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LAW ALERT

PROPERLY DRAFTED WAIVER PROVISIONS CAN PROTECT INCLUSIONARY HOUSING ORDINANCES FROM LEGAL CHALLENGE

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On May 24, 2006, a San Diego County Superior Court found that San Diego's inclusionary zoning ordinance constituted a "taking" because of the lack of a properly drafted "waiver" provision. The decision has received wide publicity, creating concern about the legality of inclusionary housing ordinances. Since over 100 communities in California have adopted inclusionary housing ordinances, cities and counties have asked how to protect their ordinances from a similar challenge.

An "inclusionary" housing ordinance is one that requires a certain percentage of new housing to be affordable to lower or moderate income households. Some builders and others have challenged the constitutionality of these ordinances. In the only published California decision, the City of Napa's inclusionary housing ordinance withstood a court challenge (*Home Builders Ass'n of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2002)). The Court of Appeal decided that the challenge could not be successful because Napa's ordinance included a "waiver" provision. The provision allowed developers to ask for a reduction in the ordinance's requirements if there was no "reasonable relationship" between the impact of development and the inclusionary requirement.

The San Diego inclusionary ordinance also allowed developers to request a waiver, but

under different circumstances. The local Superior Court found that the ordinance was unconstitutional because the waiver provision did not include the same "reasonable relationship" language as the Napa ordinance.

The City of San Diego has announced that it will ask the judge to reconsider his ruling and plans to appeal if this does not happen. *The case cannot be used as precedent for other challenges to inclusionary ordinances*, since it was decided at the Superior Court level. Inclusionary ordinances that have been in effect for more than 90 days are also usually protected from a facial challenge (a challenge to the mere enactment of the ordinance) by statutes of limitation.

The courts may well ultimately decide that San Diego's ordinance meets all constitutional tests, or the case may be settled without a published decision. Nonetheless, to protect themselves from a similar challenge, cities and counties may want to ensure that their inclusionary ordinances include waiver provisions with wording similar to that used by the City of Napa.

For further information, please contact Barbara Kautz, Polly Marshall, or any other Goldfarb & Lipman attorney at 510-836-6336.