ORIGINAL

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SUPREME COURT
FILED

AUG 15 2013

Frank A. McGuire Clerk

Deputy

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)

REPLY IN SUPPORT OF PETITION FOR REVIEW

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Petitioner California Building Industry Association (CBIA) hereby submits the following Reply to the Answers to CBIA's Petition for Review (Petition) filed by the City of San Jose (San Jose) and Intervenors.

INTRODUCTION

CBIA seeks review based on the conflict between the opinion below, *California Building Industry Association v. City of San Jose*, 216 Cal. App. 4th 1373 (2013), and *Building Industry Association of Central California v. City of Patterson*, 171 Cal. App. 4th 886 (2009), in how to interpret and apply this Court's decision in *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643 (2002). The Answers do not provide a principled basis on which to distinguish or harmonize the two cases. Therefore, the Court should grant review to resolve the conflict.

Review is also appropriate because the question presented in the Petition is one of statewide importance, a point which the Answers similarly fail to undercut. In fact, Intervenors appear to agree with CBIA to the extent that the legality of inclusionary housing ordinances is a question of statewide importance. Intervenors' Answer, August 5, 2013, at 4. Intervenors also note that over 170 jurisdictions within California implement some form of inclusionary housing program, *id.* at 2, while San Jose points out that in "the Bay Area alone, nearly 70% of cities have adopted citywide inclusionary policies. (AA 1147)," San Jose Answer, August 6, 2013, at 5. CBIA concurs

that inclusionary housing ordinances are an issue of statewide importance, and argues that the proper standard of judicial review of such ordinances is an important question of law which this Court should settle by resolving the conflict between *City of San Jose* and *City of Patterson*.[1]

Finally, review is appropriate to address the important question of whether *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013), undermines *City of San Jose* on the issue of whether an inclusionary housing in-lieu fee constitutes an exaction. *Cf. id.* at 2599. Rather than address this point, the Answers sidestep it. Therefore, this Court should grant review to address the important question of whether *Koontz* undermines *City of San Jose*'s holding that an inclusionary housing ordinance is subject to minimal judicial scrutiny. *See* Pet. at 16-19.

ARGUMENT

I

CITY OF PATTERSON AND *CITY OF SAN JOSE* CANNOT BE MEANINGFULLY DISTINGUISHED

CBIA's Petition identifies the common essential features of the ordinances at issue in *City of Patterson* and *City of San Jose*, demonstrated that

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[1] San Jose, in its Answer, mis-reads the Petition as asking this Court to clarify *policy* relating to affordable housing. San Jose's Answer at 18. Rather, the Petition argues that this Court should grant review in order to resolve the important question of whether inclusionary housing ordinances are a *legal means* of advancing affordable housing policy. Petition at 14-16.

they are legally indistinguishable, and shows that the two cases reach the opposite answer on whether such ordinances are subject to *San Remo Hotel*. Petition at 7-12. The Petition also explains how the court of appeal's attempt to distinguish *City of Patterson* is unconvincing. *Id.* at 13-14.

The Answers only briefly address the conflict between these two decisions. San Jose's Answer at 17-18; Intervenor's Answer at 6-8. As demonstrated below, the Answers' various arguments attempting to distinguish the decisions are without merit.

A. *San Remo Hotel* Applies the Same Standard of Judicial Review to Both Facial and As-Applied Challenges

San Jose and Intervenors argue for a distinction based on the fact that *City of Patterson* was an as-applied challenge, while *City of San Jose* is a facial challenge. San Jose's Answer at 17; Intervenors' Answer at 7. As already explained, Petition at 13-14, this difference does not meaningfully distinguish the holdings in the two decisions. *San Remo Hotel* resolved both facial and as-applied challenges to a legislative exaction. *San Remo Hotel*, 27 Cal. 4th at 672. It applied the same standard of judicial review (reasonable relationship to deleterious impact of the development) to both the facial and as-applied challenges. *Id.* at 672-74, 677-79. The fact that *City of Patterson* applied *San Remo Hotel* to an as-applied challenge does not distinguish it from *City of San Jose*'s resolution of CBIA's facial challenge, because *San Remo Hotel* applies the same standard of review to both types of challenges: the

exaction must be reasonably related to the deleterious impact of the development.

Contrary to the intimations of San Jose and Intervenors, this case does not present the question of how one prevails in a facial versus as-applied challenge to an inclusionary housing ordinance. Rather, the case presents the logically prior question of what standard of judicial review should be applied to determine the legality of an inclusionary housing ordinance *in any application*. Whether an inclusionary housing ordinance is judged in a single application (to the particular facts of a specific plaintiff), or in all applications through a facial challenge, the ordinance itself is held to only one standard of judicial review. This Court should grant review in this case to settle the conflict between the Fifth and Sixth Districts on the question of what that standard is.

B. *City of Patterson* Applies *San Remo Hotel* Based on Analysis of the Appropriate Standard of Review, Not Because Patterson "Conceded" the Question

San Jose and Intervenors argue that *City of Patterson* is distinguishable because Patterson had not argued against the application of *San Remo Hotel* to its ordinance. In particular, San Jose argues that Patterson "conceded that *San Remo Hotel* applied to its situation." San Jose's Answer at 18; Intervenors' Answer at 7. *City of Patterson* says that Patterson "argue[d] for no different test." In its proper context, this statement follows *City of*

Patterson's detailed examination of *San Remo Hotel*, its discussion of whether *San Remo Hotel* or the higher standard of *Nollan/Dolan/Ehrlich* should apply, and its ultimate conclusion that San Francisco's hotel conversion ordinance was "not substantively different" from Patterson's housing ordinance. *City of Patterson*, 171 Cal. App. 4th at 897-98. This context does not support San Jose and Intervenors' argument that *City of Patterson* did not meaningfully consider the applicability of *San Remo Hotel*. The court in *City of Patterson* considered competing standards of review at some length, held that *San Remo Hotel* applied, and only *then* observed that the city offered no alternative. 171 Cal. App. 4th at 897-98.

C. The Patterson and San Jose Ordinances Are Substantively the Same

CBIA has already explained that the ordinances in *City of Patterson* and *City of San* Jose have no materially distinguishing provisions. *See* Petition at 8-9, 12.

Nevertheless, Intervenors argue that *City of Patterson*'s "affordable housing in-lieu fee" is different from *City of San Jose*'s "inclusionary housing ordinance." Intervenors' Answer at 6. San Jose argues that *City of Patterson* does not involve or interpret a "generally applicable inclusionary housing ordinance" and does not even address "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." San Jose's Answer at 17.

These arguments are not supported by the facts of either case. *City of Patterson* surveys the lengthy history of Patterson's affordable housing in-lieu fee, from its inception in 1995 (at $319 per single family unit) to its increase to $734 in 2001, to its ultimate and dramatic increase to $20,946 per single family home in March of 2006. *City of Patterson*, 171 Cal. App. 4th at 890-93. The fee was raised so steeply because Patterson stopped using the older, lower, fee to "leverage" other federal and state funds for affordable housing, and instead calculated how much was necessary to directly subsidize the difference between the cost of market rate units and units affordable to households with very low, low, and moderate incomes. *Id.* at 892. This history supports describing Patterson's ordinance as a generally applicable exaction, the specific function of which is exactly the same as that of the San Jose Ordinance (Ordinance) challenged in this case: to make up the difference in cost between market-rate and affordable units.

Further, *City of Patterson does* address "an optional in-lieu fee related to the cost of affordable units that a developer would otherwise have provided." San Jose's Answer at 17. The Patterson ordinance afforded four compliance alternatives: "(1) build affordable housing units; (2) develop senior housing within the project; (3) obtain a sufficient number of affordable

residential unit credits from other residential developments within City; or (4) pay an in-lieu fee at the time the building permit is issued for a market rate housing unit." *City of Patterson*, 171 Cal. App. 4th at 890. *See* Petition at 8. The Patterson ordinance required the builder to decide between building the affordable units (including building senior housing within the project, *i.e.*, an inclusionary requirement), off-site alternative compliance, or paying an "optional in-lieu fee" which, in San Jose's words, is "related to the cost of affordable units that a developer would have otherwise provided." San Jose's Answer at 17. Accordingly, there is no meaningful difference between the two ordinances.

D. *City of Patterson*'s Holding That *San Remo Hotel* Applies to Affordable Housing Ordinances Is Not Limited by *City of Patterson*'s Interpretation of the Development Contract at Issue In That Case

San Jose argues that *City of Patterson* "was a contract interpretation case." San Jose's Answer at 17. This description, although partly true, is not germane to the question presented in the Petition. The controversy in *City of Patterson* arose because the plaintiff's development agreement with Patterson reflected the $734 fee adopted in 2001, subject to increase based on a future revision to the fee schedule, "providing the same is reasonably justified." 171 Cal. App. 4th at 890. The contract interpretation portion of *City of Patterson* determines that "reasonably justified" in the development agreement simply means that "any increase in the affordable housing in-lieu fee would *conform*

to existing law." *Id.* at 896 (emphasis added). The court in *City of Patterson* then held that *San Remo Hotel* is the "existing law" to which "any increase in the . . . in-lieu fee [must] conform." *Id.* at 896-98. The fact that it was necessary to interpret the plaintiff's development contract in *City of Patterson* before addressing the applicable legal standard for Patterson's housing ordinance is a procedural difference, but not a meaningful distinction, between the cases.

E. The Ordinances in *City of Patterson* and *City of San Jose* Do Not Have Different Purposes; Both Are Mitigation Fees

Finally, Intervenors argue that *City of Patterson* and *City of San Jose* are distinguishable because *City of Patterson*, like *San Remo Hotel*, involved an ordinance the purpose of which was to mitigate an impact of new development, whereas the purpose of San Jose's ordinance is purportedly not to mitigate the impact of new residential development, but only to further the important public purpose of providing more affordable housing. Intervenors' Answer at 6-7.

This argument, which the court below also made, is without merit. As explained in the Petition at 10-11, this "distinction" is not an argument to distinguish *City of Patterson*, but simply another way of stating disagreement with its conclusion that *San Remo Hotel* applies to inclusionary housing ordinances. Moreover, the argument is inconsistent with the facts in this case.

San Jose's City Council purported to find, when it adopted the Ordinance, a reasonable relationship between the exactions in the Ordinance and new residential development, *i.e.*, the Ordinance is at least in part a mitigation fee.[2] San Jose's Answer at 11-12 (citing AA 658). Hence, the assertion of disparate "purposes" does not distinguish *City of Patterson* and *City of San Jose*, because the ordinances' purposes are basically the same.

Additionally, the court in *City of Patterson* did not look to whether the Patterson ordinance was a mitigation fee. It determined that Patterson's in-lieu fee was "not substantively different" from San Francisco's fee in *San Remo Hotel* because both were "formulaic, legislatively mandated fees imposed as conditions to developing property" as opposed to ad hoc discretionary exactions. *City of Patterson*, 171 Cal. App. 4th at 898. Whether Patterson's $20,000 per home fee was a *mitigation* fee (as opposed to any other type of exaction) is not material to *City of Patterson*'s holding that in-lieu affordable housing fees are in fact a type of exaction subject to *San Remo Hotel*. *City of Patterson* does not even use the word "mitigation" except (a) when quoting *San Remo Hotel*, and (b) in stating that it expresses no opinion on whether the

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[2] The trial court below found that San Jose could point to no *evidence* that any of the exactions in the Ordinance were reasonably related to deleterious impacts of new residential developments. Trial Court's Order at 6, Appellants' Appendix (AA) 3353.

Mitigation Fee Act applies to affordable housing in-lieu fees. 171 Cal. App. 4th at 897 n.13.

The Petition establishes that *City of Patterson* and *City of San Jose* cannot be distinguished on any principled basis, and that they create a split of opinion among appellate districts on whether *San Remo Hotel* applies to inclusionary housing ordinances. Petition at 7-14. San Jose and Intervenors have not rebutted this demonstration. This Court should grant review to resolve the split of opinion on whether *San Remo Hotel* applies to inclusionary housing ordinances.

II

THE PETITION SEEKS REVIEW TO RESOLVE THE IMPORTANT LEGAL QUESTION OF HOW *KOONTZ* AFFECTS WHETHER THE POLICE POWER IS ADEQUATE AUTHORITY FOR IN-LIEU DEVELOPMENT FEE EXACTIONS

As already explained, this Court should grant review to resolve the question of how one of *Koontz*' holdings—all in-lieu development fees are exactions—applies to *City of San Jose*'s holding that such exactions should be subject to minimal "police power" review. Petition at 16-19. San Jose argues against review on this basis, by asserting that *Koontz* "concerns a takings claim" and is not applicable to CBIA's claims in this case. San Jose's Answer at 19. This argument misunderstands *Koontz* as well as CBIA's Petition. *Koontz* did not involve the actual taking of property, but the unconstitutional

demand for property as a condition of permit approval (which was denied because Koontz refused to accede to the unconstitutional demand). *Koontz*, 133 S. Ct. at 2591. In that regard it is no more (or less) a takings case than is CBIA's challenge to San Jose's Ordinance in this case.

Further, CBIA does not raise *Koontz* to expand or change its claims or issues in this case.[3] CBIA has consistently alleged and argued that San Jose's Ordinance violates the Takings Clause standards set forth in *San Remo Hotel*. AA 0010 (CBIA's Complaint ¶ 27, alleging that the Ordinance violates *San Remo Hotel*); AA 3351 (page 4 of trial court's Order), Respondent's Brief below, December 24, 2012, at 2-5, 37; Opinion, slip op. at 10; San Jose's Answer at 1-2 (acknowledging while disagreeing with CBIA's claim that the Ordinance violates *San Remo Hotel*). Similarly, San Jose's argument that CBIA has not made the claims that the plaintiff in *San Remo Hotel* made is without merit. San Jose's Answer at 16. The plaintiff in *San Remo Hotel* argued that *Nollan/Dolan/Ehrlich* applied. This Court declined to extend

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[3] San Jose argues that CBIA waived any and all takings claims below, by citing various statements out of context from pages 4, 19, and 21 of CBIA's Closing Trial Brief, AA 3111-3147. San Jose's Answer at 16, 19. Page 4 of CBIA's Closing Trial Brief does not support this assertion. AA 3121. San Jose also cites pages 19 and 21 of CBIA's Closing Trial Brief to argue that CBIA denied making any takings claims. In context, CBIA's Closing Trial Brief simply points out that CBIA had not claimed that any property had yet been taken and that no compensation was being sought, and clarified that its claim in this case is based on the constitutional protections set forth in *San Remo Hotel*. AA 3136, 3138.

Ehrlich to legislative development exactions, and instead held that such exactions must be reasonably related to the deleterious impact of the development on which they are imposed. *San Remo Hotel*, 27 Cal. 4th at 670-71. As stated above, in this lawsuit CBIA argues that *San Remo Hotel* applies to the Ordinance, and has never waived that claim.

San Remo Hotel holds that California's constitutional protections against takings and unconstitutional exactions are "congruent" with the Fifth Amendment to the United States Constitution, and that United States Supreme Court case law on the subject is applicable to analyzing state law claims. 27 Cal. 4th at 664. *Koontz* is a development in federal exactions law which post-dates the Opinion below, and, by ruling that all in-lieu development fees are exactions, undermines the Opinion's holding that the Ordinance should be subjected to minimal "police power" review.

In contrast, Intervenors argue that *Koontz* provides no basis for review because "unlike *Koontz*, the Ordinance does not seek a dedication of property as did the water district in *Koontz*." Intervenors' Answer at 9. This argument is wrong both as to *Koontz* and the Ordinance. In *Koontz*, the water management district demanded money or services in lieu of real property. 133 S. Ct. at 2593. And the Ordinance *does* seek dedications of property. Most importantly, the affordable units exacted by the Ordinance are themselves set aside for public use, *i.e.*, sale at below-market prices to lower-income

purchasers whose eligibility is defined by San Jose. Secondly, the Ordinance requires that title restrictions in favor of San Jose be placed on the affordable units to ensure that they remain affordable. Such restrictions may include rights of first refusal, and provisions that capture any increase in value of the homes upon sale, with forfeiture of that increase from the homeowner to San Jose.[4] Finally, one of the alternatives for compliance with the Ordinance is to dedicate land that is suitable for construction of inclusionary units and the value of which is at least that of the applicable in-lieu fee. SJMC § 5.08.530(A).

CBIA's point in arguing for review on this ground is simply that *Koontz* expands on prior federal and California case law by making it inescapably clear that all in-lieu development fees are exactions, a conclusion that cannot be reconciled with the court of appeal's holding below.

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[4] The Ordinance authorizes implementing regulations, SJMC § 5.08.200, which among other subjects must require recordation of documents, as prescribed by the City Attorney, against the title to the inclusionary units and the entire development, that ensure that the inclusionary units will continue to be affordable. These documents can include resale restrictions, rights of first refusal, options to purchase, and shared appreciation documents which would permit the city to capture at resale of an inclusionary unit the difference between the resale price and its "affordable" price. *Id.* § 5.08.600(A).

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

DATED: August 14, 2013.

Respectfully submitted,

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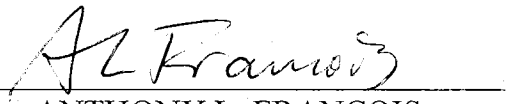
By 
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing REPLY IN SUPPORT OF PETITION FOR REVIEW is proportionately spaced, has a typeface of 13 points or more, and contains 3,142 words.

DATED: August 14, 2013.

A L François

ANTHONY L. FRANÇOIS

DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, 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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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this __th day of August, 2013, at Sacramento, California.

TAWNDA ELLING