Affordable Housing Mitigation: Legal Considerations

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CLARION
Common Legal Challenges

LEGAL CONSIDERATIONS

• Authority
• Substantive Due Process
• Equal Protection
• Takings
  • Nollan/Dolan
  • Partial Regulatory Takings
LEGAL CONSIDERATIONS

• Important to Evaluate State Constitution and Statutes
  • State Constitutional Home Rule Powers
  • State Statutory Authority
    • Express Authority
    • Mandatory Plans and Plan Consistency
  • Implied Statutory Authority
    • Broadly Implies Local Government Powers
    • Narrowly implies Local Government Powers
• Dillon’s Rule State
• Prohibitions
LEGAL CONSIDERATIONS

- Deferential Standard
- Substantive Due Process
  - Is there a Legitimate Governmental Goal the Local Government Could Arguably be Pursuing?
  - Is there a Conceivable Rational Relationship between the Goal and the Regulation?
- Equal Protection
  - Does the Regulation effect a Fundamental Right?
  - If Not: Standard of Review is Similar to that of SDP.
Takings-Nollan/Dolan

LEGAL CONSIDERATIONS

• Does Nollan/Dolan Apply? (Involves Permit Conditions)
  
  • **Nollan**- Whether fails to advance a legitimate governmental interest because there is no essential nexus between governmental interest and permit condition.
  
  • **Dolan**- Whether there is “rough proportionality,” or reasonable relationship, both in nature and extent, between permit condition imposed and impact of development.
Does Nollan/Dolan Apply? (cont.)

- **Linkage Fees and Inclusionary Requirements are formula-based and Legislatively Adopted**

- Linkage Fees and Inclusionary Housing Requirements are rent and price controls – there is no physical occupation because permit condition does not compel action, or result in property owner’s right to use, possess, and dispose of property.

If Nollan/Dolan Applies:

- Use **Support Study** to Identify There is Affordable Housing Problem

- Use **Support Study** to Demonstrate there is Reasonable Relationship Between Mitigation Requirement and Need Created for Affordable Housing From Development.
Comparison of Median Sales Prices and Affordable Housing Prices for Monroe County, 2005-2015

Sources: Florida Department of Revenue, Sales Data Files, Collected by the Florida Housing Data Clearinghouse from the Shimburg Center for Housing Studies at UF; American Community Survey 1-Year Estimates: Median Income for Households,
## ANNUAL SALES OF HOMES AFFORDABLE TO THE MEDIAN HOUSEHOLD INCOME FOR MONROE COUNTY (2005 - 2016)

<table>
<thead>
<tr>
<th>Year</th>
<th>Median Household Income</th>
<th>Affordable Price at 333% of Income</th>
<th>Sales at or Below Affordable Price*</th>
<th>Total Units Sold Annually</th>
<th>Affordable Price Units as % of Total Annual Sales</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td></td>
<td>Single-Family</td>
<td>Other**</td>
<td>Total</td>
</tr>
<tr>
<td>2005</td>
<td>$49,040</td>
<td>$163,303</td>
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<td>31</td>
<td>32</td>
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<tr>
<td>2006</td>
<td>$52,069</td>
<td>$173,390</td>
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<tr>
<td>2007</td>
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<td>$201,938</td>
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<tr>
<td>2008</td>
<td>$52,443</td>
<td>$174,635</td>
<td>5</td>
<td>32</td>
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<tr>
<td>2009</td>
<td>$49,721</td>
<td>$165,571</td>
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<tr>
<td>2010</td>
<td>$50,619</td>
<td>$168,561</td>
<td>43</td>
<td>135</td>
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<tr>
<td>2011</td>
<td>$51,524</td>
<td>$171,575</td>
<td>80</td>
<td>159</td>
<td>140</td>
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<tr>
<td>2012</td>
<td>$53,637</td>
<td>$178,611</td>
<td>69</td>
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<td>116</td>
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<td>2013</td>
<td>$50,838</td>
<td>$169,291</td>
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<td>2014</td>
<td>$59,388</td>
<td>$197,762</td>
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<tr>
<td>2015</td>
<td>$61,020</td>
<td>$203,197</td>
<td>50</td>
<td>167</td>
<td>121</td>
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<tr>
<td>Totals</td>
<td></td>
<td></td>
<td>406</td>
<td>1,224</td>
<td>1,630</td>
</tr>
</tbody>
</table>

**All Sales**

- **11,560**
- **7,312**
- **8,651**

**% at or under Affordability Threshold**

- **3.51%**
- **16.74%**
- **8.64%**

Source: Florida Keys Public Property Search, Florida Keys Board of Realtors

* The affordability limit defined at 30% of household income, results in the Affordability Threshold Price equal to 333% of median household income

**Other includes those sales classified as Condo, Townhouse, Duplex, Half Duplex, Mobile Homes, and Multi-Units in the database. Reasonable care was taken to exclude listed sales outside of the Florida Keys.
Overview of Workforce Housing Study

LEGAL CONSIDERATIONS

Development of Residential Units
- Construction Workers
- Operations and Maintenance Workers

Development of Non-Residential Buildings
- Construction Workers
- Workers at New Development

Creates demand for labor

Many workers earn lower wages and can’t afford local housing

Demand for Workforce Housing

Demand for Workforce Housing
Overview of Workforce Housing Study

LEGAL CONSIDERATIONS

# Construction
Workers Required to Build Residential Units (per Square Foot)

+ 

# Operations and Maintenance Employees Needed to Service Residential Units (by tenancy and square foot)

= 

Workforce Housing Need Generated by Residential Unit
Overview of Workforce Housing Study

LEGAL CONSIDERATIONS

$$\text{Cost of Prototypical Workforce Housing Unit for Construction and O&M Workers}$$

$$\text{Cost of Housing That Is Affordable to Construction and O&M Workers}$$

$$=\text{Subsidy Required to Afford Workforce Housing Unit}$$
Takings-Partial Regulatory Taking

LEGAL CONSIDERATIONS

• Does Regulation Deny Economically Beneficial Use?

  • Affordable Housing Regulations can be designed so as not to deprive a property owner of economically beneficial use.

  • To ensure this is case should conduct general evaluation of development feasibility for projects.

  • Include Special Study provision that allows landowner to demonstrate deprivation of economically beneficial use, and regulatory remedy

  • Density bonuses
• Important to Prepare **Support Study** Before Adopt Affordable Housing Mitigation Program.

• **Support Study** should develop strong nexus/reasonable relationship between development and need for affordable housing, and mitigation required of it.

  • **Problem Description** – identify affordable housing problem exists in community.

  • **Need for Affordable Housing** – identify need for affordable housing created by new development.

  • **Goal** – establish affordable housing goal.

  • **Reasonable Mitigation Requirement** – establish there is a reasonable relationship between the affordable housing mitigation required from new development and the need for affordable housing it creates.
• Construction of Affordable Housing Units.

• Conversion of Market Units.

• Dedication of Land.

• Payment of Fee/Subsidy.
QUESTIONS