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Pleasanton Ordered to Drop Cap

By Jason W. Armstrong

Daily Journal Staff Writer

Cities across California stood up and took notice earlier this month when an Alameda County judge, in a first-of-its-kind ruling, ordered Pleasanton to drop its voter-approved housing cap, saying it flouted state policies mandating how much housing municipalities must offer.

If the decision - which requires the Bay Area city of 68,000 to loosen its development standards to make way for several thousand more homes - survives appeal, real estate lawyers expect it to make cities and counties rethink their development strategies. Legal experts say it's one of a cluster of recent state court rulings underscoring increasing tension between municipalities, which tend to clutch tightly to their individual control in mapping out their communities, and state and regional planning agencies, whose tasks include making sure cities have enough housing choices for different incomes levels to accommodate their local workforce.

"There's always been some tension between local control, which cities jealously guard, and state and regional planning," said James W. Andrew, a shareholder at Buchalter Nemer in San Francisco who chairs the firm's real estate practice group. He is not involved in the case.

The case, filed in 2006 by nonprofit firm Public Advocates in San Francisco and Urban Habitat, an Oakland-based environmental advocacy group for low income communities, casts a spotlight on some cities' reluctance to factor ample affordable housing into their planning, attorneys said. The plaintiffs' beefs, among other things, were that Pleasanton wasn't giving low-income residents enough options.

Dozens of other cities in the state, including Yorba Linda and Sierra Madre, have policies pulling back on growth in some fashion. Pleasanton's cap, which voters approved in 1996, limited the number of all types of housing, including apartments, condominium units and single family homes, to 29,000 in a wealthy city that is home to several major corporate headquarters.

In Pleasanton's case, Judge Frank Roesch ruled March 12 that the city's restriction breached state law by preventing the city from meeting its Regional Housing Need Allocation, or the amount of housing needed for various income levels. State planning officials and local government councils - in Pleasanton's case, the Association of Bay Area Governments, or ABAG - factor in things like traffic and job growth to determine how much housing cities need. Under the state's Housing Element Law, cities are supposed to factor the housing numbers into their planning about every five years.

Roesch noted that Pleasanton already has 27,000 homes. ABAG told the city that it should approve the construction of 5,059 housing units for the 1999-2007 planning period, and an additional 3,277 homes for 2007-14. The judge said the city hadn't planned for the first total and couldn't comply with the second if its

housing restriction stayed in place.

Roesch also faulted Pleasanton's rezoning of a portion of a major city business park as residential on the eve of the hearing in the case. He found the city's process for incorporating residential development into the area could last from "one year to forever."

While municipalities have authority to plan out their own communities, Roesch said, they also have a responsibility under the Housing Element Law to keep available sites to accommodate their housing need allocations.

"The city is in clear violation of the Housing Element Law," Roesch wrote in his 9-page decision.

State law, he said, "preempts whenever local laws contradict state law." He noted that the state Supreme Court has agreed with legislators' intent that cities and counties keep a "maximum degree of local control" in zoning. But, he said, a municipality can't enforce ordinances or regulations "in conflict with general laws."

Roesch ordered Pleasanton to plan for 3,277 additional homes, including 2,524 affordable residences. He also required the city, among other things, to stop handing out non-residential building permits until it complied with his mandate.

If Roesch's ruling isn't reversed on appeal, it would "force the city to accommodate its fair share of the regional housing need," said Richard A. Marcantonio, managing attorney with Public Advocates.

Also representing the plaintiffs were lawyers with the California Affordable Housing Project and Paul, Hastings, Janofsky & Walker. Attorney General Jerry Brown Jr. intervened in the suit shortly after it was filed, arguing Pleasanton was encouraging sprawl and boosting greenhouse gas emissions by refusing to build enough housing for the many people who work in the city. *Urban Habitat Program and Sandra De Gregorio v. City of Pleasanton*, RG06-293831.

Thomas B. Brown, a partner with Hansen Bridgett in San Francisco who represented Pleasanton, did not respond to a request for comment. Pleasanton's city attorney, Jonathan P. Lowell, referred comment to the city's communications manager. The manager, Joanne Hall, declined to discuss the ruling or say whether the city would appeal it.

"It's still under evaluation with staff and attorneys and elected officials," Hall said last week.

The ruling is grabbing cities' attention and making them take a fresh look at their housing needs allocations, according to attorneys who have represented municipalities in zoning and development matters.

"In the past, the [government councils] told you how to produce your regional fair share of housing, and everyone ignored it," said Michael P. Durkee, co-chair of Allen Matkins' California Land Use Practice in Walnut Creek. "Now, I think this ruling will make any city that has a locally adopted growth limitation regulation stop and pause and wonder if it will be challenged."

If the Pleasanton case becomes precedent, it will join other recent land use decisions spotlighting cities' clashes with the state over their housing numbers.

Three years ago, Irvine sued its regional government council, the Southern California Association of Governments, contending it had been assigned too large a chunk of the region's affordable housing numbers. The 4th District Court of Appeal ruled against the city last June, holding that courts lacked the authority to second guess the validity of a city's regional housing needs allocation. That power belongs to

the state Department of Housing and Development, which allocates the regional number of units needed, and the local government councils that assign them to specific cities, the court held. *City of Irvine v. Southern California Association of Governments*, 175 Cal. App. 4th 506 (2009).

The state Supreme Court declined to review the case.

Cecily Talbert Barclay, a land use and real estate partner at Bingham McCutchen in San Francisco, said recent court decisions including the *Pleasanton* case "have thrown a big challenge on the doorstep of City Hall to figure out how to solve these problems."

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