

## MEMORANDUM

To: Mayor Reed and San Jose City Council  
From: James Zahradka, Law Foundation of Silicon Valley  
Re: Update to *Inclusionary Zoning: Legal Issues* publication  
Date: December 10, 2007

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The *Inclusionary Zoning: Legal Issues* (“*Legal Issues*”) publication (attached hereto as Exhibit A) provides a thorough and accurate analysis of the legal issues surrounding inclusionary zoning in California. Any legal developments in the five years since this publication was produced have not changed the conclusions of the authors of that publication; however, some relevant legal developments have taken place and are discussed below.

In *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528 (attached hereto as Exhibit B), the Supreme Court overruled *Agins v. City of Tiburon* (1980) 447 U.S. 255, insofar as *Agins* set out a requirement that the application of a general zoning law to a particular piece of property must “substantially advance legitimate state interests” to not qualify as a taking. “We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.” *Lingle, supra*, 544 U.S. at 540. Thus, although *Homebuilders of Northern California v. City of Napa* (2001) 90 Cal.App.4th 188 (attached hereto as Exhibit C), is still the leading California case on the constitutionality of inclusionary zoning laws, one no longer need perform an examination of such laws under the *Agins* “substantially advances” test that the court there subjected Napa’s ordinance to. (See *Napa, supra*, 90 Cal.App.4th at 195-96; see also *Legal Issues* at 9-11, § IV.A.1.)

With this holding, the Court reduced the possible challenges to an inclusionary zoning ordinance and made takings challenges almost impossible. After abrogating the “substantially advances” test, the *Lingle* court enumerated the four surviving means by which a plaintiff may challenge “a government regulation as an uncompensated taking of private property,” *Lingle, supra*, 544 U.S. at 548; as articulated in the *Legal Issues* publication, none of these pose a serious threat to inclusionary zoning. See *Legal Issues* at 9-15; see also Deborah Collins and Mike Rawson, *Avoiding Constitutional Challenges to Inclusionary Zoning*, 32 NHC Affordable Housing Policy Review, Vol. 3, Issue 1 (February 2004) at 35 (attached hereto as Exhibit D).

Further, in *Lingle*, the Court squarely rejected Chevron’s argument that the Takings Clause “bar[s] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” *Lingle, supra*, 544 U.S. at 543, an argument often advanced by opponents of inclusionary zoning.

In any event, cases that have been decided by trial courts as to whether inclusionary zoning ordinances have made clear that after *Napa*, a jurisdiction may preclude a successful challenge on takings or due process grounds by including sufficient “standards

and procedures for reducing, waiving or mitigating the requirements.” *Inclusionary Zoning: Legal Issues* at 13. Two recent cases bear mentioning; *Building Industry Association of Superior California v. County of Sacramento* (Sac. Co. Sup. Ct.) Case No. 05-AS-00967, and *Building Industry Association of San Diego County v. City of San Diego* (S.D. Co. Sup. Ct.) Case No. GIC-017064.

In the Sacramento case decided in March 2006, the court squarely rejected all of BIA’s challenges to the county’s ordinance. As to the takings causes of action, the court held, citing *Napa*, that “because the County amended the Ordinance to provide a waiver provision to permit a developer to seek an exemption from complying with the Ordinance, the Ordinance cannot result in a taking.” Order on Motion for Judgment on the Pleadings at 3, March 20, 2006 (attached hereto as Exhibit E).

A similar scenario played out around the same time last year in San Diego. There, the judge initially upheld a constitutional challenge to the ordinance, based on the fact that the ordinance’s waiver provision was deficient. The court, citing *Napa*, ruled that to survive a facial constitutional challenge on due process grounds, the ordinance needed to “provide for the granting of a waiver solely because of an absence of any reasonable relationship or nexus between the impact of the development and the inclusionary requirement.” Ruling on Submitted Matter at 2, May 24, 2006 (attached hereto as Exhibit F). San Diego amended its ordinance to “provide protection to applicants under [*Napa*]”, as well as address industry concerns about “the timing of the in lieu fee payment,” (Ordinance No. O-19530, August 15, 2006 at 1, [attached hereto as Exhibit G]) and the case was dismissed.