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Holland & Knight Attys Win Key Case For Calif. Housing

By **Jack Karp**

Law360 (October 25, 2021, 11:06 AM EDT) -- Holland & Knight LLP attorneys had to win a statutory and three constitutional arguments to get a California appeals court to overturn a decision that allowed a city to reject an apartment project, securing an important ruling that could help ameliorate the state's housing crisis.

Daniel Golub

Partners Daniel Golub and Jennifer Hernandez convinced California's First District Court of Appeal in September to reverse a trial court ruling that found a state housing law infringed the city of San Mateo's right to home rule and unconstitutionally delegated its municipal powers, and that allowed the city to nix a proposed multifamily housing project.

Jennifer Hernandez

The appeals court ruling is important not only because it undid the rejection of that particular apartment building but also because it affirmed the constitutionality of the state's Housing Accountability Act, which is vital to addressing the "devastating" shortage of housing in the Golden State, Golub told Law360 Pulse.

"So we think it's a pretty big-deal case, and it's going to mean a lot for housing production in the decades to come," Golub said.

Associates Emily Lieban and Emily Warfield also worked on the case; Warfield has since left the firm for the California Department of Toxic Substances Control, according to her LinkedIn page.

Emily Lieban

The HAA was enacted in 1982 by a state Legislature that recognized that California's housing shortage was caused in part by city approval processes that are too vulnerable to the opposition of existing homeowners who don't want to see new development in their neighborhoods, according to Golub.

"We have a very strong not-in-my-backyard movement here in California," Golub said. In fact, the HAA is colloquially known as the "anti-NIMBY" law, according to the appeals court decision.

The HAA addresses the issue by requiring California cities to use only "objective" standards, such as height and density restrictions, to reject housing developments that otherwise comply with zoning rules.

But San Mateo violated the law when it used a subjective reason to deny an application to build a four-story, 10-unit apartment building in 2017, according to Golub.

Despite having been recommended for approval twice by city planning commission staff, the building's potential neighbors opposed it, saying it was too big for the residential area. So the planning commission grounded its rejection of the project in city design guidelines that suggest buildings use architectural setbacks, or incremental increases in height at each story, to ease the transition from shorter buildings to taller ones.

The rejected building had actually been designed with such setbacks, but the commission contended they faced the wrong direction, according to Golub.

When the California Renters Legal Advocacy and Education Fund challenged that rejection in San Mateo County Superior Court, the city argued that the standard it used to deny the application was objective, not subjective.

But San Mateo also claimed that the HAA itself violates California's constitution by infringing the city's right to home rule, unlawfully delegating municipal functions to others and denying neighboring landowners due process.

San Mateo threw the "whole kitchen sink of constitutional challenges at this law," Golub said.

So when Golub and Hernandez took on the appeal after a trial judge sided with the city, they had to win their case on four points: the statutory question of whether the city had violated the HAA by rejecting the project and the three constitutional attacks on the HAA itself.

The statutory issue seemed pretty straightforward, according to Golub, who had been the deputy director of land use and planning for the Manhattan borough president before moving to California and attending law school.

But San Mateo argued that courts should defer to a city's judgment when deciding whether a project conforms to that city's own guidelines.

So the Holland & Knight lawyers turned to the HAA's legislative history to show that lawmakers had in fact specifically intended to limit municipalities' discretion in housing approval.

In 1990, the Legislature made the HAA expressly applicable to charter cities, according to the appeals court decision. In 1999, it narrowed the policies that could be invoked to defeat a project. A 2005 amendment authorized fines if a city denies a project in bad faith. In 2016, the law was revised again to allow housing organizations to challenge rejections as well as potential residents.

"You just see decades of continual frustration by the Legislature in trying to tighten these requirements more and more," said Golub. "And I think that's an important part of the analysis."

Next, the attorneys tackled the constitutional arguments, which meant proving that the HAA addresses a matter of "statewide concern" and that the law is narrowly tailored and related to resolving that concern.

The lawyers again relied on the legislative history, pointing to the many revisions of the HAA as well as

the passage of other laws like S.B. 35, a 2017 law that streamlined housing construction in municipalities that fail to meet state-mandated housing requirements.

Those legislative actions prove the HAA was intended to address a statewide concern: California's housing shortage. And other laws like S.B. 35, which go further than the HAA in mandating what municipalities must do, show the HAA is narrowly tailored, according to Golub.

"That gloss on the constitutional claims helped show why it was unlikely to be the case that the California Constitution would prohibit the state Legislature from enacting such a law," Golub said.

The **appeals court agreed**.

The guidelines San Mateo had used to reject the project are unclear as to where a setback is required, how far upper floors must step and how many floors must be stepped back, among other vagaries, meaning they "require personal interpretation or subjective judgment that may vary from one situation to the next," the appeals court said.

And the city's insistence that the court defer to its own interpretation of the guidelines is "a tacit acknowledgement" that the guidelines are subjective, the court ruled.

As for the constitutional challenges, there is ample evidence that "a shortage of housing in our state has led to escalating costs that for many have rendered adequate shelter unaffordable," the court said, so the HAA does address a statewide concern.

Since nothing in the HAA prevents cities from establishing their own objective land-use standards, the HAA doesn't unconstitutionally delegate municipal authority, the court ruled.

"This is a law that does not, like other laws, tell cities they have to approve anything," Golub said. "It just says if you, the city, have adopted a rule, you have to abide by it."

Finally, the court rejected San Mateo's argument that the HAA deprives property owners of their right to due process. An "action involving only the nondiscretionary application of objective standards" does not entitle neighboring landowners to due process protections, according to the court.

Like Golub and Hernandez, the appeals court pointed out the legislative history.

"As the Legislature has steadily strengthened the statute's requirements, it has made increasingly clear that those mandates are to be taken seriously," the court said.

That ruling "provides some significant guidance for future courts" since it establishes that the HAA should be interpreted broadly and that tough calls about greenlighting development should be made in favor of approving housing, Golub said.

"It's going to be the leading precedent about what this law means," he said.

Hopefully, it will mean the construction of more housing in a state that ranks 49th out of 50 in homes per capita, according to Golub.

And it means that at least the particular apartment building at the center of this case will now be reconsidered.

The San Mateo City Council in October unanimously approved a settlement under which the city won't appeal the decision to the California Supreme Court.

Instead, the proposed housing project will be reconsidered, and the city will pay $450,000 in attorney fees and costs to the California Renters Legal Advocacy and Education Fund, according to a statement from San Mateo.

"This lawsuit over a 10-unit market rate housing development that offered no affordable units was not reflective of the city's history of expanding affordable housing opportunities through innovative policies and programs," San Mateo Mayor Eric Rodriguez said in the statement. "We agree that expanding housing in California is critical and over the last four years alone the city has approved over 2,000 new housing units, including more than 430 affordable below-market rate homes."

Golub hopes that San Mateo continues approving more housing, especially when it comes to this apartment building.

"I certainly hope and expect they're going to promptly approve the project," he said. "And we'll be watching closely to see that that's what the city actually does."

--Editing by Alyssa Miller.

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