California Housing Relief is Coming – Possibly

By the Firm's Real Estate Practice Group

Two recent Superior Court decisions promise relief – or at least the beginnings of relief – for anyone in California involved in residential development. It may be getting easier to build.

For at least three decades, and arguably much longer, California has been in a housing crisis. There are simply not enough homes for the State's growing population. While this is not good for anyone seeking to purchase a home, it should be great news for those in the construction industry, developers, and the trades. To paraphrase an old campaign slogan, "Build, baby, build!"

However, it is not that simple. For most of California, building is incredibly difficult. The challenge isn't market forces, the economy, or any of the usual suspects. Instead, it is local government impeding new construction.

In city after city, local governments, seeking to limit or stop growth for a variety of reasons, have enacted regulations, laws, and ordinances banning or restricting residential construction. Sometimes this is done by making construction unworkably expensive; in other instances, cities restrict what developers can do, and in extreme cases by simply banning it. While this restricts the supply of available housing across the board, it hits particularly the most vulnerable Californians hardest. Specifically, those who need low-income housing. In many places, because of regulation and fees, low income housing simply doesn't exist. Again, this isn't new. The California Legislature noted this thirty years ago, observing, "[t]he excessive cost of the state's housing supply is partially caused by activities and policies of many local governments that limit the approval of housing, increase the cost of land for housing, and require that high fees and exactions be paid by producers of housing."

Sacramento has been pushing back for many years, with limited success. In an effort to boost the supply of housing statewide, bill after bill has been passed, including the Housing Element Law, requiring cities to plan for housing needs; the Housing Accountability Act (HAA) which limits cities' discretion to deny certain types of projects; and the Density Bonus Law, requiring cities to grant modifications to qualifying affordable housing projects.

In return, cities, particularly charter cities, have argued that statewide housing laws don't apply to them. A charter city is one created and governed not by state law, but by their own charters. The California Constitution states that these cities are exempt from conflicting state laws with respect to "municipal affairs", a term which isn't defined. This is significant – around 25% of California's cities, including population centers like San Jose, are charter cities.

Unfortunately for these cities, California courts have recently begun deciding that a statewide housing shortage is not a "municipal affair" but a statewide problem, and ruling accordingly. This pattern of decisions has far-reaching consequences not just for recent disputes, but also to the applicability of the much older statutes listed above, which charter cities had previously ignored.

The 2016 case of *Anderson v. City of San Jose* set the standard for this new line of holdings. In *Anderson*, the city claimed to be exempt from a state law dealing with the disposition of surplus municipal land. The Sixth District Court of Appeals disagreed and held that in deciding whether a state law preempted a local one, a four-part test articulated by the California Supreme Court needed to be applied: "[t]o determine whether state law constitutionally overrides the local law of a charter city: 1) to consider whether the city's local law or policy relates to a municipal affair, 2) to consider whether state law conflicts with the city policy, 3) to consider whether the state law relates to a statewide interest, and 4) to consider whether the state law is reasonably related to resolution of the statewide concern and narrowly tailored to avoid unnecessary interference in local governance. If "the subject of the state statute is one of statewide concern and ... the statute is reasonably related to its resolution, then the conflicting charter city measure ceases to be a 'municipal affair' pro tanto." Bottom line: the developers won.

Anderson was part of a trend, the most recent examples of which were two Superior Court cases resulting in decisions that continued limiting the ability of local governments or, significantly, local voters, from impeding development. In November 2019, voters in the city of Oceanside passed Measure L, a referendum that would serve to limit growth by repealing a previously-enacted local ordinance. A developer affected by Measure L sued, and won. On May 6, 2021, San Diego Superior Court Judge Richard Whitney held in the case of *The NRF Project Owner LLC v. City of Oceanside* that Measure L qualified as a "policy, standard, or condition" that violated state law. The case is significant because it was applied not to an ordinance, but a referendum, thus broadening the scope of the "state law prevails" doctrine.

The same thing happened in the city of Antioch. In 2020, voters there passed Measure T, which limited the number of housing units permitted in a particular location, imposed a minimum lot size, and limited the number of parcels per lot. An aggrieved developer sued in the case of *Oak Hill Park Co. v. The City of Antioch*, and in June, Contra Costa County Superior Court Judge Edward Weil held that the measure was void for violating state pro-housing law, which controlled.

Does this mean that building residential housing in California is now easy, simple, profitable, and popular? No, it does not. Does it mean that the trend away from impossible restrictions is easing, that legal challenges are likely to be effective under certain circumstances, and that if you're a developer or in construction, you might want to take another look at projects that you thought might be unworkable? The answer to that question is yes.

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