The California Supreme Court, in a unanimous decision issued today, rejected state developers' efforts to nullify the City of San Jose's affordable housing ordinance. That decision, *California Building Industry Association v. City of San Jose*, is critically important for both state land use policy and for constitutional principles governing private property rights and the proper scope of government regulation.

The City of San Jose, with a population greater than any other municipality in the Bay Area, anchors California's Silicon Valley. That region represents one of America's most overheated real estate markets, with median home values in the neighborhood of $1 million. As a result, low and moderate income residents are increasingly being priced out of the area. That, in turn, forces these residents to seek housing in less expensive, outlying regions, with concomitant, lengthy commutes, increased conventional and greenhouse gas emissions, etc.

As recounted in detail in today's Supreme Court decision, the California Legislature has since at least 1975 recognized that "there exists within the urban and rural areas of the state a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income…can afford." In 1980, the Legislature declared: "Local and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community." (Cal. Gov. Code § 65580.)

To their credit, the City of San Jose and approximately 170 other California cities and counties have responded to this crisis by adopting so-called affordable housing measures. San Jose's ordinance–the focus of the California Building Industry Association's lawsuit–is illustrative of this statewide trend. It requires new residential development projects of 20 or more units to sell at least 15 per cent of the constructed for-sale homes at a price that is affordable to low or moderate income households. The measure gives developers the option of providing the requisite housing offsite through a number of available options; if they do so, however, the requisite low or moderate housing increment increases to 20 per cent.

CBIA brought a facial challenge to the San Jose ordinance, claiming that it is unconstitutional. In the lower courts, CBIA was vague as to the specific constitutional provision(s) or theory(s) on which it was relying. Those lower courts

compounded that ambiguity by issuing opinions which can most charitably be characterized as opaque.

Fortunately, the California Supreme Court granted review, and CBIA was motivated to be more explicit as to the constitutional theory it was advocating: that the San Jose affordable housing measure violates the Takings Clause of both the U.S. and California Constitutions. Specifically, CBIA argued that the ordinance contravenes the "unconstitutional conditions" component of takings law–i.e., that the measure violates California developers' private property rights because the city has failed to demonstrate that the ordinance's requirements are reasonably related to the adverse impact on San Jose's affordable housing problem *caused by or attributable to the proposed new developments that are subject to the ordinance's requirements*.

In a unanimous decision authored by California Chief Justice Tani Cantil-Sakauye, the Supreme Court rejected the developers' takings theory. The proper constitutional inquiry, ruled the Court, is a far less exacting one: whether the requirements of San Jose's inclusionary housing ordinance are reasonably related to the city's legitimate interest in alleviating the municipality's chronic shortage of low- and moderate-income housing generally. The justices had little difficulty in concluding that they are.

Today's decision represents an important legal victory for not only the City of San Jose, but also for the 170 other California local governments with inclusionary housing ordinances on their books, and for affordable housing advocates who had successfully intervened in the case. California's state and local governments continue to struggle with the problem of inadequate low and moderate income housing upon which many millions of state residents depend. But today's legal victory removes a potentially fatal threat to the viability of the measures currently in place. Hopefully, the decision will encourage other California local governments to adopt their own affordable housing ordinances and thereby assume their "fair share" of the state housing crisis.

Kudos to California Attorney General Kamala Harris, the League of California Cities, the California State Association of Counties, the Silicon Valley Leadership Group and a host of public interest organizations, all of whom filed amici briefs in support of San Jose.

A note of caution, however: in all likelihood, this litigation is not over. CBIA, ably

represented by the Pacific Legal Foundation, will undoubtedly seek review from the U.S. Supreme Court on the constitutional issue underlying the case. The High Court has in recent years shown substantial interest in takings law generally, and the unconstitutional conditions doctrine in particular. The latter principle was at the heart of a key 2013 U.S. Supreme Court takings case, *Koontz v. St. Johns River Water Management Dist.*, which the California justices took great pains to distinguish in today's *CBIA v. San Jose* opinion. A key distinction, they observed, is that the *CBIA* decision involved a facial challenge to San Jose's quasi-legislative act of approving its affordable housing ordinance. Reiterating a holding in its earlier decisions, the California Supreme Court held that *Koontz* and similar U.S. Supreme Court takings precedents only apply to ad hoc, quasi-adjudicatory land use permitting decisions. But *Koontz* is itself ambiguous on that particular point, and the Supremes could conceivably use the *CBIA* case to resolve the scope of their unconstitutional conditions jurisprudence in its upcoming 2015-16 Term.

But in the meantime, San Jose and its inclusionary housing allies can celebrate a most important legal and policy victory.