IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S212072

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

vs.

CITY OF SAN JOSE,

Respondent.

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

Intervenors.

SUPREME COURT
FILED
AUG - 5 2013
Frank A. McGuire Clerk
Deputy

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)

APPELLANT/DEFENDANT INTERVENORS' ANSWER TO PETITION FOR REVIEW

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I. Introduction

Without adequate basis Petitioner California Building Industry Association ("CBIA") seeks this Court's review of the Sixth District Court of Appeal's decision *California Building Industry Ass'n v. City of San Jose* (2013) 216 Cal.App.4th 1373 ("Opinion"). The Opinion neither lacks consistency with any other reported California case nor otherwise presents an important, unsettled question of law as to warrant review pursuant Rule of Court 8.500(b)(1). The Court should deny review.

Appellant/Defendant Intervenors are nonprofit organizations that advocate for policies that promote the development of affordable housing for lower and moderate-income families, both locally and statewide. They became involved in this case to assist the City in defending inclusionary housing—a longstanding form of local zoning that has enabled local governments throughout the state to address the chronic shortage of housing affordable to lower and moderate income households, develop housing affordable to the local workforce, and to ensure that as communities grow they become more inclusive and less segregated. Intervenors appealed the trial court's decision not only to save San Jose's inclusionary ordinance, but to ensure that appellate case law on inclusionary housing policies remains consistent statewide.

II. Background

Inclusionary housing, also known as inclusionary zoning, generally refers to local laws that require developers of new multifamily housing to include units that are designated as affordable to lower- or moderate-income households. These laws are adopted in response to the critical unmet need for housing affordable to lower and moderate income households that continues to plague many Californian communities trying to meet the housing needs of their workforce and dismantle historic patterns of segregation. Beginning in 1973 with Palo Alto, now over 170 local jurisdictions have some form of inclusionary housing policy, and these policies have proven effective in increasing the supply of affordable housing. (Non-Profit Housing Association of Northern California, *Affordable by Choice: Trends in California Inclusionary Housing Programs*, p. 9 (2007), *available at* http://www.nonprofithousing.org/pdf_attachments/IHIReport.pdf. [as of May 24, 2011].) Courts have consistently held that inclusionary housing policies, which are designed to address the community's need for affordable housing, are a valid exercise of a municipality's police power.

In 2010, the City of San Jose ("the City") adopted its Citywide Inclusionary Housing Ordinance ("the Ordinance"), which requires developers of certain new residential developments to include units that are

affordable to very low- , low-, or moderate incomes, or to choose from a menu of alternate means of compliance. (Appellants' Appendix ["AA"] 655-708 [San Jose Mun. Code, §§ 5.08.010- 5.08.730].)[1] Before the Ordinance became operative, CBIA filed this lawsuit alleging that the Ordinance was invalid because the City had failed to demonstrate that the inclusionary housing requirements were reasonably related to the "deleterious public impact" of new market-rate residential development. The trial court granted Intervenors permission to intervene on behalf of the City in defending the Ordinance. The City and Intervenors contended that CBIA's proffered standard of review was incorrect. A local ordinance of general application, they explained, is valid if it is reasonably related to its legitimate governmental purpose.

The trial court adopted CBIA's reasoning and enjoined the City from enforcing the Ordinance. Both the City and Intervenors appealed, and the Court of Appeal held the "deleterious public impact" standard articulated by CBIA inapplicable. (*California Building Industry Ass'n v. City of San Jose*, *supra,* 216 Cal.App.4th at 1384.) The court pointed out that the Ordinance was enacted not for the purpose of mitigating the housing loss caused by the impact of new residential development, but for the purpose of

[1] The Ordinance is codified in the San Jose Municipal Code, Title 5, Chapter 5.08, available at http://www.amlegal.com/nxt/gateway.dll/California/sanjose_ca/title5housing/chapter508inclusionaryhousing?f=templates$fn=altmain-nf.htm$3.0#JD_Chapter5.08.

promoting the use of available land for affordable housing to alleviate the need for affordable housing. "[W]hether the Ordinance was reasonably related to the deleterious impact of market rate residential development in San Jose is the wrong question to ask in this case." (*Ibid.*)

The Court of Appeal remanded the matter to the trial court to consider the evidence presented by CBIA with an explicit reminder that "it is *CBIA's* burden to establish the facial invalidity of the [Ordinance], not the City's to prove that it survives the challenge." (*Id.* at 1389 [emphasis in original].) CBIA seeks review of that decision.

III. Argument

CBIA has petitioned review of the Court of Appeal's decision pursuant to Rule of Court 8.500(b)(1), arguing that the Opinion conflicts with the Fifth District Court of Appeal's decision in *Building Industry Association of Central California v. City of Patterson* (2009) 171 Cal.App.4th 886 ("*Patterson*") – which interprets this Court's decision in *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643 ("*San Remo Hotel*") – and the United States Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District* (2013) 133 S.Ct. 2586 ("*Koontz*"). While Intervenors agree with CBIA that the Court of Appeal decided an issue of statewide importance, they disagree that the Opinion creates confusion or inconsistency in the

interpretation of state law. *San Remo Hotel* and *Patterson* are inapposite because, unlike the Opinion, those cases addressed land use ordinances that imposed requirements to mitigate impacts created by new development. *Koontz* likewise addressed a completely distinct question –whether jurisdictions imposing fees in lieu of ad hoc land dedication conditions are subject to heightened scrutiny.

A. The Opinion Is Consistent With the Decisions of Other California Courts.

Prior to the Sixth District Court of Appeal's decision in this case, other Courts of Appeal had upheld inclusionary housing ordinances as valid exercises of the local police power. In *Home Builders Ass'n of Northern California v. City of Napa* (2001) 90 Cal.App.4th 188 ("*Home Builders*"), the First District Court of Appeal upheld the City of Napa's inclusionary housing ordinance against facial takings and due process challenges. The court found that "creating affordable housing for low and moderate income families is a legitimate state interest" and that Napa's inclusionary housing ordinance was reasonably related to that interest. (*Id.* at 195.) It rejected the plaintiff's contention that Napa's ordinance was subject to review under the essential nexus and rough proportionality tests of *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 ("*Nollan*") and *Dolan v. City of Tigard* (1994) 512 U.S. 374 ("*Dolan*"). (*Home Builders, supra,* 90 Cal.App.4th at 196-197.) Similarly, in *Action Apartment Ass'n v. City of*

Santa Monica (2008) 166 Cal.App.4th 456 ("*Action Apartment Ass'n*"), the Second District Court of Appeal held that the *Nollan/Dolan* heightened scrutiny was not applicable in a facial takings challenge to an inclusionary housing ordinance of general application. (*Action Apartment Ass'n, supra*, 166 Cal.App.4th at 470-471.) While CBIA did not explicitly challenge San Jose's ordinance on takings or due process grounds, the Court of Appeal's holding that the Ordinance is entitled to deference as an exercise of the City's police power extends and reinforces the reasoning of these earlier decisions.

Additionally, the Opinion does not create a conflict with the Fourth District Court of Appeal's decision in *Patterson.* In arguing that *Patterson* "holds that *San Remo Hotel* applies to inclusionary housing ordinances," CBIA mischaracterizes the facts and issues that were before the court in *Patterson* and misstates the Fourth District's holding. (Petition for Review, p. 2.) As noted in the Opinion, *Patterson* addressed an as-applied challenge to a city's method of calculating its "affordable housing in-lieu fee," not the facial validity of an inclusionary housing ordinance. (*California Building Industry Ass'n v. City of San Jose*, *supra*, 216 Cal.App.4th at 1384-1385.)

The fee at issue in *Patterson* was styled as a "development impact fee," suggesting that it was designed to mitigate the impact of new development. (See *Patterson, supra*, 171 Cal.App.4th at 891.) The developer asserted that because the fee was an impact fee, it was subject to

the analysis described by this Court in *San Remo Hotel* and, therefore, must be related to the "deleterious public impact" of the new development. (*Patterson, supra*, 171 Cal.App.4th at 898.) The City did not propose any alternate test, and the court simply found that the City's particular method of calculating the fee did not demonstrate a reasonable relationship between the fee amount and the need for affordable housing created by the particular development. (*Ibid.;* see also *California Building Industry Ass'n v. City of San Jose, supra,* 216 Cal.App.4th at 1384-1385.)

In contrast, the instant case is a facial challenge to the San Jose Ordinance, not an as-applied challenge to application of its in-lieu fee provision to a particular development proposal. And, unlike the fee in *Patterson*, the purposes of the inclusionary housing requirements of San Jose's Ordinance are much broader than mitigation of the negative impacts of new market-rate residential development. The purposes include increasing the supply of affordable housing to meet existing needs, promoting the integration of affordable and market-rate units, and dispersion of affordable units throughout the City. (AA 655-658 [San Jose Mun. Code, § 5.08.010].) Accordingly, there is no inconsistency between the Fourth District's holding in *Patterson* and the Opinion. *Patterson* requires a reasonable relationship between development impacts and fees imposed for the purpose of mitigating the impacts, and analogously, the

Opinion requires a reasonable relationship between the requirements of an inclusionary housing ordinance and the purposes of the ordinance.

B. *Koontz* Neither Disturbs Settled California Law Governing Land Use Ordinances of General Application Nor Conflicts With the Opinion Below.

CBIA argues that under the U. S. Supreme Court's recent decision in *Koontz*, the Court of Appeal's review of the Ordinance under the reasonable relationship test was in error. In CBIA's view, *Koontz* requires application of a heightened scrutiny to an ordinance of general application that allows for payment of a fee imposed in lieu of compliance with a development condition. CBIA errs in its interpretation of the Court's holding and in its application of *Koontz* to the Opinion below. The Opinion, in fact, does not conflict with *Koontz* and therefore does not present an unsettled question of California law warranting review under Rule of Court 8.500(b)(1).

Koontz held that conditioning the approval of a particular development application on the payment of a fee in lieu of a dedication of property sought by a local district must satisfy the *Nollan/Dolan* essential nexus and rough proportionality requirements. (*Koontz, supra,* 133 S.Ct. at 2599.) The Court found that a local water district's discretionary demand of a payment of money in lieu of a dedication of real property as a condition for issuance of a development permit was equivalent to seeking a dedication of property and, therefore, triggered the heightened scrutiny of

Nollan/Dolan. (*Id.*) This, however, has been the law in California since this Court's decision in *Erhlich v. City of Culver City* (1996) 12 Cal.4th 854 ("*Erhlich*") holding that the *Nollan/Dolan* tests apply to monetary exactions imposed on an ad-hoc basis as a condition for approval of a development application. (*Erhlich, supra*, 12 Cal.4th at 867-868.)

San Jose's Inclusionary Housing Ordinance, on the other hand, provides for a non-discretionary in-lieu fee as one alternative to its requirement that 15% of the units in new residential developments be affordable to low and moderate income households. Beyond allowing for an in-lieu fee alternative, it parts company with the facts and issues of concern to the Supreme Court in *Nollan, Dolan* and *Koontz.* The Ordinance and its requirements are different in at least three fundamental ways from the conditions sought by the water district in *Koontz.*

First, unlike *Koontz,* the Ordinance does not seek a dedication of property as did the water district in *Koontz.* It requires only that a small portion of new units be sold at prices affordable to households at and below moderate income. (See *Fogarty v. City of Chico* (2007) 148 Cal.App.4th 914, 927 (a dedication of property generally means "the transfer of an interest in real property to a public entity for the public's use" [cited in the Opinion— *California Building Industry Ass'n v. City of San Jose, supra,*, 216 Cal.App.4th at 1383].)

Second, the Ordinance is a legislative act of general application rather than an individualized fee imposed on a developer on an ad-hoc basis *after* the developer has applied for a permit as was the case in *Koontz, Nollan* and *Dolan*. The Ordinance, therefore, does not present the same possibility of abusive leveraging of the permit power to obtain a previously undisclosed fee from a developer already deep into the development process. As Justice Alito explains in *Koontz*, the central concern of *Nollan* and *Dolan* was "the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of *the specific property at issue*, thereby diminishing without justification the value of the property." (*Koontz, supra,* 133 S.Ct. at 2600 [*emphasis* added]; see also *Dolan, supra,* 512 U.S. at 385 ["the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel"].) Similarly, in *Erhlich*, this Court noted the concern of Justice Scalia in *Nollan* was that "such a discretionary context presents an inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends...." (*Erhlich, supra,* 12 Cal.4th at 868 [*emphasis* in the original].)[2] The point was reiterated in *San Remo Hotel* where this

[2] See *also McClung v. City of Sumner* (9th Cir. 2008) 548 F.3d 1219, 1227-1228 [ordinance regulating storm pipe size for new development not an

Court explained that *Erhlich* found generally applicable development fees enacted through the legislative process to be distinct from "discretionary permit conditions," with only the latter requiring scrutiny under the *Nollan/Dolan* tests. (*San Remo Hotel, supra,* 27 Cal.4th at 666-667.) San Jose's Ordinance provides no discretion to the City to increase the in-lieu fee. As an ordinance adopted through the legislative process, moreover, it necessarily discloses the precise formula for determining the fee in *advance* of the permitting process.

Finally, this Court has already established a clear standard for measuring the validity of an in-lieu fee that is consistent with *Koontz*. In *San Remo Hotel* the Court found that the amount of an in-lieu fee imposed as a condition for development must be reasonably related to the purpose of the underlying land use requirement. The in-lieu fee provided in San Francisco's residential hotel conversion ordinance, the decision explained, met this standard because it was related and proportionate to the cost of replacing the converted residential hotel units. (*San Remo Hotel, supra*, 27 Cal.4th at 673.) San Jose's Ordinance utilizes a similar in-lieu calculation. The in-lieu fee is determined based on a calculation of the cost of developing the affordable units required by the Ordinance. (AA 689-692 [San Jose Mun. Code, § 5.08.520].) Indeed, the precise mathematical formula establishing a fee proportional to the stated purpose of the

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individual decision governed by the *Nollan* and *Dolan* tests.]

Ordinance—to ensure inclusion of a specified percentage of affordable housing in new development—meets even the heightened scrutiny of *Nollan* and *Dolan.*

C. *Sterling Park* Presents A Distinctly Different Issue than the Opinion Below, and Does Not Implicate *Koontz.*

Sterling Park v. City of Palo Alto, No. S204771, presently under review by this Court will resolve the issue of whether the City's inclusionary housing ordinance is an "other exaction" under the Mitigation Fee Act (Government Code §66000 *et seq.*) and therefore subject to the 180-day statute of limitations for challenges to development exactions under Government Code §66020(a) of the Act.[3] Contrary to CBIA's contention, the resolution of this question is irrelevant to the issue whether *Koontz* changes the standard of review for measuring the validity of in-lieu fee provisions of land use ordinances of general application. As explained, California law on this question is long settled and is consistent with *Koontz.*

[3] The Court's website states the issue as follows: "Did the 90-day statute of limitations for challenging an agency decision under the Subdivision Map Act (Gov. Code. § 66499.37) or the 180-day statute of limitations for challenging the imposition of 'any fees, dedications, reservations, or other exactions imposed on a development project' (Gov. Code, § 66020) apply to plaintiff's action challenging the city's imposition of conditions on a development project pursuant to a local ordinance?" (http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=0&doc_id=2022770&doc_no=S204771)

IV. Conclusion

This Court should deny the Petition for Review because the Opinion does not conflict with the holdings in *Patterson* or *San Remo Hotel*, and it presents no important question of law in light of *Koontz*. *Sterling Park*, moreover, provides no additional rationale for granting the petition because the case presents an unrelated statute of limitations question and has nothing in common with the Opinion except that the question arose in the context of a challenge to inclusionary zoning.

Dated: August 5, 2013

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court Rule 8.204(c)(1), counsel for Appellant/Defendant Intervenors certifies that exclusive of this certification, the Appellant/Defendant Intervenors' Answer to Petition for Review contains 2,772 words, as determined by the word count of the computer program used to prepare the brief, is proportionately spaced, and has a typeface of 13 points or more.

Dated: August 5, 2013

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PROOF OF SERVICE

I, Farshid Arjam:

I am employed in San Francisco County, State of California. I am over the age of 18 years and not a party to the within action. My business address is Wilson Sonsini Goodrich & Rosati, One Market Street, Suite 3300, Spear Tower, San Francisco, California 94105. On August 5, 2013, I served the following documents:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on August 5, 2013.

Farshid Arjam