# AFFORDABLE HOUSING SET ASIDE ORDINANCE

## DECISION ISSUED IN FLORIDA HOME BUILDERS ASSOCIATION, INC. V. CITY OF TALLAHASEE

In an opinion issued on November 20, 2007, Circuit Judge John C. Cooper ruled that an ordinance adopted by the City of Tallahassee which required developers to set aside a certain percentage of housing for sale at the "maximum affordable sales price" ("MASP") was valid because it did not constitute a physical or regulatory taking of property without just compensation.

The Tallahassee City Commission adopted the City's Inclusionary Housing Ordinance No. 04-090 AA (the "Ordinance") which provided that a certain geographical area of the City was set aside as an "Inclusionary Zone". Within the Inclusionary Zone, any subdivision or site plan that included fifty (50) or more dwelling units, was required to provide a minimum of ten percent (10%) of the dwelling units at prices no greater than the MASP. The MASP was established by the Ordinance, and the MASP must be reviewed by the City Commission at least one time per year. According to the City, the purpose and intent of the Ordinance was to further the City's goals and objectives as stated in the City's Comprehensive Plan to increase affordable housing ownership opportunities within the City, and to encourage a range of housing opportunities in the City.

The Court upheld the constitutionality of the ordinance against a challenge filed by the Florida Home Builders Association and other parties. The court reviewed the standards for physical takings delineated in *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419 (1982), and *Lingle v. Chevron, Inc.*, 125 S.Ct. 2074 (2005). Following a review of the *Loretto* and *Lingle* cases, the court found that the ordinance did not constitute a direct appropriation of property, and was therefore not a physical taking. The Court found that the type of action required by the Ordinance was an exaction which is subject to the holdings of the Supreme Court in *Nollan v. Callifornia Coastal Comm'n*, 43 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Due to the fact that the actual regulations contained within the Ordinance had not been actually applied to any specific development, the Court ruled that it was not possible to determine whether the exactions that would be required pursuant to the Ordinance constituted a taking. As the Court stated ". . . it is not possible to determine whether a taking that requires compensation has occurred, or, if it has, whether the value of the benefits received provides just compensation to the developer without having a development to actually analyze." *Florida Home Builders, Page 8.* If an actual exaction takes place, pursuant to the Ordinance, the court ruled that it would be appropriate at that time to determine, under the guidance of *Nollan* and *Dolan*, whether the exaction constitutes a taking. ("The U.S. Supreme Court has repeatedly held that taking cases should be decided in the context of actual factual settings.")

As a result of this decision, the adoption of inclusionary housing requirements does not, in and of itself, constitute a taking. The issue still to be addressed is whether the specific applications of the inclusionary housing requirements constitutes a taking. Following the decision in the *Florida Home Builder* case, local governments may consider adopting inclusionary housing ordinances. The local government will, however, need to insure that at the time the specific housing requirements are imposed that it can clearly and accurately identify the value of the benefits resulting from the imposition of the inclusionary housing requirements. The failure to document the value of the benefits resulting from the inclusionary housing requirements may allow a property owner to successfully prosecute a challenge to the ordinance requirements.

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