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Who Pays for Property – Under the Constitution? Dangerous Move to Force Builders to Cover “Affordable Housing”, Oct. 16, 2015

by Kimberly Hermann

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Who should pay for public policy mandates by the government? This seems like a simple question – one that the vast majority of Americans would answer with “the government.”

A good analogy is the endangered species question that SLF has argued successfully in the U.S. Supreme Court. If society decides that setting aside the habitat of the spotted owl is worthy, then society should pay for it. The government should buy the land to preserve it. It’s not fair – and it is patently unconstitutional – that the government place the burden on the property owner without just compensation. That’s one of the fundamental protections guaranteed by the Constitution.

Fast forward a couple of decades, and we’re in the same place with another important issue – affordable housing.

Decades of experimentation with below-market or “affordable” housing programs tell us they just don’t work. In fact, requiring developers to include below-market units in their projects actually aggravates the challenges associated with attracting development to low and middle income communities. For example, below-market mandates in the San Francisco Bay Area have resulted in only 6,836 below-market units, or an average of only 228 per year over the last thirty years.

If history tells us that below-market housing programs don’t work, then why are the federal government and certain local governments such as the City of San Jose hell-bent to pursue them?

One explanation is that through these programs, the government reduces its own expenses by passing along the costs associated with below-market housing to a mere few in the community – the developers, builders, and real estate professionals. If they don’t have to spend money (and raise taxes), then how much easier it is to push the cost to the private sector.

San Jose, for example, has passed the buck by requiring developers to set aside 15% of their entire housing development to be purchased by city-designated low-income buyers at below-market and

below-cost. If the developer refuses, he must pay a steep fine (\$122,000 per house) or will be denied his development permit.

What is even more troubling about these programs is that they violate the Takings Clause of our Constitution. There are two constitutional victims in play. The unconstitutional taking occurs in the first instance from the builder or developer. An unconstitutional taking occurs in the second instance when the initial buyer is prevented from reselling it at market price. In both scenarios, the people are punished and the Constitution is violated, all in favor of failed wealth redistribution policies.

Fortunately, a group of builders and developers are standing up for the constitutional rights of all Americans and challenging the San Jose ordinance and have asked the Supreme Court to review their case. Today Southeastern Legal Foundation filed a brief supporting their fight. We view this as the next constitutional challenge pitting government social engineering against the rights of property owners who, in the case of builders and developers, risk capital and venture into a no-guarantee-of-return exercise of their fundamental constitutional right to “full use and enjoyment” of property.

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