IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S212072

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE,

Respondent.

AFFORDABLE HOUSING NETWORK OF SANTA CLARA COUNTY, et al.,

Intervenors.

After an Opinion by the Court of Appeal,
Sixth Appellate District
(Case No. H038563)

On Appeal from the Superior Court of Santa Clara County
(Case No. CV167289, Honorable Socrates Manoukian, Judge)

PETITIONER'S REPLY BRIEF
ON THE MERITS

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INTRODUCTION

Petitioner California Building Industry Association (CBIA) hereby respectfully submits the following Reply to the Response Briefs on the Merits of the City and the Intervenors (jointly Respondents).

I

AFFORDABLE HOUSING IS NOT ON TRIAL IN THIS CASE

Respondents' background information on the history and reported accomplishments of inclusionary housing in California provide some context for this case, but are not specifically germane to the question before the Court, which is whether using residential development exactions to fund affordable housing is constitutional if there is not a reasonable relationship between the exactions and any impact of the developments. Opening Brief at 1. To the extent that Respondents' recitation implies that unconstitutional exactions are the only means of financing affordable housing in California or in the City, CBIA submits that neither the law nor the record supports that implication. To the contrary, CBIA's Opening Brief demonstrates from the record that the City was aware of a range of actions that could fund its desired expenditure on affordable housing. Opening Brief at 1. The importance of affordable housing is not at issue in this case. The underlying dispute arises from the City's

choice of who will pay for affordable housing, and whether the method it selected is constitutional.[1]

II

CBIA HAS NOT CHANGED ITS THEORY, OR WAIVED ITS CLAIM BELOW

The City previously rehearsed this argument when it opposed this Court's grant of review. In its Answer to Petition for Review, at pages 16 and 19, the City asserted that CBIA had waived any and all claims based on the Takings Clause in the courts below. This argument was specious then, as CBIA showed in its Reply in Support of Petition for Review at page 11, note 3, as well as its Opposition to the City's Motion to Dismiss Review. The argument remains specious today.

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[1] CBIA also notes that Respondents cite nothing in state law that either requires or even authorizes the set asides and related exactions in the Ordinance. Rather, state law generally requires density bonuses be awarded to home builders who voluntarily provide affordable housing. Cal. Gov't Code § 65915 (Density Bonus Law). Despite Respondents' citations to the Housing Element Law, CBIA showed evidence in the record at trial that the California Department of Housing and Community Development considers the Ordinance to be a potential constraint in the City's housing element. RT 33:13-27; *see also* AA 1060 (Mayor Reed discussing letter from Housing and Community Development). Furthermore, Governor Brown has recently expressed at least some scepticism as to the efficacy of inclusionary housing as a means of increasing affordable housing. Governor's Veto Message for Assembly Bill 1229 of 2013 ("As Mayor of Oakland, I saw how difficult it can be to attract development to low and middle income communities. Requiring developers to include below-market units in their projects can exacerbate these challenges, even while not meaningfully increasing the amount of affordable housing in a given community.").

CBIA's complaint expressly invokes the state and federal constitutional standards governing exactions and conditions of development approval, as set forth in *San Remo Hotel L.P. v. City & County of San Francisco*. Complaint ¶ 27, page 10 (AA 0010). A cursory examination of *San Remo Hotel* informs the attentive reader that the constitutional standards applicable to development exactions established in that case are based on the California Constitution's Takings Clause, as informed by the United States Supreme Court's case law interpreting the United States Constitution's Takings Clause. 27 Cal. 4th 643, 649, 663-64 (2002).

There are at least two species of claims that arise under the federal and state Takings Clauses. One is a claim for compensation when property has been taken, which includes regulatory takings as well as physical invasions of property. As repeatedly stated below (in response to the City's repeated assertion of legal principles applicable generally only to regulatory takings cases), that is not this case. CBIA does not seek compensation for itself or its members, and has not alleged that the Ordinance has worked a regulatory taking of any property.

CBIA makes a different species of claim under the Takings Clause, specifically that the Ordinance violates the unconstitutional conditions doctrine, as applied to development exactions. *See Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2594 (2013) ("[A]n overarching

principle, known as the unconstitutional conditions doctrine, . . . vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."). *Koontz* is instructive in clarifying that the unconstitutional conditions doctrine holds that a "government's demand for property can violate the Takings Clause" even if no property is actually taken from the plaintiff. *Id.* at 2596.

> Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a government benefit is a constitutionally cognizable injury.

Id.

CBIA has prosecuted an unconstitutional conditions claim against the Ordinance throughout this litigation, starting with the Complaint (AA 0010), proceeding through pre-trial briefing, *see* Plaintiff's Opening Trial Brief at 9-10 (AA 0319-0320), and at trial, *see* RT 34:21-35:7; 74:18-23; and 75:1-5. CBIA consistently defended this claim in the appellate court below. Respondents Brief in the Court of Appeal at 2. And CBIA presented exactly this claim to this Court in its Petition for Review at 1-2, and its Opening Brief at 1-2, 9, 17.

Throughout this litigation, the City has pressed the simplistic argument that any claim for relief premised on the Takings Clause can only be a

regulatory takings-based compensation claim, subject to the ripeness and exhaustion requirements that apply in regulatory takings claims. The current iteration of that argument appears in the City's Response Brief at 22-25. CBIA has consistently and patiently rebutted this error and clarified that it is litigating an unconstitutional conditions claim and is not seeking compensation for a taking of property, as actually evidenced by the citations to the record in the City's Response Brief at 17-19. *See, e.g.*, Plaintiff's Post-Trial Brief at 2:14-19, AA 3321 ("Plaintiff does not allege that any property has been 'taken' by the Ordinance, nor does it seek 'just compensation' from the City."); RT 34:21-35:7 (clarifying that this is an unconstitutional conditions case, not a compensation or regulatory takings case); RT 74:18-23 (same).

These rebuttals have been greeted by the City's now oft-repeated refrain that any claim related to the Takings Clause has been waived, as though using the word "taking" to describe (and disclaim) a compensation claim based on a regulatory taking bars an unconstitutional conditions claim merely because that claim also arises under the Takings Clause.

CBIA identified the constitutional basis of its claim in both the trial court and the court of appeal, repeatedly citing the rule in *San Remo Hotel*, which is itself based on the State and (by application of federal decisions in *San Remo Hotel*) federal Takings Clauses. CBIA did not disclaim any and all claims arising under the federal or state constitutional Takings Clauses, and

could not have, since those constitutional provisions are the basis for the rule in *San Remo Hotel*. CBIA repeatedly made clear that it was bringing an unconstitutional conditions claim under the Takings Clause and *San Remo Hotel*, while not bringing a compensation claim for a regulatory taking of property. And, as explained above, CBIA has not reversed itself in this Court.

III

STERLING PARK—THE ORDINANCE EXACTS MONEY AND PROPERTY FROM HOME BUILDERS

Contrary to the concerns raised by Respondents, CBIA does not argue that all development conditions are subject to the rule in *San Remo Hotel*. Rather, CBIA argues that those development conditions which exact money or property are subject to *San Remo Hotel*, and that the Court's recent decision in *Sterling Park, L.P. v. City of Palo Alto* provides the test for identifying whether a condition is an exaction. 57 Cal. 4th 1193, 1204 (2013). Exactions transfer cash or property, while mere land use regulations and related conditions simply limit use of the property without transferring cash or property. *Id.*; *Fogarty v. City of Chico*, 148 Cal. App. 4th 537, 543-44 (2007). CBIA's Opening Brief, at 27-31, applies this test to the Ordinance's basic set aside requirement and each of the alternatives, for both for-sale and rental homes, and taking into account the long-term restrictions applicable to each housing type. The Ordinance meets the *Sterling Park* definition of exactions,

and as such is not a mere land use regulation. *Sterling Park*, 57 Cal. 4th at 1207. The court of appeal below erroneously held that the Ordinance is simply a land use regulation, *California Building Industry Ass'n. v. City of San Jose*, 157 Cal. Rptr. 3d 813, 824 (2013), and thus erroneously held that as a land use regulation it was only subject to scrutiny as an exercise of the police power.

A. The City Ignores the Text, Purpose, and Record of Adoption of the Ordinance in Arguing That It Is Not an Exaction

The City argues that the long-term restrictions in the Ordinance "will not necessarily result" in the recordation of liens against affordable units. This is belied by the text of the Ordinance and the record, and misses the point in any event.

1. The Text and Record Show That the City Will Record Liens Against Affordable Units

The City states that "documents may be recorded against a development" but that this will not *"necessarily* result in the City acquiring a recorded lien or other compensable property interest." City's Response Brief at 43-44. But the Ordinance actually states:

> The inclusionary housing guidelines *shall* include standard documents, in a form approved by the city attorney, to ensure the continued affordability of the inclusionary units . . . . The documents may include, but are not limited to, inclusionary housing agreements, regulatory agreements, promissory notes, deeds of trust, resale restrictions, rights of first refusal, options to purchase, and/or other documents, and *shall be recorded* against . . . all inclusionary units . . . .

SJMC § 5.08.600(A), AA 0700-01 (emphasis added). It is not at all clear which of these documents (promissory notes, deeds of trust, resale restrictions, etc.), if any of them, would not be a transfer of an interest in the affordable units to the City. The City certainly does not explain how any of these would not be an interest in the affordable units.

The record discloses that the City will implement the Ordinance's long-term restrictions by recording liens that function as a second mortgage against the affordable unit. AA 1250, 1253-55 (November 19 staff presentation to Planning Commission). This staff presentation describes the lien mechanism and results in detail, without reference to any other means of implementing the long-term restrictions, and without describing it as a tentative or preliminary plan. So while the City argues that it theoretically could proceed in a different manner, the record demonstrates that the City will acquire a lien against affordable units that operates as a second mortgage on the home.

2. The City Concedes That the Purpose and Effect of the Ordinance Is To Ensure That Only the City Can Receive Money in Excess of the Original Affordable Cost of Affordable Units

The City concedes that the purpose and effect of any long-term restriction on the for-sale affordable units is to ensure that in the event of a subsequent sale to a non-eligible buyer at the prevailing market price, it is the City, and only the City, that will receive the cash difference between the original affordable price and the prevailing market price at subsequent resale.

City's Response Brief at 43; *see* SJMC § 5.08.600(A), AA 0701. *See also* Krutko November 26 Memorandum to City Council, page 6, AA 1133 (explaining operation of shared equity and recapture provision). So the effect of any document recorded against an affordable unit would be to secure this cash benefit to the City. The receipt of such cash is an exaction, and the right to receive it is transferred by the Ordinance from the builder to the City, regardless of which recorded instrument accomplishes the task.

B. The Only Way the City Can Deny Appreciation to the Buyer Is by First Exacting That Interest from the Builder

The City also argues that "the shared appreciation provisions will not operate against a developer but against subsequent purchasers." City's Response Brief at 44. This is incorrect in two respects.

First, there are two quanta of cash value that the long-term restrictions capture. The first is the spread between the market and affordable price at the time of original sale. The second is the appreciation above the original market price. SJMC § 5.08.600(A), AA 0701. The right to the initial "market-affordable" cash spread is always exacted from the builder and transferred via the recorded long-term restrictions to the City. It is not exacted from the subsequent purchaser. *See* Opening Brief at 26 n.13; 28 n.14.

Second, the reason the City is able to deprive the original affordable home purchaser of the cash appreciation value on resale is because the right to receive that money has already been exacted from the builder prior to the original sale. Stated from the purchaser's perspective, the builder would not have been able to sell the purchaser this right, because the builder would have already transferred that interest to the City via the recorded long-term restrictions under the Ordinance.

C. CBIA Argues That the Ordinance Is Subject to *San Remo Hotel*, Not That It Is Subject to *Nollan/Dolan*

Intervenors claim that CBIA is trying to use the *Sterling Park* decision as a back door means of applying *Nollan/Dolan* scrutiny to legislative exactions. Intervenors' Response Brief at 34. This is manifestly incorrect. CBIA argues that *San Remo Hotel*, not *Nollan/Dolan*, apply to legislative affordable housing exactions such as the Ordinance. Opening Brief at 1, 9, 17-19, 31. CBIA's argument as to *Sterling Park* is that this recent decision, by providing a clear distinction between exactions and land use regulations, also provides the appropriate test for determining when *San Remo Hotel* applies. Opening Brief at 25, 31. CBIA also notes that the court, in *Sterling Park*, did not interpret the term "other exaction" in the Mitigation Fee Act solely with reference to the Act. Instead, the court started with the "usual and ordinary meaning of the word" as used in *Fogarty v. City of Chico*, and then applied that general meaning of the term to the Mitigation Fee Act. 57 Cal. 4th at

1204 (citing *Fogarty*, 148 Cal. App. 4th at 543-44). So, *Sterling Park*'s definition of the term "exaction" is not limited to the Mitigation Fee Act.

San Remo Hotel directly addresses development fees, while *Sterling Park* addresses an integrated program of affordable housing set asides and in-lieu alternatives, which the Court found to be exactions under the Mitigation Fee Act. *Sterling Park*, 57 Cal. 4th at 1196, 1208. Both of these types of development conditions are "functionally equivalent" exactions, *Koontz*, 133 S. Ct. at 2599, and there would be no reason to afford a lower level of scrutiny to property interest exactions than *San Remo Hotel* affords to in-lieu fees. *Cf. San Remo Hotel*, 27 Cal. 4th at 671 (property interests generally entitled to greater protection than payments of money). Applying *San Remo Hotel* only to in-lieu fees while applying a lower, police power level of scrutiny to other property exactions would provide an easily abused protocol for local governments to legislatively exact more significant property interests while withdrawing or reducing the availability of in-lieu fees.

IV

SAN REMO HOTEL—LEGISLATIVE EXACTIONS MUST REASONABLY RELATE TO IMPACTS OF DEVELOPMENTS ON WHICH THEY ARE IMPOSED

The appellate court below erred in ruling that *San Remo Hotel* did not apply to the Ordinance because the Court's decision in the case only applies

to mitigation measures. Opening Brief at 31-35. Respondents take this a step further by arguing that *San Remo Hotel* is not really even a mitigation fee case.

A. Respondents Take the Terms "Means-ends" and "Mitigation" Out of Their Context in *San Remo Hotel*

The text of the Court's opinion in *San Remo Hotel* shows that the court did not intend the rule in that case to apply only when a city purposely justified an exaction as a mitigation measure. Instead, the court intended that the reasonable relation to deleterious public impacts formula to apply to all in-lieu fees and related exactions.

To begin with, in surveying federal exactions decisions, the court describes the *Nollan/Dolan* test as a relationship between an "exaction and its purposes" and also states in the same discussion that the test identifies the "required degree of connection between the exactions and the projected impact of the proposed development." *San Remo Hotel*, 27 Cal. 4th at 666. That is, the court used a less precise "means-ends" terminology even in describing *Nollan/Dolan*, which CBIA doubts even Respondents would characterize as an everyday "relationship to legitimate public purposes" test.

But the crux of the matter arises in the court's discussion of the Hotel's "zoning for sale" hypothetical. 27 Cal. 4th at 670-71. The San Remo Hotel posited that without *Nollan/Dolan* scrutiny, a city could zone every parcel for a single uniform use, and then offer variances for arbitrary prices to those who wanted to build other types of developments. *Id.* at 670. The court's

subsequent description of the "deleterious public impacts" rule is entirely in response to this hypothetical. *Id.* at 671.

"A city council that charged extortionate fees for all property development, *unjustifiable by mitigation needs*, would likely face widespread and well-financed opposition at the next election." *Id.* (emphasis added). That is the context in which the court then said, "Nor are plaintiffs correct that . . . legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development." *Id.* (citations omitted). That is to say, even if a city council imposed exactions that are not intended to mitigate any harm caused by development, those fees would still have to pass the test of whether they are reasonably related (in purpose and amount) to impacts proximately caused by the developments on which they are imposed. The tone of the court's response to the Hotel's hypothetical suggests that it sounded slightly absurd, at the time, that a local government would even attempt to impose fees that did not at least purport to mitigate some harm caused by development.[2] And yet, despite the remote likeliness of such a program of exactions, the court in *San Remo Hotel* explained the standard that such fees "unjustifiable by mitigation needs" would

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[2] In this case the City claims it has done exactly that.

have to meet. "Plaintiffs' hypothetical city could only "put [its] zoning up for sale" in the manner described if the "prices" charged, and the intended use of the proceeds, bore a reasonable relationship to the impacts of the various development intensity levels on public resources and interests." *Id.* at 671. The court stated the test a city would face if it imposed fees and other exactions which were not intended to mitigate any harm caused by development (as the City claims to be doing in this case). "While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees subject to *Ehrlich*, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster." *Id.*

The use of the terms "means and ends" and "mitigation" in this last sentence do not limit the rule in *San Remo Hotel* only to those legislative exactions whose proponents lack the creativity to describe them as something other than mitigation fees. This sentence does not establish that the rule is just a particular version of the "reasonable relationship to a legitimate public purpose" test. Respondents would not describe the *Nollan/Dolan* test this way, but that is one way the court in one sentence described that test ("exaction and its purposes"). Similarly, the court's reference to means and ends cannot be taken as a shorthand way of saying that the entire *San Remo Hotel* decision is

just a particular case of the ordinary test applicable to exercises of the police power.

Justice Baxter's partial concurrence in *San Remo Hotel* certainly does not read the majority the way Respondents do. He states the rule in the majority opinion without reference to mitigation at all, simply stating that the rule applies to "in-lieu fees." *Id.* at 686-87 "[T]his formulation makes plain that something more is required than mere rational-basis review[.]" *Id.* at 687. In describing what he would have added to further clarify the test, he states that the "subjects of the inquiry" are "the governmental regulation and the public impact of the development" without qualifying the regulation as a mitigation measure. *Id.*

B. Intervenors Concede That the Ordinance Purports To Mitigate Impacts of New Home Building

Given Respondents' argument that *San Remo Hotel* only applies where an exaction is intended to mitigate harms caused by development, it is hard to know what to make of Intervenors' argument that the Ordinance really is a mitigation measure after all, Intervenors' Response Brief at 53-55, directly counter to almost all of Respondents' arguments at trial, Opening Brief at 11-12.

The trial court found no evidence in the record to support any reasonable relationship between the Ordinance and any negative impact of new residential development. AA 3353. Respondents' briefs at trial, on appeal,

and in this Court cite no such evidence in the record, and there is no indication that this finding is seriously challenged on appeal. City's Opening Brief on Appeal at 21 ("the pertinent facts are undisputed").

CBIA, for its part, carried any burden it had of showing that the record was devoid of such evidence. Opening Brief at 10-11 (citing to the record), 39 (same, and discussing burden of proof).

But Intervenors' argument on this point raises a significant question about their narrow and limited view of *San Remo Hotel*. How does one determine if a fee is a mitigation fee or not for purposes of applying their rewritten *San Remo Hotel* test? In this case, the Ordinance purports, on its face, to mitigate certain supposed impacts, but the City and Intervenors disclaimed at trial that it was intended to do so. What determines whether *San Remo Hotel* applies, under their test, other than their litigation position?

The only sound answer to this question is that *San Remo Hotel* applies regardless of how the adopting authority characterizes the exaction, either on its face, in the record, or in its litigation positions.

C. *Patterson* Properly Applies *San Remo Hotel* to Affordable Housing Exactions

CBIA's Opening Brief shows that *City of Patterson* properly applies *San Remo Hotel* to affordable housing in-lieu fees, and that the court of appeal erroneously distinguished *City of Patterson*. Opening Brief at 19-23.

Respondents' make two spurious arguments in the effort to manufacture a distinction between *City of Patterson* and this case: that the fee in *City of Patterson* "was *explicitly designed to address the impacts of new development*," Intervenors' Response Brief at 30 (emphasis in original), and that the fee in *City of Patterson* was not dedicated solely for affordable housing purposes, City's Response Brief at 40.

1. Contrary to Intervenors' Assertion, *Patterson*'s Fee Was Not "Expressly Intended as a Mitigation Measure"

Building Industry Association of Central California v. City of Patterson surveys the history of the affordable housing fee increase at issue, and recites the underlying study's title as "Development Impact[3] Fee Justification Study 2005/06 Update," referring to it subsequently as the Fee Justification Study. 171 Cal. App. 4th 886, 891 (2009). The Fee Justification Study calculated the amount necessary to provide affordable housing subsidies to three different income classifications, *id.* at 891-92, then multiplied these amounts by the number of units needed in each category (based on the number of such units assigned by the county in the current Regional Housing Needs Assessment) to reach "the total amount of the subsidy needed for affordable housing" of $73.5

[3] This single occurrence of the word "impact" is the only point in the opinion that remotely characterizes Patterson's $20,000 fee increase as a mitigation fee. Everything else in the opinion shows not only that it was not a mitigation fee, but that Patterson never really intended it as such.

million, *id.* at 892 n.6-7. Finally, the Study spread this figure over the city's then current stock of 5,507 entitled units to arrive at just under $21,000 per unit.

City of Patterson held that Patterson's affordable housing fee was not substantively different from San Francisco's Housing Conversion Ordinance, and thus was subject to *San Remo Hotel*. *Id.* at 898. The common features that the court of appeal listed were that they were both formulaic, legislatively mandated fees imposed as conditions to developing property, not ad hoc exactions. *Id.* The court of appeal then concluded that Patterson's fee would only meet the *San Remo Hotel* standard if there was a reasonable relationship between the increased amount of the fee and "the deleterious public impact of the development." *Id.* (citing *San Remo Hotel*, 27 Cal. 4th at 671). The court of appeal noted that Patterson had stated conclusorily that the Study "clearly shows the need for affordable housing generated by the new construction." *Id.* The court went on to explain that its own review of the record revealed no evidence at all for this proposition, but instead that the new fee was based solely on the number and cost of the affordable units assigned to Patterson by the county in the Regional Housing Needs Assessment. *Id.* at 898-99.

So the case does not support the Intervenors' characterization of either the fee or the court of appeal's reasoning. The court's recitation of the facts of the Fee Justification Study, 171 Cal. App. 4th at 891-92, shows that the fee

was not designed to mitigate any impacts of new development, and the subsequent discussion shows there was no other evidence in the record "that demonstrates or implies that the increased fee was reasonably related to the need for affordable housing associated with the project," *id.* at 898-99. The character of the discussion in *City of Patterson* belies Intervenors' description in at least two ways. First, the court of appeal did not hold that *San Remo Hotel* applied because Patterson claimed at argument or in its briefs that the affordable housing fee was a mitigation measure. Rather, the court of appeal so held because the fees in both cases were formulaic, legislatively mandated development fees. Second, the court acknowledged that Patterson argued, conclusorily, that the increased fee was based on impacts of the development, without saying that this had anything to do with why *San Remo Hotel* applied. Rather, this observation occurs after the court of appeal had already concluded that *San Remo Hotel* applied. The court expressly found that there was no evidence to support Patterson's assertion anywhere in the record. It is obvious from the discussion that the purpose of the fee in *City of Patterson* was completely unrelated to the new homes on which it was imposed. Instead, its purpose was to collect enough cash to build enough units to meet the city's assignment in the regional housing needs assessment from the county. Patterson's forlorn effort to claim its $20,000 increase was a mitigation fee is

not why *San Remo Hotel* applied in that case. But it is part of why the fee failed the *San Remo Hotel* test in that case.

2. Contrary to the City's Assertion, Patterson Imposed Its Fee to Fund Construction of Affordable Housing

As discussed above, the fee in *City of Patterson* was calculated in an amount necessary to fully fund the construction of 642 units of affordable housing. 171 Cal. App. 4th at 899. There is nothing CBIA can find in *City of Patterson* to suggest that the affordable housing fee could be used for anything other than affordable housing. This is not a basis for distinguishing *City of Patterson* from this case.

D. Respondents' Discussion of the Ordinance Under the Police Power Test Is Not Relevant

These arguments, in City's Response Brief at 26-29, and Intervenors' Response Brief at 41-53, all rest on the position that the court of appeal below properly held that the Ordinance should be judged merely as an exercise of the police power. Since that is not the proper standard in this case, these arguments are not relevant.[4] If the Court were to hold that this is the proper test, then the case should be remanded to the trial court, as the court of appeal ruled. 157 Cal. Rptr. 3d at 825.

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[4] It is possible that an exaction would have to meet both the *San Remo Hotel* standard and the police power test, in a case in which the plaintiff challenged both the relationship of an exaction to a development's impacts *and* that the purpose of the exaction was not a legitimate state interest.

Nor is Respondent's reliance on *Associated Homebuilders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 582 (1971), well placed. That case upheld the City of Walnut Creek's implementation of California Business and Professions Code section 11546, which authorized cities or counties to require, as a condition of non-industrial subdivision map approval, that developers dedicate land for parks and recreation, provided that, among other criteria, "the amount and location of land to be dedicated or the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by future inhabitants of the subdivision." 4 Cal. 3d at 635-36 (quoting Cal. Bus. & Prof. Code § 11546(e)). This criteria for authorizing recreational and park land exactions is essentially what became the *San Remo Hotel* test. So, *City of Walnut Creek* cannot support the argument that no such relationship need be shown in this case.

Respondent also cites to *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952 (1999), for the argument that the set aside provision should be considered a price control, similar to the rent control context. However, there are critical distinctions between the Ordinance and rent control. Among these differences, rent control applies outside of the development permitting context. *See, e.g., id.* at 957. State law also ensures the right of rental property owners who are subject to rent control laws to set the initial rental rate and to remove the unit from the rental market and sell it. *See, e.g., Palmer/Sixth Street*

Properties, LP v. City of Los Angeles, 175 Cal. App. 4th 1396 (2009) (Los Angeles affordable rental housing ordinance pre-empted by Costa-Hawkins Act). More fundamentally, though, rent control does not involve the transfer of the rental owner's property or cash to the local government in the way that the exactions in the Ordinance do. Through the long term restrictions, the Ordinance ensures that the City ultimately receives the difference between the affordable and market price of the affordable units. The Ordinance is not a price control. Instead, it controls who actually receives the market price, by transferring the right to receive the market price from the builder to the City.

V

THE CITY CANNOT IMMUNIZE ITSELF FROM JUDICIAL SCRUTINY BEHIND A DISCRETIONARY WAIVER PROVISION

Respondents argue that the City is immune from a facial constitutional challenge to the validity of the Ordinance, because the Ordinance allows the City the discretion to adjust, reduce, or waive the requirements following an adjudicatory process in which the City would make an ad hoc determination as to whether (a) the Ordinance either violated *San Remo Hotel* or took property in violation of the state or federal Constitutions, and (b) the extent of

adjustment, reduction, or waiver. SJMC § 5.08.720(A), (D), (E).[5] This argument rests on the decision in *Home Builders Ass'n of Northern California v. City of Napa*, 90 Cal. App. 4th 188 (2001).

City of Napa was a facial claim that the Napa inclusionary housing ordinance was a regulatory taking, using the *Agins* rule which was then understood to state the appropriate test. *Id.* at 195. The court of appeal in that case applied what the Opinion below described as the "stricter" version of standard for a facial challenge, stating that a regulation could only be facially invalid if it did not permit constitutional application. *Id.* The court framed the facial challenge this way because it viewed the claim as "predicated on the theory that "the mere enactment of the . . . ordinance worked a taking of plaintiff's property . . . ." *Id.* at 194 (citing *Hensler v. City of Glendale*, 8 Cal. 4th 1, 24 (1994)). From that premise, the court concluded that "[s]ince the City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking." *Id. City of Napa* found that the ordinance substantially advanced a legitimate state interest. *Id.* at 195-96. In discussing plaintiff's due process claim, *Napa* again briefly discussed administrative relief as preventing facial challenge, this time citing

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[5] This strategem would convert every permit that followed this procedure into an ad hoc permit, because the Ordinance provides wide discretion to the City to limit, reduce, or waive the requirements, based on adjudicatory fact finding about the impact of the development on the need for affordable housing and the relationship of the Ordinance's exactions to that impact.

Fisher v. City of Berkeley, 37 Cal. 3d 644, 684 (1984), and *City of Berkeley v. City of Berkeley Rent Stabilization Board*, 27 Cal. App. 4th 951, 962 (1994).

There are some important limitations to *City of Napa* that distinguish it from this case. It does not employ the same standard for a facial challenge as employed in *San Remo Hotel* (generality or great majority of cases). It treats Napa inclusionary housing ordinance as a generally applicable land use regulation, 90 Cal. App. 4th at 194-95, which is at odds with the court's recent decision in *Sterling Park. City of Napa* also does not discuss any long-term affordability provisions of Napa's ordinance. And, *City of Napa* has never been relied on by any California court for the "waiver" rule for which Respondents argue.

A. Immunizing an Unconstitutional Ordinance from aFacial Challenge Would Be Pernicious

The Court should not adopt or apply the waiver rule as Intervenors have argued for it in this case. In the context of an unconstitutional conditions claim, where the harm imposed is asking people to waive their constitutional rights as a condition of government action, *Koontz*, 133 S. Ct. at 2596, there is no sound reason for allowing cities to avoid facial constitutional scrutiny simply by inserting a self-serving waiver provision in an ordinance. This is not a question of whether a plaintiff who brings a regulatory takings claims must

first exhaust administrative remedies. We are not addressing a regulatory takings challenge in this case.

Respondents' desired waiver principle is only discussed in the context of this case, but the unconstitutional conditions doctrine extends far beyond development exactions. *See Koontz*, 133 S. Ct. at 2594 (listing examples). If a city can insulate itself from facial attack under the unconstitutional conditions doctrine by reserving the power to essentially ignore its enactment, such a "waiver rule" would perforce immunize the following hypothetical ordinances:

A city adopts an ordinance restricting the display of all yard signs, without any exception for political signs. A provision allows the city code enforcement office to waive the ban on a discretionary basis where residents can demonstrate that the ordinance operates as a prior constraint on their First Amendment rights.

A county adopts an ordinance limiting the ability of mobile home park owners to rent homes or spaces to undocumented immigrants, which is immediately effective and requires owners to evict current tenants who are undocumented immigrants. The ordinance allows the county public works department to waive the prohibition in the event mobile home park owners demonstrate that their vested right in currently lawful use of their property is impaired.

Respondents propose no limiting principle that would prevent their "waiver rule" from insulating either of these ordinances from facial challenge under the unconstitutional conditions doctrine. In both cases, it is evident that the sole purpose of the waiver provision is to both avoid facial challenge and to limit, by its practical effect, the number of people that will avail themselves of the relief and to impose hurdles before those few who will seek relief from the Ordinance.

Seen from this perspective, the Court should consider the Ordinance's waiver provision as aggravating the unconstitutionality of the Ordinance, not as mitigating it. The very basis of the unconstitutional conditions doctrine is that "the government may not deny a benefit to a person because he exercises a constitutional right." *Regan v. Taxation with Representation of Wash.*, 461 U.S. 540, 545 (1983). The structure of the Ordinance's waiver provision turns this right on its head, by requiring those who hold the right (to be free of coercive demands to waive their right to just compensation) to demonstrate that they even have the right in the first place. Respondents' waiver rule should be rejected.

CBIA also notes the irony of the showing required to be afforded discretionary relief under the Ordinance's waiver provision. Respondents have argued throughout this litigation that the City has no obligation to demonstrate any relationship between the exactions in the Ordinance and the impact of any

new residential project, and that the Ordinance is not subject to review under *San Remo Hotel*. Opening Brief at 11-13 (citations to the trial record). At the same time, Respondents argue that the Ordinance is immune from facial challenge because it includes a provision that gives it discretion to adjust, reduce, or waive the exactions based on an applicant showing that the Ordinance violates *San Remo Hotel* as to a single project.

B. No California Court Has Cited *City of Napa* for Yhis Proposition

City of Napa has not been relied upon by California courts for the propositions that are salient to this case. *San Remo Hotel*, decided within a year of *City of Napa*, does not cite it at all.[6] Given their very different treatment of housing exactions, this Court's decision in *San Remo Hotel* prevails as to what test applies to affordable housing exactions. *City of Patterson*, 171 Cal. App. 4th at 898 n.14. Similarly, *Sterling Park* did not cite *City of Napa* in its discussion of whether Palo Alto's affordable housing set aside was an exaction under the Mitigation Fee Act.

Nor have other California courts relied on *City of Napa*'s "waiver" rule.[7] The Opinion below does not address the City's waiver argument,

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[6] If Respondents were correct about the narrow scope of *San Remo Hotel*, one might expect to see *City of Napa* cited therein, making clear that *San Remo Hotel* is really just a police power case.

[7] *City of Napa* is noted in *Greater Atlanta Homebuilders Ass'n v. DeKalb* (continued...)

because the court below did not apply what it described as the "stricter" version of the standard for facial challenges. 157 Cal. Rptr. 3d at 813, 818 &19 n.6.[8] The Opinion does cite *City of Napa*'s ruling that an inclusionary housing ordinance substantially advances the important government interest of providing affordable housing, 157 Cal. Rptr. 3d at 819, but whether that is the correct standard is of course the issue before this Court, so *City of Napa* is hardly controlling.

The court of appeal in *Action Apartment Ass'n v. City of Santa Monica* also declined to address a waiver argument premised on *City of Napa*. 166 Cal. App. 4th 456, 471 (2008). *City of Patterson* distinguishes *City of Napa* because it was a facial challenge without an as-applied challenge, and it was decided prior to *San Remo Hotel*. *Patterson*, 171 Cal. App. 4th at 898 n.14.

At best, *City of Napa*, properly read as a regulatory taking case, stands for the truism that a facial regulatory takings claim will almost always face

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[7] (...continued)
County, 588 S.E.2d 694, 697 n.13 (Ga. 2003), for the ability of "special exceptions and administrative appeals" to defeat a facial regulatory takings claim. However, like *City of Napa*, this case was a regulatory takings claim, and the tree preservation ordinance in question was not an exaction but a land use regulation ("it only regulates the way in which new and existing trees must be managed during the development process") under the *Fogarty/Sterling Park* test for land use regulations.

[8] The Opinion does not say the court of appeal declined this analysis based on CBIA's disclaimer of regulatory takings (*i.e.*, compensation) claims.

ripeness and exhaustion defenses. But since this is not a regulatory takings case, *City of Napa* is not on point.

VI

KOONTZ CASTS DOUBT ON *EHRLICH*'S PUBLIC ART FEE HOLDING

Respondents misconstrue CBIA's argument as to *Koontz* and *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996). CBIA does not argue that *Koontz* requires the Court to revisit whether *Nollan* and *Dolan* apply to legislative exactions. Instead, CBIA argues that *Koontz* and *Sterling Park* call into question the Court's holding in *Ehrlich* that Culver City's art in public places in-lieu fee was properly considered an aesthetic zoning law reviewable as an exercise of the police power. Opening Brief at 35-38. This argument is germane because the court of appeal below held that the Ordinance is reviewable as an exercise of the police power, as though it were a general land use or zoning law. *Koontz*' equation of in-lieu fees as functionally equivalent to other land use exactions, along with *Sterling Park*'s definition of the distinction between exactions and land use regulations, both suggest that *Ehrlich*'s holding that in-lieu fees can be equivalent to land use or zoning regulations should be revisited.

VII

THE ALTERNATIVE EXACTIONS ARE NOT SEVERABLE

The Court should not sever the alternative compliance provisions of the Ordinance.

A. The Record Demonstrates That the Alternative Exactions Are Not Volitionally Severable

California case law prescribes "three criteria for severability: the invalid provision must be grammatically, functionally, and volitionally separable." *Calfarm Ins. Co. v. Duekmejian*, 48 Cal. 3d 805, 821 (1989). All three criteria must be satisfied. *McMahan v. City & County of San Francisco*, 127 Cal. App. 4th 1368, 1374 (2005) (citation omitted).

There is no showing that the alternative compliance provisions of the Ordinance are volitionally severable. Instead, the January 12, 2010, presentation made by City staff to the City Council when it adopted the Ordinance, consisting of 16 slides, AA 0846 - 0861, discusses the alternatives in seven of the slides. In three of the slides, the alternatives are set out side-by-side with the basic set aside requirement. AA 0848-50. Housing Director Krutko's December 7, 2009, Memorandum to the City Council, at page 3, discloses that a year earlier, the Council had directed staff to propose an inclusionary housing ordinance that included compliance alternatives, which the staff had proposed subject to certain modifications. AA 0865. The same memorandum, at pages 11-14, provides extensive detail on the various alternatives in the Ordinance. AA 0873 - 0876.

These pages contain parallel columns, the middle of which contains the Council's detailed direction for each of the alternative compliance options. It is impossible to review this evidence and conclude that the City Council would have adopted the Ordinance with none of these alternative compliance provisions. They are all in the Ordinance at the specific direction of the Council.

B. City Has Not Shown What Text Would Have To Be Stricken in Order to Sever Any Provision

The City's three sentence argument that the alternative compliance provisions can be severed fails to even disclose which provisions the City considers severable, or analyze whether these provisions are grammatically or functionally severable from what would remain.

CONCLUSION

Based upon the foregoing, the Court should reverse the court below, affirm the Judgment of the trial court, hold that the Ordinance is subject to the standard of review set forth in *San Remo Hotel*, hold that *San Remo Hotel* applies regardless of whether a development exaction purports to mitigate

development impacts, and reject Respondents' proposed waiver rule immunity from facial constitutional challenge.

DATED: February 19, 2014.

Respectfully submitted,

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By _____
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PETITIONER'S REPLY BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 7,334 words.

DATED: February 19, 2014.

ANTHONY L. FRANÇOIS

DECLARATION OF SERVICE BY MAIL

I, Suzanne M. MacDonald, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 19th day of February, 2014, at Sacramento, California.

Suzanne M. MacDonald
SUZANNE M. MacDONALD