

INCLUSIONARY ZONING *After Palmer & Patterson*

**California Affordable Housing Law Project/
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What's Different?
To Fee or Not to Fee?

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Homebuilders of Northern Calif. v. Napa

90 Cal.App. 4th 188 (2001) [Pre-Lingle]

- Takings- Upheld IZ v. “facial” attack (per old standard)
 - Provides
 - Benefits to balance regulatory burden
 - Right to Appeal for Waiver
 - Legit. Means to Address Need for Affordable Housing
 - *Nolan/Dolan* “essential nexus”/ “rough proportionality” NOT Applicable
- Due Process Upheld IZ against *facial* attack
 - In Lieu Fee and Land Donation available
 - Hardship Waiver available
- In Lieu Fee: Failed to reach Mitigation Fee Act (Nexus Study Requirement) exaction attack

Action Apart. Assn. v. Santa Monica

166 Cal.App.4th 456 (2008)

- Upheld IZ against facial Takings attack
 - 20-25% IZ for condo projects four or more units
 - Off site OK if 25% more affordable units provided
- Utilized the new Lingle takings analysis
- Found “Nolan/Dolan” essential nexus ‘rough proportionality’ test not applicable to IZ ords.
 - *Only* Applies to Decisions on Individual Projects

Mead v. Cotati

2008 U.S. Dist. LEXIS 94238

- 20% IZ or In-Lieu Fee if less than 9 units
- Developer proposes 8 units, waiver denied
- Decision Upholds IZ:
 - Takings Claim Unripe—Did not seek compensation
 - Due Process—IZ clearly rationally related to legit. obj.—need for affordable housing
 - Equal Protection—IZ treats all developers equally & is rationally related to need for affordable housing
 - Developers NOT similarly situated to other tax payers
 - Mitigation Fee Act—IZ NOT monetary exaction
 - In-Lieu Fee is an alternative to land use requirement
 - Not exacted to fund public facilities related to the project

Kamaole Pointe Dev. v. Maui

573 F.Supp. 2d 1354 (D. Haw. 2008)
(& Superseded July 3, 2008 Order)

- Takings—Applies *Lingle* analysis to IZ
 - Finds *Nolan/ Dolan* essential nexus & rough proportionality requirements do not apply
 - Facial Takings claims are not “ripe” unless developer has sought compensation
- Facial Due Process & Equal Protection Denied
 - IZ is rationally related to legit. governmental purpose
- “As-Applied” Due Process & E. P. Claims Survive
 - Decision must be based on impact on the project

Palmer/ Sixth St. Prop. v. Los Angeles

175 Cal.App.4th 1396 (2009)

- 1991 Specific Plan Affordable Housing Mandates
 - Projects of > 10/units per lot
 - Replace Lower Income Units Previously Demolished
OR 15% IZ
 - In-Lieu Fee Option (\$100,576 for very low inc. unit)
- Purpose: Replace & Preserve Afford. Housing
- Based on Study
 - Housing Demolished & Future Lower Inc. Needs
- Palmer Denied Waiver & Refuses to Pay In-Lieu

Palmer Holding

- Costa-Hawkins Rental Housing Act preempts IZ as applied to Rental Housing
 - “Vacancy Decontrol” and New Construction provisions prohibit restricting rents on IZ units
- In-Lieu Fee Option not enough to avoid preempt.
- Fee is “inextricably intertwined” with the IZ requirement to produce restricted rental units
- Costa-Hawkins’ Affordable Unit Exemption
 - Applies only where Developer agrees to contract w/ locality for financial or other assistance

BIA of Central Cal. v. Patterson

171 Cal. App. 4th 886 (2009)

City Had Generic 10% IZ

- In-Lieu Fee Based on Affordability Gap
 - \$ Needed to Leverage Subsidies --\$734/unit (9% of Gap)

Adopted “Development Impact Fee”

- Conducted Study:
 - Affordability Gap—cost of developing low
 - Based Need on Lower Income RHNA (*not* on % of dev.)
 - Multiplied RHNA X GAP
 - Divided into Remaining Residential Development Capacity
- Increased the Fee to \$20,946/unit

Patterson Holding

- Nollan/Dolan Takings Test—Not Applicable
- “Reasonable Relationship” Test—San Remo
 - Fee Must Be ***Reasonably Related*** to
 - “Deleterious Public Impact of the Development”
- Fee Not Reasonably Related to Project Impact
 - Based on RHNA & Scarcity of Land
 - Not based on Need Created by the Project
- Implies Fee Could be based on IZ percentage....
 - Like it Was Before...
- No Opinion on Application of Mitigation Fee Act

Legal Effect -- Limited

Substituted “Impact Fee” For true *In-lieu* Fee

- Fee was Not Related to IZ Percentage

Fee *Not* Related to its Purpose—Alleged Impact

- Impact of Housing Dev. On Housing Need
- A Standard In-Lieu Fee Directly Related to IZ %

Did Not Adequately Address *Lingle v. Chevron*

- Eliminated “Substantially Advance” requirement
- On which Reasonable Relationship test based

Legal Attacks After *Palmer & Patterson*

- Facial Takings attacks unlikely
 - Must seek compensation first to apply new *Lingle* test (*but see Guggenheim*)
 - Must meet the *Penn Central* takings standard
- IZ and/or In-lieu fees attacked as Exactions
 - Requiring Nexus Study
 - Demonstrating Relationship to Housing Need created by New Housing Development

Current Suits (Same Atty/ Same Appellate Dist.)

- Palo Alto— (*Sterling v. Palo Alto*)—
 - As-Applied Attack
 - IZ & In-Lieu Fee Attacked Under: *Nollan/Dolan*, DP, EP, MFA, Prop. 218 (special tax)
- San Jose— (*CBIA v. San Jose*)—
 - Facial Attack
 - IZ & In-Lieu Fee— No Reasonable Relationship
San Remo/Patterson
- Sunnyvale— Similar to Palo Alto

IZ Issues After *Palmer*

- Covering Rental Housing—Some Ideas:
 - Impact Fees—Based on Nexus Study?
 - Affordable Housing Fee—Based IZ percentage?
 - Overlay or Super Density Bonus:
 - Mandating On-Site w/ Financial Assistance & Incentives

In-Lieu Fee Issues After *Patterson*

- Standard Formula Sound
 - Reasonably Related to Purpose
 - Bases Fees on Cost of Developing Foregone IZ Units
 - “Deleterious Impact” = Failure to Include IZ Units
- Don’t base fee on *Cost* of Meeting RHNA
- Mitigation Fee Act Nexus Study Not Necessary
 - Not Used to Fund “Public Facilities”
 - Formula On Its Face Quantitatively Related to Purpose:
 - Provide Affordable Housing Proportionate to New Development

On-Site Issues after *Patterson*

- Will be Attacked As Exaction
- But, it's a Land Use Obligation
 - Reasonably Related to Broad Purpose to Include Affordable Housing in Future Development
- Establish Basis for Inclusionary Requirement
 - Housing Needs, Environmental Concerns, Remedy Past Exclusion & Segregation, Further Fair Housing
 - Include Broad Policy in General Plan
 - Compare Existing & Projected Need to Percentage