S212072

IN THE

SUPREME COURT OF CALIFORNIA

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE,

Respondent.

AFFORDABLE HOUSING NETWORK OF SANTA CLARA COUNTY, et al.

Intervenors.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

After a Decision by the Court of Appeal
Sixth Appellate District, Case No. H038563
Superior Court, Santa Clara County,
Case No. 1-10-CV167289

RICHARD DOYLE, City Attorney (88625)
NORA FRIMANN, Assistant City Attorney (93249)
MARGO LASKOWSKA, Sr. Deputy City Attorney (187252)
Office of the City Attorney
200 East Santa Clara Street
San José, California 95113-1905
Telephone Number: (408) 535-1900
Facsimile Number: (408) 998-3131
E-Mail Address: cao.main@sanjoseca.gov

Attorneys for Respondent CITY OF SAN JOSE

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200 East Santa Clara Street
San José, California 95113-1905
Telephone Number: (408) 535-1900
Facsimile Number: (408) 998-3131
E-Mail Address: cao.main@sanjoseca.gov

Attorneys for Respondent CITY OF SAN JOSE

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I. SUMMARY OF ARGUMENT

California Building Industry Association's petition for review should be denied because it is based on CBIA's misapprehension of existing law. CBIA's issue is whether inclusionary housing ordinances must be reasonably related to deleterious impact of future real estate developments on availability of affordable housing. (Petition for Review 1.) That issue is reliably answered by reference to established law on local governments' police power under Article IX section 7 of the California Constitution.

CBIA's petition is based on a misreading of this Court's opinion in *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, and of the Fifth Appellate District's opinion in *Building Industry Association of Central California v. City of Patterson* (2009) 171 Cal.App.4th 886. There is no conflict among courts of appeal because those cases were decided under legal theories that CBIA expressly rejected: takings and the Mitigation Fee Act. The recent United States Supreme Court decision in *Koontz v. St. Johns River Water Management District* (2013) 113 S.Ct. 2586, and the case of *Sterling Park, L.P. v. City of Palo Alto*, S204771, pending before this Court, do not apply here, either, because they involve permit applicants rather than a facial challenge to legislation.

Contrary to CBIA's argument, there is no need to clarify policies regarding inclusionary housing programs because the California Legislature already noted in the Housing Accountability Act that lack of housing is a critical problem, and charged local governments with the duty to facilitate the provision of housing for all economic segments of the community.

This case is unusual in that CBIA does not claim that the San José Inclusionary Housing Ordinance effects a taking, and it does not argue that the Ordinance violates the Mitigation Fee Act. CBIA only insists that the Sixth District Court of Appeal in this case should have followed the *San*

Remo Hotel decision. CBIA, in effect, merely argues that this case was wrongly decided. *San Remo Hotel* is not a precedent here because its circumstances and legal theories were different.

In essence, CBIA argues that the Sixth District Decision was wrongly decided because it did not follow *San Remo Hotel*. (CBIA's Petition for Review 10-11.) That is not a ground for this Court's review. This Court's attention to this case is unnecessary.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. PROCEDURAL HISTORY

CBIA filed a complaint in March 2010. (Appellant's Appendix ("AA") 1-74.) It alleged four causes of action, seeking declaratory relief, injunctive relief, and a writ of mandate to invalidate the San José Inclusionary Housing Ordinance. (*Id.*) In May 2012 the Trial Court allowed intervention of the Affordable Housing Network of Santa Clara County, California Coalition for Rural Housing, Housing California, Non-Profit Housing Association of Northern California, San Diego Housing Federation, Southern California Association of Non-Profit Housing, and Janel Martinez. (AA 457-58.)

Trial took place on July 11 and 13, 2011 before the Hon. Judge Socrates P. Manoukian. (Reporter's Transcript ("RT") 1-98.) It was held on an agreed set of Stipulated Documents that included materials before the City Council during its consideration of the Ordinance, City Council hearing transcripts, and relevant parts of the City's General Plan. (AA704-2470.) Further argument on the Trial Court's questions to the parties was held on November 17, 2011. (RT 100-148.)

On May 25, 2012, the Trial Court issued an Order Granting Plaintiff's Request for Temporary, Preliminary, and Permanent Injunctive

Relief. (AA 3348-53.) Judgment was entered on July 11, 2012. (AA 3355-68.)

The City and the Interveners appealed to the Sixth District Court of Appeal. On June 6, 2013, the Sixth District issued a published decision reversing the judgment and remanding the matter to the Trial Court to reconsider CBIA's complaint in light of the legal standards stated therein. (*Cal. Bldg. Industry Assn. v. City of San José* (2013) 216 Cal.App.4th 1373.)

The City and CBIA petitioned the Court of Appeal for a rehearing. Both petitions were denied.

B. FACTUAL BACKGROUND

1. California's Affordable Housing Laws

The Legislature has declared affordable housing a top priority and of vital statewide importance. (Gov't Code §65580(a).) The Legislature has enacted many laws regarding the provision of affordable housing, and has required cities to plan for and to take affirmative measures to ensure the provision of affordable housing.

State planning law requires cities to adopt a general plan. (Gov't Code §65300.) The general plan is "at the top of 'the hierarchy of local government law regulating land use.'" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773.) The general plan consists of a "statement of development policies . . . setting forth objectives, principles, standards, and plan proposals." (Gov't Code §65302.) This Court has described "the function of a general plan as a 'constitution,' and has called it the "basic land use charter governing the direction of future land use" in the locality. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540 & 542.)

Declaring that affordable housing is "a priority of the highest order" and of "vital statewide importance," the Legislature in 1980 enacted laws that require each local government to adopt a "housing element" as a component of its general plan. (Gov't Code §§65580(a), 65581(b), 65582 (d).) The housing element is of "preeminent importance" to the State Legislature in attaining its housing goals. (*Committee for Responsible Planning v. City of Indian Wells* (1989) 209 Cal App.3d 1005, 1013.) Enacting the Housing Element Law, the Legislature stated that "[l]ocal and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community." (Gov't Code §65580(d).)

The Housing Element Law requires that a public locality's general plan "must include a housing element consisting of several mandatory components." (*Black Property Owners Assn. v. City of Berkeley* (1994) 22 Cal.App.4th 974, 978.) Among other things, the housing element must identify adequate sites for housing, including rental housing, factory-built housing, mobilehomes, and emergency shelters, and must make adequate provision for the existing and projected needs of all economic segments of the community. (Gov't Code §65583.) The Housing Element Law recognizes that local governments will adopt inclusionary requirements as means to accomplish the production of affordable housing. (Gov't Code §65589.8.) It provides that a local government that adopts a requirement in its housing element that a housing development contain a fixed percentage of affordable housing units—i.e., an inclusionary requirement—shall permit a developer to satisfy that requirement by constructing affordable rental housing. (*Id.*)

2. Shortage of Affordable Housing in San José

The Legislature has found "that there exists a severe shortage of affordable housing, especially for persons and families of low and moderate income. . . ." (Gov't Code §65913(a).) That is also the case in San José. The Association of Bay Area Governments ("ABAG") has calculated that the City's share of the regional need for new housing over the 2007-2014 planning period is about 34,721 units, of which 19,271 will be needed for moderate, low-income and very-low-income families. (AA 2530.) As of early 2009, the ABAG regional needs for extremely low-income, very-low income, low-income and moderate-income housing were reached in San Jose by only 13%, 16%, 2% and 6%, respectively. (AA 2607.) The City is charged under the Housing Element Law with making adequate provision for the existing and projected housing needs of all economic segments of the community. (Gov't Code §65583.) Like many other local governments across California, the City has used inclusionary zoning as one means to accomplish that result. In the Bay Area alone, nearly 70% of cities have adopted citywide inclusionary policies. (AA 1147.)

3. History of Inclusionary Housing in San José's Redevelopment Areas

Redevelopment areas covered about 18% of City territory and included one-third of San José's population. (AA 2563.) State law required that at least 15% of the housing developed in redevelopment project areas established since 1976 be affordable. (Health & Saf. Code §§33413(b)(1), 2(A)(i)).) To comply with this requirement, in 1988 the City Council and the San José Redevelopment Agency Board jointly adopted the "City of San José Policy on Implementation of the Inclusionary Housing Requirement of Health & Safety Code Section 33423(b)(2)." (AA 532-39, 568-70, 970.) The policy was amended several times, including to

provide developers with more flexibility in complying with the inclusionary requirements. (AA 541-61 & 572-646.) The redevelopment area inclusionary policy offered developers the option of paying in in-lieu fee rather than providing the required inclusionary units. (AA 2564.)

Over the years the City's redevelopment inclusionary policy successfully generated affordable housing units. Between 1999 and 2009, more than 10,000 affordable units were built. (AA 2564.) The City's successful experience with inclusionary zoning within its redevelopment areas was a factor that led the City Council to direct City staff to draft an inclusionary ordinance that would apply City-wide. (AA 2564-65.) As stated in the City's Housing Element, it was "anticipated that the Citywide inclusionary ordinance will assist in the production of housing [units] across income categories . . . based on the fact that a substantial amount of housing construction in the recent past has occurred in the RDA [Redevelopment Agency] areas that are subject to existing inclusionary requirements." (*Id.*)

4. San José's Housing Element

One of the key functions of a city is provision of housing to shelter its residents. (AA 2174.) While San José does not construct housing for its residents, the City's overall housing objective is to provide a wide variety of housing opportunities to meet the needs of all the economic segments of the community. (*Id.*)

The components of the Housing Element are found in the text of the General Plan and in the Housing Appendix. (AA 2187, 2483-704.) One of the principal goals of the Housing Element is to fully plan for the jurisdiction's regional housing needs allocation ("RHNA"), as required by state law. (AA 2527.) San José's total allocation for the 2007-2014 RHNA planning period was 34,721 housing units, 60% of which (*i.e.* 19,271 units) are designated for lower- and moderate-income households. (AA 2530.)

The Housing Element concludes that the housing need across all income categories is significant, especially for lower-income households. (AA 2531.) Over 22,000 of lower-income households need more affordable housing, and if overcrowding and incomplete kitchen or plumbing facilities are included in the estimate, then the housing need for lower-income households increases to nearly 30,000 units. (*Id.*) And those numbers do not include the households that would live in San José but are priced out due to the cost of housing. (*Id.*)

5. San José City Council's Direction to Develop a Citywide Inclusionary Housing Ordinance

The City's inclusionary housing ordinance was adopted against the background discussed above, that included the City's long experience with inclusionary housing beginning as early as 1988, and the affordable housing policies and goals established by the City's general plan. In preparing and adopting a City-wide inclusionary housing ordinance, the City undertook a broad and lengthy public outreach and considered extensive testimony and evidence, described below.

In June 2007 the City Council adopted a Five-Year Housing Investment Plan that included consideration of the feasibility of a citywide inclusionary housing policy. (AA 922.) In December 2007, the City Council held a special study session to discuss inclusionary housing, how it had been used in other jurisdictions, and its potential benefits and impacts including how it would help the City to meet its regional housing goals. (*Id.*)

As an initial step and out of concern for the economic impact of an inclusionary requirement on developers, in early 2008 the City retained a consultant David Paul Rosen and Associates to conduct an economic feasibility study concerning a citywide inclusionary housing policy. (*Id.* &

AA 1570-870.) The feasibility study was prepared with input from over 700 individuals, affordable housing advocates, developers, and community organizations. (AA 922.) The study concluded that despite faltering economy and a standstill in residential development, inclusionary housing could be economically feasible in most product types under better economic circumstances and given certain developer incentives. (*Id.*) The City Council learned the study's findings in June 2008. (*Id.* & AA 1471.) The Council directed City staff to develop a policy, educate the public regarding its potential impacts, and obtain community and stakeholder input before bringing a draft policy to the City Council for consideration. (AA 922, 1472-73.)

Between June and December 2008, following the Council's direction, San José's Housing Department held 56 meetings to discuss inclusionary housing. (AA 864, 922.) Two public meetings were held to educate interested community members. (AA 883-84, 922-23.) Forty one-on-one meetings were held with stakeholders, including businesses, homebuilders and labor associations, affordable housing advocates, and community organizations, to solicit their positions or concerns. (AA 883-84.) Fourteen community meetings were held to give the public a chance to review and discuss potential policy options that might be included in a draft ordinance. (*Id.*)

In December 2008, the City Council directed staff to return with a draft inclusionary housing ordinance that would meet certain specified parameters. (AA 923, 1019.) The draft ordinance was released for public review in July 2009. (AA 923.) Between July 2009 and October 2009 nine public meetings were held to discuss with stakeholders and the public the ordinance's components. (AA 865.)

6. Adoption of the Citywide Inclusionary Ordinance

On January 12, 2010, the Council approved Ordinance No. 28689 and passed it for publication. (AA 824 & 827.) At the Council meeting, before the vote, the Council received extensive public comments from developer and real estate industry representatives, the San José Silicon Valley Chamber of Commerce, affordable housing advocates, and others. (*Id.*)

Before that January 12, 2010, Council meeting, the Council received many documents. The Department of Housing provided a memorandum from the Director of the City Department of Housing and a staff presentation outlining the Ordinance. (AA 846-61.) Attorney David Lanferman of the law firm of Sheppard, Mullin, Richter & Hampton, and Myron Crawford of Berg & Berg Developers, Inc., submitted letters in opposition to the Ordinance. (AA 895-906.) A memorandum from Councilmember Nancy Pyle, a letter from attorney Joan Gallo of the law firm of Hopkins & Carley requesting modifications to the Ordinance, and letters from attorney James Zahradka of the Law Foundation of Silicon Valley and from Bonnie Mace, Chair of the Housing and Community Development Advisory Commission supported the Ordinance. (AA 823, 887-94.)

The Council adopted the Ordinance on January 26, 2010, amending Title 5 of the San José Municipal Code to add a new Chapter 5.08, and adopting a Citywide Inclusionary Housing Program. (AA 756, 762-819.) The Ordinance became effective as of February 26, 2010. (AA 762.) But the Ordinance was not operative. (AA 648.) The operative date of the Ordinance is the earlier of January 1, 2013, or six months after the first day of the month following the first twelve-month consecutive period prior to January 1, 2013, in which the City has issued 2,500 residential building

permits, at least 1,250 of which are issued outside the North San José Development Policy Area. (AA 671-72.)

7. Terms of the Ordinance

a. Purposes and Findings

Adopting the Ordinance, the City Council identified some of its purposes as follows:

a. To **enhance the public welfare** by establishing policies that require the development of housing affordable to households of very low, lower, and moderate incomes, meet the City's regional share of housing needs, and implement the goals and objectives of the general plan and housing element (AA 659);

b. To **provide incentives** for affordable units to be located on the same sites as market rate developments in order to provide for the integration of very low, lower and moderate income households with households in market rate developments and to disperse inclusionary units throughout the city (AA 659); and

c. To **provide developers with alternatives** to construction of inclusionary units on the same site as market rate development. (AA 660.)

The City Council also made several findings, for example:

a. Housing in San José, both rental and owner-occupied, has become steadily more expensive and in recent years housing costs have escalated sharply, increasing faster than incomes, resulting a severe shortage of adequate, affordable housing for extremely low, very low, lower and moderate income households. (AA 655.)

b. The City can achieve its goals of providing more affordable housing and achieving an economically balanced community only if some

portion of new housing built in the City is affordable to households with limited incomes. (AA 657.)

c. In order to further its goal that affordable housing be distributed throughout the City, the ordinance would provide incentives for affordable housing to be built on the same site as market rate units. (AA 657.)

d. The ordinance will substantially advance the City's legitimate interest in providing additional housing affordable to all income levels and dispersed throughout the City because required inclusionary units must be affordable to either very low, lower, and moderate income households. (AA 657.)

e. The ordinance was adopted under the City's police power authority to protect the public health, safety, and welfare, and requiring affordable units within each development is consistent with the housing element's goals of protecting the public welfare by fostering an adequate supply of housing for persons at all economic levels and maintaining economic diversity and geographically dispersed affordable housing. (AA 657-58.)

f. A requirement that builders of new market rate housing provide housing affordable to very low, lower, and moderate income households is also reasonably related to the impacts of their projects because (1) rising land prices have been a key factor in preventing development of new affordable housing, and new market-rate housing uses available land and drives up the price of remaining land, and reduces the amount of land development opportunities available for the construction of affordable housing, and (2) new residents of market-rate housing place demands on services, creating a demand for new employees such as retail, transit, childcare, and

other service workers, who themselves earn incomes only adequate to pay for affordable housing. (AA 658.)

b. The Basic Inclusionary Requirement

The basic inclusionary requirement of the Ordinance calls for developers of for-sale projects of 20 or more units to make available 15% of the total on-site dwelling units for purchase at a below-market price to households earning no more than 110% of the area median income. (AA 676.) Under the Ordinance, such units can be sold to households earning no more than 120% of the area median income. For-sale on-site inclusionary units are to be dispersed throughout the development and built according to design and construction quality standards consistent with those of the market rate units in the development. (AA 684-85.)

For rental projects, the Ordinance contains a requirement that 9% of the total dwelling units in a development of 20 or more units be made available for rent at a below-market rate to moderate income households, and 6% of the total units be made available at a below market rent to very low income households. (AA 676-77.) However, the Ordinance also provides that the inclusionary requirement applicable to rental residential development would not be operative until the case *Palmer/Sixth Street Properties, L.P.* (2009) 175 Cal.App.4th 1396, is judicially overturned, disapproved or depublished, or modified by statute. (AA 677.)

c. Alternative Compliance Options

The Ordinance is not a fee ordinance and does not require a developer to pay a fee. It does provide developers alternative ways to comply with the basic inclusionary requirement, which developers may request for a particular project.

Optional alternative compliance measures include the construction of on-site below-market rental units or below-market off-site units, the

dedication of land in lieu of building inclusionary units, or acquisition and rehabilitation of existing market-rate units for conversion to affordable units. (AA 687-89 & 692-97.) Additionally, a developer may satisfy the basic inclusionary requirement by paying a fee in lieu of constructing the affordable units called for by the inclusionary requirement within the development. (AA 689-91.) The in-lieu fee for each for-sale inclusionary unit is to be established annually and may not exceed the difference between the median sales price of an attached market rate unit and the cost of affordable housing for a household earning no more than 110% of the area median income. (AA 689-91.) All in-lieu fees collected must be expended exclusively for affordable housing purposes. (AA 691, 705-706.)

d. Incentives

As incentives for production of on-site affordable housing, the Ordinance provides various measures for which a developer may apply. (AA 679-82.) Those incentives allow a developer to profit from construction of a greater number of units or from a reduction in costs. They include a "density bonus," i.e. allowing the developer to build and sell a greater number of units than the zoning would otherwise permit, equal to the percentage of the inclusionary requirement (AA 680), a reduction in parking requirements (*id.*), a reduction in minimum setback requirements (*id.*), and permitting alternative unit type and interior design standards. (AA 681.)

e. Waiver of Requirements

Section 5.08.720 of the Ordinance provides that the requirements of the Ordinance may be waived, adjusted or reduced if an applicant can demonstrate that there is no reasonable relationship between the impact of a proposed development and the requirements of the Ordinance, or that applying those requirements would take property in violation of the United

States or California Constitutions. (AA 706-707.) The requirements of the ordinance are also waived if the market-rate price is within 5% of the inclusionary price of a unit. (AA 677.)

III. ARGUMENT

A. CBIA'S ISSUE IS GOVERNED BY ESTABLISHED LAW.

1. Cities May Legislate to Fulfill Their Housing Obligations to Their Residents.

CBIA's issue—whether inclusionary housing ordinances must be reasonably related to deleterious impact of future real estate developments on availability of affordable housing—is governed by this Court's long-standing precedents that interpret Article IX, Section 7 of the State's Constitution. Article XI, Section 7 provides in its entirety: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const. Art. IX §7.) This Court held that land use restrictions lie within the public power if they are reasonably related to the public welfare: (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 604-605.) This Court also noted that land use regulations are a function of local government under their inherent police power: "Land use regulation in California historically has been a function of local government under the grant of police power contained in article XI, section 7 of the California Constitution." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151.)

The Sixth District's decision in the present case is part of that line of cases. They concern the ability of local governments to legislate on topics related to general health and safety, including legislation aimed at fulfilling cities' obligations to their residents. In the present case it is the duty to ensure adequate housing. Inclusionary housing ordinances, with the goal of

increasing the supply of affordable housing, are just such an exercise of police power, and must be analyzed under the principles set forth in the above cases. "In deciding whether a challenged ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor." (*Associated Home Builders*, 18 Cal.3d 604-605.)

2. There Is No Conflict Among Appellate Courts.

Arguing that there is a conflict between courts of appeal in California regarding the correct standard of review of inclusionary housing ordinances, CBIA relies on this Court's *San Remo Hotel, L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, and on the Fifth District Court of Appeal decision in *Building Industry Association of Central California v. City of Patterson* (2009) 171 Cal.App.4th 886. (Petition for Review 2-3 & 7-14.) Those cases do not demonstrate a conflict.

a. The *San Remo Hotel* Legislation Had a Different Purpose and the Case Involved Theories that CBIA Rejected.

CBIA claims that the Sixth District should have followed the rule in *San Remo Hotel.* But there, the challenged regulation was a development mitigation fee intended to alleviate deleterious effects of a change in use. The *San Remo Hotel* case concerned an in-lieu fee provision of San Francisco's residential hotel conversion and demolition ordinance whose goal was to prevent reduction of housing units due to conversions of residential hotel units to tourist use. (*San Remo Hotel*, 27 Cal.4th at 673 & 671.) The in-lieu fee was based on the number of converted rooms and the number of residential units before the ordinance's enactment. (*Id.* at 673.)

Here, however, the inclusionary requirement and in-lieu alternative are not development mitigation fees or impact fees. Unlike in *San Remo Hotel*, their purpose is to generate affordable housing rather than replace the stock of housing lost as a result of future development.

Nor did CBIA assert any of the theories alleged by the developer in *San Remo Hotel*. CBIA cannot assert new theories to challenge the Ordinance at this late stage. (Cal. Rules of Court, Rule 8.500(c)(1).) The *San Remo Hotel* plaintiff alleged that the ordinance effected a taking. (*Id.* at 649.) Here, however, CBIA disavowed any reliance on the takings theory. (AA 3121.) ("[P]laintiff does not make any 'takings' claim." (emphasis in the original).) The court of appeal also stated that "[a]side from an oblique suggestion that *Nollan* and *Dolan* are applicable by citing *Lingle*, CBIA does not attempt to reintroduce heightened scrutiny as a standard for measuring the City's regulation." (*Id.* at 1387 n.8.)

And to find that development mitigation fees must bear a reasonable relationship to the deleterious public impact of development "as a matter of both statutory and constitutional law," the *San Remo Hotel* Court pointed to the Mitigation Fee Act, Government Code Section 66001. (*San Remo Hotel*, 27 Cal.4th at 671.) But here, CBIA did not challenge the Ordinance under the Mitigation Fee Act. (AA 3136, 3138.) CBIA's closing trial brief stated that "the invalidity of the ordinance is not premised on its violation of the Mitigation Fee Act." (*Id.*) Nor did CBIA rely on that theory on appeal. The Sixth District Court of Appeal noted that "CBIA did not contest the Ordinance as an 'other exaction' under the Mitigation Fee Act." (*Cal. Bldg. Industry Assn. v. City of San José* (2013) 216 Cal.App.4th 1373, 1387.) CBIA acknowledged that the San José Ordinance was not adopted as a mitigation measure. (AA 3236 ("The Ordinance does not purport to

'mitigate' for any impacts caused or exacerbated by new residential development. . . .'))

b. *City of Patterson* Did Not Concern an Inclusionary Housing Ordinance, and Applicability of *San Remo Hotel* Was Conceded.

The *City of Patterson* decision was a contract interpretation case where the court applied the *San Remo Hotel* analysis to determine what it means that an increase of an affordable housing in-lieu fee must be "reasonably justified." (*City of Patterson*, 171 Cal.App.4th 896.) The terms of the contract applied to a single developer for development of two residential subdivisions in a development known as Patterson Gardens. (*Id.* at 889.) Unlike here, the *City of Patterson* did not involve a facial challenge to an inclusionary housing ordinance. (*Id.* at 898, n.14.) The ordinance in *City of Patterson* simply approved the contract between the city and the developer:

> [P]ursuant to Government Code section 65864 et seq., City entered into a development agreement with Developer's predecessor-in-interest, dated January 21, 2003 (Development Agreement). That agreement provides for the development of Patterson Gardens and establishes certain development rights in that project. ¶ The City Council approved the Development Agreement in January 2003, and that approval became ordinance No. 648.

(*City of Patterson*, 171 Cal.App.4th at 889.) There was no generally applicable inclusionary housing ordinance. The *City of Patterson* decision did not interpret an inclusionary housing requirement or, for that matter, an optional in-lieu fee related to the cost of affordable units that a developer would have otherwise provided under the inclusionary requirement, like in San José's Ordinance.

And unlike here, the City of Patterson conceded that *San Remo Hotel* applied to its situation. (*Id.* at 899.) As a result, the *City of Patterson* court did not did not consider the city's stated objectives and did not analyze whether the underlying requirement was a land-use requirement as opposed to an exaction.

Thus, the *San Remo Hotel* and the *City of Patterson* cases simply do not apply here and, consequently, cannot conflict with the Sixth District Court's decision.

c. There Is No Need to Clarify Policy

There is also no need to clarify policy issues here because in the Housing Accountability Act the Legislature stated that the lack of housing "is a critical problem that threatens the economic, environmental, and social quality of life in California." (Gov't Code §65589.5(a)(1).) The Legislature charged local governments with the duty to facilitate the provision of housing for "all economic segments of the community." (Gov't Code §65580(d).) It is plain that local governments have constitutionally sanctioned police power to control their own land use decisions. (Cal. Const. Art. IX §7.) As long as a land use decision bears a substantial and reasonable relationship to the public welfare, it is a valid exercise of the police power. (*Associated Home Builders*, 18 Cal.3d at 604-605.)

B. CBIA'S CASE IS UNIQUE.

CBIA's case is highly unusual and unlikely to recur because CBIA does not base its challenge on any constitutional provision. It does not allege, for example, that the Ordinance effected a regulatory taking. CBIA only alleges that the Ordinance is illegal under the *San Remo Hotel* decision because it is not "reasonably related to any deleterious impact of new residential developments on which they are imposed." (Petition for Review 2.) But *San Remo* was a takings case. And yet, CBIA expressly conceded

that its challenge not rooted in takings law and whether or not the San José Ordinance effects a taking was not litigated. Therefore, any review of this case is unlikely to have broader application.

C. THE *KOONTZ* DECISION AND THE PENDING *STERLING PARK* CASE DO NOT APPLY.

1. *Koontz* and *Sterling Park* Involve Legal Theories that CBIA Disavowed.

As mentioned above, CBIA belatedly attempts to inject new issues into this case by arguing that the recent Supreme Court of the United States decision in *Koontz* and the pending case of *Sterling Park, L.P. v. City of Palo Alto*, S204771 (filed Aug. 27, 2012), affect this litigation. Those two cases involve different circumstances and rely on legal theories that CBIA specifically disavowed below.

The *Koontz* decision concerns a takings claim. (*Koontz*, 113 S.Ct. at 2591.) And the issue in *Sterling Park* is whether a below-market-rate housing program codified in a local ordinance is governed by the statute of limitations in the California Mitigation Fee Act or in the Subdivision Map Act. (*Sterling Park*, S204771.) None of those issues were litigated here. CBIA denied making any takings claims or claims under the Mitigation Fee Act. (AA 3136, 3138, 3121.) Therefore, CBIA's attempt to raise them now is inappropriate. (Cal. Rules of Court, Rule 8.500(c)(1).) Because CBIA never challenged the San José Ordinance as effecting a taking, then on review this Court could not "resolve the broader constitutional question whether inclusionary housing ordinances are exactions" as CBIA requests. (Petition for Review at 18-19.)

2. *Koontz* and *Sterling Park* Do Not Involve Facial Challenges to Legislation.

The holding of *Koontz* is clear: "We hold that the government's demand for property **from a land-use permit applicant** must satisfy the requirements of *Nollan* and *Dolan* even when the government denies the permit and even when its demand is for money." (*Koontz*, 113 S.Ct. at 2603.) (emphasis added) The *Koontz* case concerned monetary exactions in the ad-hoc, individualized context. The present case, however, concerns a facial challenge to an ordinance. *Koontz* simply did not address the subject of generally-applied, legislatively-imposed conditions or fees. Thus, the *Koontz* opinion cannot control here.

Unlike the plaintiffs in *Koontz* and *Sterling Park*, CBIA is not a development permit applicant but challenges an ordinance on its face. Neither *Koontz* nor the pending *Sterling Park* case affect the present matter because they involve different circumstances.

IV. CONCLUSION

For the reasons stated above, Respondent respectfully requests the Court to deny CBIA's Petition for Review.

Respectfully submitted,

Dated: August 2, 2013

RICHARD DOYLE, City Attorney

By: Margo Laskowska
MARGO LASKOWSKA
Sr. Deputy City Attorney

Attorneys for Respondent
CITY OF SAN JOSE

CERTIFICATE REGARDING WORD COUNT

I, Margo Laskowska, counsel for Respondent City of San José, hereby certify under California Rules of Court, Rule 8.204(c)(1), that this brief is proportionately spaced, has a typeface of 13 points, and the word count for this Respondents' Answer to Petition for Review, exclusive of tables, cover sheet, and proof of service, according to my computer program is 5,496 words.

Respectfully submitted,

Dated: August 2, 2013

RICHARD DOYLE, City Attorney

By: Margo Laskowska
MARGO LASKOWSKA
Sr. Deputy City Attorney

Attorneys for CITY OF SAN JOSE

PROOF OF SERVICE

CASE NAME: *California Building Industry Association v. City of San José, et al*

SUPREME COURT CASE NO.: S212072
COURT OF APPEALS CASE NO.: H038563
(Superior Court No.: 1-10-CV167289)

I, the undersigned declare as follows:

I am a citizen of the United States, over 18 years of age, employed in Santa Clara County, and not a party to the within action. My business address is 200 East Santa Clara Street, San José, California 95113-1905, and is located in the county where the service described below occurred.

On **August 5, 2013**, I caused to be served the within:

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

☒ by MAIL, with a copy of this declaration, by depositing them into a sealed envelope, with postage fully prepaid, and causing the envelope to be deposited for collection and mailing on the date indicated above.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Said correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business;

☒ by FEDERAL EXPRESS; and

☒ by ELECTRONIC SERVICE

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I declare under penalty of perjury that the foregoing is true and correct.

Executed on **August 5, 2013**, at San José, California.

S. C. CARDOZA

SERVICE LIST

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(Superior Court No.: 1-10-CV167289)

Original and Thirteen (13) Copies delivered via Federal Express to:
California Supreme Court
350 McAllister St., Room 1295
San Francisco, California 94102
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One (1) Copy via U.S. Mail to:
David P. Lanferman, Esq.
RUTAN & TUCKER, LLP
Five Palo Alto Square
3000 El Camino Real, Suite 200
Palo Alto CA 94306-9814
Telephone: (650) 320-1507
Facsimile: (650) 320-9905
Email: dlanferman@rutan.com

One (1) Copy via U.S. Mail to:
Damien M. Schiff, Esq.
Anthony L. Francois, Esq.
PACIFIC LEGAL FOUNDATION
930 G Street
Sacramento CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
Email: alf@pacificlegal.org

One (1) Copy via U.S. Mail to:
Corina I. Cacovean, Esq.
WILSON SONSINI GOODRICH & ROSATI, P.C.
One Market Plaza
Spear Tower, Suite 3300
San Francisco CA 94105-1126
Telephone: (415) 947-2017

One (1) Copy via U.S. Mail to:
Michael F. Rawson, Esq.
THE PUBLIC INTEREST LAW PROJECT
CALIFORNIA AFFORDABLE HOUSING
LAW PROJECT
449 15th Street, Suite 301
Oakland CA 94612
Telephone: (510) 891-9794

One (1) Copy via U.S. Mail to:
Melissa Antoinette Morris, Esq.
LAW FOUNDATION OF SILICON
VALLEY
152 North Third Street, 3rd Floor
San José CA 95112
Telephone: (408) 280-2429

One (1) Copy via U.S. Mail to:
L. David Nefouse, Esq.
WILSON SONSINI GOODRICH &
ROSATI, P.C.
650 Page Mill Road
Palo Alto CA 94304-1050
Telephone: (650) 565-3812

One (1) Copy via Electronic Service to:
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191 North First Street
San José, California 95113