to comply. It further held that section 8899.50 may be enforced in an action for writ of mandate.

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