
TAKINGS CLAUSE — AFFORDABLE HOUSING — CALIFORNIA SUPREME COURT UPHOLDS RESIDENTIAL INCLUSIONARY ZONING ORDINANCE. — *California Building Industry Ass'n v. City of San Jose*, 351 P.3d 974 (Cal. 2015).

Ghettoization, or the concentration of poverty within small geographic areas, has long plagued many cities.¹ Ghettoization has wide-ranging impacts on both individuals and municipalities: for example, it begets racial segregation,² limits access to quality education for the poor,³ contributes to increased crime,⁴ reduces private investment,⁵ and raises local government costs.⁶ Moreover, it is often accompanied by a generalized shortage of affordable housing.⁷ To combat these problems, many cities have enacted residential inclusionary zoning ordinances.⁸ These ordinances vary in their particulars, but are fundamentally similar in that they attempt to incorporate affordable housing into new residential developments.⁹

Recently, in *California Building Industry Ass'n v. City of San Jose*¹⁰ (*CBIA*), the California Supreme Court upheld a residential inclusionary zoning ordinance, and it did so in part by arguing that these ordinances, as use restrictions and not confiscations of property or money, are not subject to a rigorous analysis under the U.S. Supreme Court's "exactions" doctrine.¹¹ But while the *CBIA* court established that residential inclusionary zoning ordinances should be viewed formally as use restrictions, the court did not probe how these ordinances

¹ See ELIZABETH KNEEBONE ET AL., BROOKINGS INST., THE RE-EMERGENCE OF CONCENTRATED POVERTY 5–7 (2011), http://www.brookings.edu/~media/research/files/papers/2011/11/03-poverty-kneebone-nadeau-berube/1103_poverty_kneebone_nadeau_berube.pdf [<http://perma.cc/F9KA-HEDH>].

² See Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 197 (2003).

³ KNEEBONE ET AL., *supra* note 1, at 2.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ See NAT'L LOW INCOME HOUS. COAL., OUT OF REACH 2014, at 7 (2014), <http://nlihc.org/sites/default/files/oor/2014OOR.pdf> [<http://perma.cc/398Z-WCNH>].

⁸ ALEX F. SCHWARTZ, HOUSING POLICY IN THE UNITED STATES 224 (2d ed. 2010).

⁹ *Id.*

¹⁰ 351 P.3d 974 (Cal. 2015).

¹¹ See *id.* at 986–96. An exaction, in this context, “confers a public benefit, such as an easement or the payment of an impact fee, and is demanded by government from real-estate developers in exchange for the grant of a development permit.” *Land-Use Exaction*, BLACK'S LAW DICTIONARY (10th ed. 2014). Conferrals of benefits to government qualify as exactions for purposes of this doctrine only if they would constitute Fifth Amendment takings requiring payment of just compensation if imposed outside the land-use-permitting process. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598–99 (2013). Regulations restricting the use of land do not constitute Fifth Amendment takings except in select circumstances that were not alleged in this case. See *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 127 (1978).

function as such. The court's analysis can be supplemented by arguing that residential inclusionary zoning is fundamentally use restrictive in that it pursues integration by limiting the construction of exclusive residences. This feature makes residential inclusionary zoning akin to ordinary zoning, which is subject to a less stringent standard of review.

In 2010, San Jose enacted a residential inclusionary zoning ordinance in response to a local and regional affordable housing shortage.¹² This ordinance required developers of residential properties of twenty or more units either to set aside fifteen percent of units for sale at an affordable price, or to fulfill one of four alternative compliance options.¹³ The California Building Industry Association (CBIA) brought a facial challenge to the ordinance, claiming that it was an unconstitutional exaction under the Takings Clauses of the California and U.S. Constitutions via the unconstitutional conditions doctrine.¹⁴

The Santa Clara County Superior Court ruled for CBIA.¹⁵ In an opinion written by Judge Manoukian, the court relied on a previous California Supreme Court case, *San Remo Hotel L.P. v. City and County of San Francisco*,¹⁶ for the proposition that a permitting condition violates Takings Clause rights if the government cannot demonstrate an essential nexus and reasonable relationship between the permitting condition and a deleterious public impact of the development.¹⁷ As the city did not present evidence of such a relationship, the court held the ordinance invalid.¹⁸

The Sixth District Court of Appeal reversed and remanded.¹⁹ In an opinion written by Justice Elia, the court distinguished *San Remo* by arguing that, in *San Remo*, the government set conditions on development with the purpose of "mitigating housing loss caused by new residential development," while San Jose's ordinance aimed more broadly at improving public welfare by promoting affordable development.²⁰ Justice Elia thus remanded for review under the police-power standard, which holds land use ordinances valid so long as they "are reasonably related to [a] legitimate public purpose."²¹

¹² *CBIA*, 351 P.3d at 981–82.

¹³ *Id.* at 983.

¹⁴ *Id.* at 978. The unconstitutional conditions doctrine "holds that government may not grant a benefit on the condition that the beneficiary surrender a constitutional right." Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1415 (1989).

¹⁵ *Cal. Bldg. Indus. Ass'n v. City of San Jose*, No. 110CV167289, slip op. at 6 (Cal. Super. Ct. May 25, 2012).

¹⁶ 41 P.3d 87 (Cal. 2002).

¹⁷ *See Cal. Bldg. Indus. Ass'n*, slip op. at 6.

¹⁸ *Id.*

¹⁹ *Cal. Bldg. Indus. Ass'n v. City of San Jose*, 157 Cal. Rptr. 3d 813, 825 (Ct. App. 2013).

²⁰ *Id.* at 820.

²¹ *Id.* at 825.

The California Supreme Court affirmed.²² Writing for a unanimous court, Chief Justice Cantil-Sakauye turned first to the question of whether the ordinance's requirement that a developer sell fifteen percent of its units at an affordable price constituted an "exaction" for purposes of the federal and California Takings Clauses.²³ If it did, then under the U.S. Supreme Court's exactions doctrine as set forth in *Nollan v. California Coastal Commission*,²⁴ *Dolan v. City of Tigard*,²⁵ and *Koontz v. St. Johns River Water Management District*,²⁶ "special scrutiny" would apply, and San Jose would be able to impose the condition only if it could demonstrate an "essential nexus" and "rough proportionality" between the ordinance's affordable housing requirement and a harm caused by residential development.²⁷ The *CBIA* court, however, distinguished the relevant U.S. Supreme Court cases on the ground that in each case the government had demanded *acquisition* of some property interest in return for a building permit; San Jose, by contrast, did not seek to acquire anything from developers, but instead sought to restrict developers' *use* of property.²⁸ To establish this distinction, the court asserted that residential inclusionary zoning ordinances set price ceilings, which the Supreme Court has previously characterized as use restrictions and to which the essential nexus and rough proportionality requirements have never applied.²⁹ Therefore, the court concluded, the San Jose ordinance did not constitute an exaction.³⁰

Next, the court turned to *CBIA*'s argument that even if the U.S. Supreme Court's exactions doctrine did not apply, the San Jose ordinance should be held to *San Remo*'s very similar standard of review for legislatively imposed mitigation fees.³¹ The court dismissed this argument as meritless. First, it noted that "there is no indication" that *San Remo*, when read in context, applies to use restrictions.³² Second,

²² *CBIA*, 351 P.3d at 979.

²³ *Id.* at 986.

²⁴ 483 U.S. 825 (1987).

²⁵ 512 U.S. 374 (1994).

²⁶ 133 S. Ct. 2586 (2013).

²⁷ *See CBIA*, 351 P.3d at 989.

²⁸ *See id.* at 990–91.

²⁹ *Id.* at 991–93.

³⁰ *Id.* at 996.

³¹ *See id.* at 996, 998. Regarding the relation between this standard and the U.S. Supreme Court's exactions standard, there is a split among state supreme courts concerning whether the exactions standard applies to permitting conditions instituted legislatively. David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 49 (2014). In *San Remo*, the California Supreme Court held that, like exactions, legislatively imposed mitigation fees must bear an essential nexus and rough proportionality to a harm caused by the development at issue, but the linkage between fee and harm "need not be so close or so thoroughly established" as in the exactions context. *San Remo Hotel L.P. v. City and County of San Francisco*, 41 P.3d 87, 106 (Cal. 2002); *see also* Callies, *supra*, at 57–58.

³² *CBIA*, 351 P.3d at 998.

the court determined that the *San Remo* standard applies only to fees designed to mitigate a particular harm caused by a particular development.³³ Residential inclusionary zoning ordinances, by contrast, aim more broadly to promote public goods, namely the provision of affordable housing and the dispersal of such housing throughout the community.³⁴ The court ultimately followed the court of appeal in applying the more lax police-power standard, and upheld the ordinance at issue under that standard.³⁵

While the *CBIA* court convincingly characterized residential inclusionary zoning ordinances as use restrictions by virtue of their character as price ceilings, the court did not consider how these ordinances function as use restrictions, and not exactions, on the ground. This gap in the court's argument can be filled: because inclusionary zoning ordinances pursue integration not only narrowly by setting price ceilings but also more broadly by barring the construction of exclusionary buildings, they meaningfully restrict the use of property in a way that is more analogous to long-upheld ordinary zoning ordinances than it is to exactions.

It is worth noting preliminarily that if residential inclusionary zoning ordinances were subject to an essential nexus and rough proportionality review, they would almost universally fail.³⁶ Building a residential building does not usually *cause*, in any direct sense, a lack of affordable housing in a municipality. So it is hard to imagine a municipality being able to establish an essential nexus, much less rough proportionality, between a caused harm and the requirement that developers internalize affordable housing costs.³⁷

³³ *Id.* at 999.

³⁴ *Id.* at 1000.

³⁵ *See id.* at 1006. The court did not consider whether the ordinance's alternative compliance options were constitutional because *Koontz* clarified that if developers are presented with one constitutional option, then other options are irrelevant. *Id.* at 996 (citing *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2598–99 (2013)).

Justice Werdegar concurred. *Id.* at 1006–09 (Werdegar, J., concurring). The author of *San Remo*, she wrote separately to characterize its test as a due process analysis rather than a takings analysis because it considers “whether a regulation of private property is *effective* in achieving some legitimate public purpose,” and the U.S. Supreme Court has considered analysis of effectiveness to be outside the ambit of the Takings Clause. *Id.* at 1008 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005)).

Justice Chin also concurred. *Id.* at 1009–10 (Chin, J., concurring). He agreed that the police-power standard used by the court was appropriate, but added that imposing an ordinance that forced developers to incur a loss on particular units would extend beyond the city's police powers. *Id.*

³⁶ *See Callies, supra* note 31, at 56 (arguing that such ordinances would survive analysis “only when the local government . . . provides sufficient incentive to offset all or a substantial portion of the cost of the mandatory affordable housing set-asides”).

³⁷ *See id.*

But, as the *CBIA* court recognized, these requirements have not been held to apply to government action if that action is viewed as a use restriction, and not a confiscation of property.³⁸ In characterizing the ordinance at issue as a use restriction, the court referenced a number of U.S. Supreme Court precedents stating that price ceilings are use restrictions.³⁹ Despite the formal appeal of this argument, over the past few years there has been increasing speculation that some courts, including the U.S. Supreme Court, might view residential inclusionary zoning as subject to an exactions analysis.⁴⁰ This point of view is based in skepticism regarding whether inclusionary zoning is really use restrictive in practice. A price ceiling in this particular context can be seen as a sort of confiscation: it saves cities money by requiring developers, rather than cities themselves, to provide affordable housing, so it can appear as if cities are effectively taking money directly from developers.⁴¹ Moreover, because residential inclusionary zoning limits the price at which a developer can sell or rent a property, it directly relates to money that is connected to an interest in land. This characteristic aligns it with the most recent U.S. Supreme Court exactions case, *Koontz*, which held that conditioning a land-use permit on spending money to preserve wetlands elsewhere amounted to a monetary exaction and was subject to essential nexus and rough proportionality review.⁴²

By looking at how residential inclusionary zoning ordinances function on the ground, we can see the error in this point of view. Residential inclusionary zoning restricts landowners in a more meaningful way than by setting price ceilings: it restricts developers' ability to use their land in an exclusionary manner by constructing homogeneously high-income residences. This restrictive aspect is crucial to residential inclusionary zoning's integrative effectiveness. In the case of New York City, for example, the City's Department of City Planning found that while its pre-inclusionary zoning affordable housing plan created affordable housing, the plan's heavy reliance on public land resulted in the congregation of low-income residents in particular areas of the city,

³⁸ See *CBIA*, 351 P.3d at 990.

³⁹ *Id.* at 992–93 (citing *Yee v. City of Escondido*, 503 U.S. 519, 528–30 (1992); *Pennell v. City of San Jose*, 485 U.S. 1, 11–14 (1988); *Permian Basin Area Rate Cases*, 390 U.S. 747, 768 (1968); *Nebbia v. New York*, 291 U.S. 502, 539 (1934)).

⁴⁰ See, e.g., Callies, *supra* note 31, at 44; Tim Iglesias, *Maximizing Inclusionary Zoning's Contributions to Both Affordable Housing and Residential Integration*, 54 WASHBURN L.J. 585, 605–06 (2015).

⁴¹ See Petitioner's Opening Brief at 28, *CBIA*, 351 P.3d 974 (No. S212072).

⁴² See *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595, 2599–600 (2013). *Koontz* looked to “functional[]” concerns in departing from the traditional view that takings analyses do not extend to monetary confiscations. See John D. Echeverria, *Koontz: The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENVTL. L.J. 1, 38 (2014) (quoting *Koontz*, 133 S. Ct. at 2599).

while the private market elsewhere supported primarily exclusive, more expensive residences.⁴³ Upon the introduction of residential inclusionary zoning in certain areas, the city noted a correlation between the creation of affordable housing and economic diversity within neighborhoods.⁴⁴ Central to this integrative success was the transition from a policy focused purely on affordable development to one focused additionally on the restriction of unaffordable development.

When viewed as restrictions on the construction of exclusionary residences, residential inclusionary zoning ordinances actually look nearly identical to many long-upheld zoning ordinances. In particular, the regulation of a use deemed harmful to “health, safety, morals, or general welfare” is paradigmatic of general zoning laws.⁴⁵ The U.S. Supreme Court has established that the pursuit of a “well-balanced” community falls reasonably within the “broad and inclusive” scope of “public welfare.”⁴⁶ Given the negative effects of socioeconomic segregation and the positive effects of integration on low-income communities, racial minorities, and municipalities at large, cities could reasonably conclude that the construction of exclusive residential buildings is harmful to the “public welfare,” and that the restriction of such housing furthers the public aim of building a “well-balanced” community.

Moreover, there is something perverse about the idea that inclusionary zoning might *not* qualify as ordinary zoning. So-called “exclusionary zoning” ordinances — which police residency by limiting, for example, the number of unrelated individuals per residence or the size of particular lots — have long survived challenge at the federal level.⁴⁷ Viewing inclusionary zoning as a restriction on exclusionary residential construction, rather than merely as a price ceiling, brings out the parallel nature of exclusionary and inclusionary zoning. Both regulate residency by limiting how owners can develop or market their land, and both aim to affect the tenor of the community and the way that residents interact. Under this formulation, it is difficult to justify giving greater deference to the exclusionary policy.

⁴³ See N.Y.C. DEP’T OF CITY PLANNING & N.Y.C. DEP’T OF HOUS. PRES. & DEV., NEW YORK CITY MANDATORY INCLUSIONARY HOUSING 70 (2015), http://www.nyc.gov/html/dcp/pdf/housing/mih_report.pdf [<http://perma.cc/3WND-33SE>].

⁴⁴ *Id.* at 71. Studies elsewhere have also found that inclusionary zoning promotes economic diversity better than alternative housing policies. See Robert Hickey et al., *Achieving Lasting Affordability Through Inclusionary Housing* 5 (Lincoln Inst. of Land Policy, Working Paper Product Code WP14RH1, 2014), <http://communitylandtrust.org/wp-content/uploads/2014/08/CLT-inclusion-July2014-LincLandInst.pdf> [<http://perma.cc/JU7W-YZS4>].

⁴⁵ Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 125 (1978) (quoting *Nectow v. City of Cambridge*, 277 U.S. 183, 188 (1928)).

⁴⁶ *Village of Belle Terre v. Boraas*, 416 U.S. 1, 6 (1974) (quoting *Berman v. Parker*, 348 U.S. 26, 33 (1954)).

⁴⁷ See Wayne Batchis, *Suburbanization and Constitutional Interpretation: Exclusionary Zoning and the Supreme Court Legacy of Enabling Sprawl*, 8 STAN. J. C.R. & C.L. 1 (2012).

Last, inclusionary zoning is not just zoning — it is good zoning that reflects the evolution of residential preferences over time. The negative effect of residential segregation on the poor and on disadvantaged racial minorities is enormous: it undermines their educational experience, access to employment, and capacity for social mobility.⁴⁸ Moreover, isolation entrenches racial divides: studies have indicated that a lack of interracial contact breeds negative stereotypes.⁴⁹ Economic integration — when pursued by expanding the poor’s freedom of choice⁵⁰ — can help alleviate these problems. It has been associated with better academic outcomes for the poor,⁵¹ greater residential stability,⁵² and reduced racial stereotyping.⁵³ And although these effects on the poor are of course most important, the influence on the culture of the city as a whole is substantial as well. As Professor Richard Sennett writes: “A city ought to be a school Through exposure to others, we might learn how to weigh what is important and what is not.”⁵⁴ Perspectives like this one have been marginalized historically,⁵⁵ but populations are diversifying⁵⁶ and young people more open to integrated neighborhoods are displacing their predecessors in the hous-

⁴⁸ See Charles, *supra* note 2, at 197–99.

⁴⁹ See, e.g., Jeffrey C. Dixon & Michael S. Rosenbaum, *Nice to Know You? Testing Contact, Cultural, and Group Threat Theories of Anti-Black and Anti-Hispanic Stereotypes*, 85 SOC. SCI. Q. 257, 276 (2004); see also W. E. BURGHARDT DU BOIS, *THE SOULS OF BLACK FOLK* 167 (1st ed. 1903) (positing that limited interaction with only the poorest among whites entrenched the perspective among blacks that “Southern white people do not have the black man’s best interests at heart”).

⁵⁰ It is worth noting that governments have used the aim of economic integration to justify policies displacing residents from extant low-income neighborhoods, or neglecting such areas. See John O. Calmore, *Fair Housing vs. Fair Housing: The Problems with Providing Increased Housing Opportunities Through Spatial Deconcentration*, 14 CLEARINGHOUSE REV. 7, 8 (1980). These policies should be distinguished from integrative approaches, like inclusionary zoning, “directed at providing an open choice of housing opportunities for the urban nonwhite and poor.” *Id.*

⁵¹ See Stephen J. Caldas & Carl Bankston III, *Effect of School Population Socioeconomic Status on Individual Academic Achievement*, 90 J. EDUC. RES. 269, 274–75 (1997).

⁵² See HEATHER SCHWARTZ, *THE CENTURY FOUND., HOUSING POLICY IS SCHOOL POLICY* 7–8 (2010), <http://www.tcf.org/assets/downloads/tcf-Schwartz.pdf> [<http://perma.cc/EAE2-5BBY>].

⁵³ See Dixon & Rosenbaum, *supra* note 49, at 276.

⁵⁴ RICHARD SENNETT, *THE CONSCIENCE OF THE EYE*, at xiii (1990); see also IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 238–39 (1990) (“The urban ideal expresses difference . . . , a side-by-side particularity neither reducible to identity nor completely other. In this ideal groups do not stand in relations of inclusion and exclusion, but overlap and intermingle without becoming homogenous.”).

⁵⁵ See Edward G. Goetz, *Housing Dispersal Programs*, 18 J. PLAN. LITERATURE 3, 14 (2003).

⁵⁶ Press Release, U.S. Census Bureau, *Millennials Outnumber Baby Boomers and Are Far More Diverse*, Census Bureau Reports (June 25, 2015), <http://www.census.gov/newsroom/press-releases/2015/cb15-113.html> [<http://perma.cc/X6F3-4E5Q>].

ing market.⁵⁷ The institution of residential inclusionary zoning ordinances is evidence that community values are shifting, and governments should be able to support this shift via their police powers — particularly given that they have been empowered to similarly support exclusionary tendencies in the past.

These arguments may be countered by asserting that, regardless of its merits, residential inclusionary zoning forces developers to internalize costs associated with building affordable housing, and that it thus uses developers to supplement the public finances (an ostensibly confiscatory aim). But this similarity to exactions is shared by many zoning ordinances that have long survived challenge. In fact, an entire class of zoning ordinances, termed “fiscal zoning,” aims “to exclude from a jurisdiction any proposed development that might create a net financial burden and to encourage development which promises a net financial gain.”⁵⁸ Such zoning often manifests itself in the exclusion of “lower income groups, and especially large families which require significant public expenditures”⁵⁹ by setting lower bounds on lot size or limiting construction of multi-unit housing more accessible to those of lower incomes.⁶⁰ These ordinances thus limit property owners’ ability to more profitably divide or market their properties, and in so doing save municipalities money. That the narrowly construed mechanism by which residential inclusionary zoning operates — a price ceiling — should distinguish it from these ordinances seems incoherent: both inflict measurable financial harm on landowners and provide financial gain to municipalities.⁶¹ Given the functional similarity between inclusionary zoning and extant zoning regulations, as well as inclusionary zoning’s significant integrative impact, it would be inappropriate to hold inclusionary zoning to a higher standard of review.

⁵⁷ See William A.V. Clark, *Changing Residential Preferences Across Income, Education, and Age: Findings from the Multi-City Study of Urban Inequality*, 44 URB. AFF. REV. 334, 346 fig.3, 352–53 (2009).

⁵⁸ NAT’L COMM’N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY, H.R. DOC. NO. 91-31, at 19 (1968).

⁵⁹ *Id.*

⁶⁰ See *id.* at 7.

⁶¹ This discussion can even be broadened to more paradigmatic zoning ordinances: the plaintiffs in *Euclid* and *Penn Central*, for example, both claimed that their property interests were confiscated. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 384 (1926); Brief for Appellants, *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104 (1978) (No. 77-444), 1978 WL 206882, at *22. And, indeed, absent the zoning power governments would have to pay — through negotiation or eminent domain — to achieve the public aims now pursued through zoning. See John Edward Cribbet, *Concepts in Transition: The Search for a New Definition of Property*, 1986 U. ILL. L. REV. 1, 34.