S212072

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE AND CITY COUNCIL AND MAYOR OF THE CITY OF SAN JOSE,

Defendants, Appellants and Respondents.

AFFORDABLE HOUSING NETWORK OF SANTA CLARA COUNTY, et al.

Intervenors.

CITY OF SAN JOSE'S ANSWER BRIEF ON THE MERITS

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

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Defendants and Appellants City of San Jose and City Council and Mayor of the City of San Jose ("City") respectfully submit their Answer Brief on the Merits.

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In 2010, the San Jose City Council enacted Ordinance No. 28689 (the Ordinance), requiring developers of new residential housing projects of more than 20 units within the City to sell 15 percent of their units at below-market prices as affordable housing. The City Council enacted the Ordinance after years of study and public meetings in response to a serious shortage of affordable housing within the City. California Building Industry Association (CBIA) sued to invalidate the Ordinance, contending that before enacting the Ordinance the City had been obliged to demonstrate that there was a "reasonable relationship" between the requirement that developers set aside 15 percent of their units as affordable housing (or pay fees in lieu of the set aside) and deleterious impacts or increased needs for additional affordable housing caused by new residential development.

Neither in the trial court nor in the Court of Appeal did CBIA ever identify any constitutional or statutory provision that the Ordinance purportedly violates. At the same time, CBIA repeatedly asserted that (1) it had not made a takings challenge to the Ordinance, (2) it did not seek relief under the Mitigation Fee Act, and (3) it did not contend that the *Nollan/Dolan* standard of review applied. In this Court, CBIA makes an about-face, now claiming that its challenge to the Ordinance is founded on the federal and state takings clauses. CBIA's new found reliance on the takings clause, however, is fatal to its claim as a threshold matter. First, the provisions of the Ordinance allowing City authorities to waive its

requirements bar CBIA's facial challenge. Also, a facial takings claim is not available where, as here, a challenged regulation does not on its face accomplish a physical invasion of property or render property valueless.

Moreover, the City enacted the Ordinance under the City's police power. Consequently, the Ordinance is presumed valid. A court may invalidate it only if it were shown to have no reasonable relation to the public welfare, or that it violates some statutory or constitutional provision. CBIA does not dispute that an inclusionary requirement calling for the provision of a fixed percentage of affordable units within new housing developments, or the payment of in-lieu fees, will promote the public welfare.

Instead, CBIA's core argument is that this Court's decision in *San Remo Hotel v. City & County of San Francisco* (2002) 27 Cal.4th 643 (*San Remo*) requires that development conditions (which CBIA calls "exactions," without precisely defining the term) be supported by a study of deleterious impacts caused by new development. According to CBIA, the inclusionary requirement, as well as the Ordinance's alternative compliance options such as the payment of in-lieu fees, constitute such "exactions." CBIA misplaces its reliance on *San Remo*, which is factually and legally inapposite. In *San Remo*, this Court applied a test that inquired whether there was a "reasonable relationship" between the means and ends of the challenged regulation. The regulation at issue in *San Remo*, however, imposed a development mitigation fee—a fee whose very purpose was to mitigate deleterious impacts. In this case, the primary goal of the Ordinance is not to mitigate deleterious impacts caused by new development, but to produce affordable housing. Also, the *San Remo* decision tailored its reasonable relationship test to a claim brought under a

legal takings theory that the U. S. Supreme Court has since abrogated. Hence, *San Remo*'s means-ends review looking to whether there is a reasonable relationship between a mitigation fee and the deleterious impacts for mitigation of which the fee was collected does not bear on this case.

CBIA's discussion of this Court's recent decision in *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, is similarly off the mark. In that case, the Court addressed an as-applied challenge to development conditions imposed under the Palo Alto's below market rate (BMR) housing program. This Court held that compelling a developer to grant a purchase option under to the BMR program was an "exaction" within the meaning of the procedural protest and limitations provisions of the Mitigation Fee Act. This Court did not address, however, the substantive standard of review for the BMR program itself. Moreover, the requirements of the Ordinance differ materially from those of the BMR program. Unlike Palo Alto's BMR program, the Ordinance does not require a developer to convey an interest in property to the City. In any event, CBIA does not and cannot explain why merely labeling a development condition an "exaction" within the meaning of the Mitigation Fee Act (under which CBIA says it does not seek relief) subjects the condition to the "relationship to impacts" test that CBIA claims *San Remo* sets forth.

Finally, CBIA argues that after the U.S. Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District* (2013) ___ U.S. ___, 133 S.Ct. 2586, all in-lieu fees in California are subject to heightened scrutiny under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374 or CBIA's

"relationship to impacts" version of the *San Remo* test. However, throughout the present case, at least until it reached this Court, CBIA insisted that it does not claim that *Nollan/Dolan* scrutiny applies. And, *Koontz* involved a challenge to an *ad hoc* requirement imposed to mitigate the loss of wetlands from a proposed development and to its in-lieu alternative. Neither the U.S. Supreme Court nor this Court has ever held that *Nollan/Dolan* scrutiny applies to legislative enactments of general applicability, such as the Ordinance. Indeed, this Court has repeatedly affirmed that generally applicable development fees and conditions are *not* subject to the heightened scrutiny of *Nollan* and *Dolan*.

The City is charged under State law with adequately providing for the housing needs of all economic segments of its community. The alleviation of the severe shortage of affordable housing is an important public purpose and serves the general welfare. There is no basis for the courts to second-guess the City Council's considered judgment in adopting an inclusionary housing ordinance as a means to comply with its affordable housing aims. The Court should hold that the Ordinance is reviewable under the police power standard and that it survives CBIA's facial challenge under that standard.

II. FACTUAL BACKGROUND

A. The Legislative Mandate Imposed on Local Governments to Facilitate the Provision of Affordable Housing

The Legislature has declared affordable housing a priority of the highest order and a matter of vital statewide importance.

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(Gov. Code § 65580(a).)[1] It has enacted many laws respecting the provision of affordable housing, and has required cities to plan for and to take affirmative measures to facilitate the provision of affordable housing.

In service of its declaration that affordable housing is "a priority of the highest order" and of "vital statewide importance," the Legislature in 1980 enacted legislation requiring each local government to adopt a "housing element" as a component of its general plan. (§§ 65580(a), 65581(b), 65582(d).) The housing element has been characterized as being 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.)

In 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." (§ 65580(d).) Among other things, the housing element must make adequate provision for the existing and projected needs of all economic segments of the community. (§ 65583(c).) In particular, the housing element must include a program that sets forth a schedule of actions to assist in the development of adequate housing to meet the needs of extremely low-, very low-, low-, and moderate-income households. (§ 65583(c)(2).)

[1] Further statutory references are to the Government Code unless otherwise indicated.

B. The Shortage of Affordable Housing within the City

The Legislature has found that "there exists a severe shortage of affordable housing, especially for persons and families of low and moderate income. . . ." (§ 65913(a).) This is the case within the City. The Association of Bay Area Governments (ABAG) has calculated the City's share of the regional need for new housing over the 2007-2014 planning period as approximately 34,721 units, of which 19,271 units will be needed to house moderate, low- and very low-income families. (AA 2530 (Stipulated Document Index ("SDI") SDI 1893 (San Jose Housing Element Update 2007-2012 ["Housing Element"]).) As of approximately February, 2009, only 13 percent, 16 percent, 2 percent, and 6 percent of the ABAG regional needs for the City for extremely low-, very low-, low-, and moderate-income housing, respectively, had been met. (AA 2607 (SDI 1970 (Housing Element).)

C. The City's Historical Experience with the Successful Production of Affordable Housing under Inclusionary Housing Policies in the City's Redevelopment Areas.

The redevelopment areas formerly comprised approximately 18 percent of City territory and included one-third of its population. (AA 2563-2564 (SDI 1926-27).) State law required that at least 15 percent of the housing developed in redevelopment project areas established since 1976 be affordable. (Health & Safety Code §§33413(b)(1), 2(A)(i).) To comply with this requirement, in 1988, the City and the San Jose Redevelopment Agency jointly adopted a redevelopment area inclusionary policy. ((AA 532-539, 568-570, 970 (City's Supplemental Exhibits ["City's Exh."] 1 through 3)); AA 2564 (SDI 1927).)

Between 1999 and 2009, more than 10,000 affordable units were built in the redevelopment areas under the redevelopment inclusionary

policy. (AA 2564 (SDI 1927).) The City's experience with inclusionary housing within its redevelopment areas was a factor that led to the City Council's direction to City staff to draft a City-wide inclusionary ordinance. (AA 2564-2565 (SDI 1927-28 (Housing Element).) As stated in the 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 [i.e. Redevelopment Agency] areas that are subject to existing inclusionary requirements." (*Ibid.*)

D. The City's Current Housing Element

A principal goal of the Housing Element is to fully plan for the City's regional housing needs allocation ("RHNA"), as state law requires. (AA 2527 (SDI 1890).) San Jose'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 (SDI 1893).) The Housing Element concludes that the housing need across all income categories is significant, especially for lower-income households. (AA 2531 (SDI 1894).) Over 22,000 of lower-income households need more affordable housing, and if overcrowding and incomplete kitchen or plumbing facilities are included, the housing need for lower-income households increases to nearly 30,000 units. (*Ibid.*)

E. The Drafting, Consideration, and Adoption of the Inclusionary Housing Ordinance

Like many local governments across California, the City chose to use inclusionary zoning as a means to meet the requirement to

provide for affordable housing. In the Bay Area alone, nearly 70 percent of cities have adopted citywide inclusionary policies. (AA 1147 (SDI 425).)

The City adopted the Ordinance against a background that included the City's long experience with inclusionary housing and the affordable housing policies and goals established by the City's general plan. Moreover, 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, as next discussed.

1. The City Council's Direction to Develop a Citywide Inclusionary Housing Ordinance

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 (SDI 205).) In December, 2007, the City Council held a study session to discuss inclusionary housing and its potential benefits and impacts including how it would help the City to meet its regional housing goals. (*Ibid.*)

Out of concern for the economic impact of an inclusionary requirement on developers, the City retained consultant David Paul Rosen and Associates to conduct an economic feasibility study concerning a citywide inclusionary housing policy. (*Ibid.* & AA 1570-1870 (SDI 830-1130; see also SDI 1131-38).) The study was prepared with input from over 700 individuals, affordable housing advocates, developers, and community organizations. (AA 922 (SDI 205).) The study concluded that despite the faltering economy, inclusionary housing could be economically feasible in most product types, under better economic circumstances and given certain developer incentives. (*Ibid.*) The study's findings were presented to the City Council on June 17, 2008. (*Ibid.* & AA 1471 (SDI

731 (Minutes of the City Council)).) At that time, the City 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, 1472-1473 (SDI 205 & 732-33).)

In accordance with the City Council's direction, between June and December, 2008 the City Housing Department held some 56 meetings to discuss inclusionary housing. (AA 864, 922 (SDI 149 & 205).) Two public meetings were held on inclusionary housing and its impacts for the purpose of educating community members. (AA 883-884, 922-923 (SDI 168-169 & 205-206).) Forty one-on-one meetings were held with stakeholders, including businesses, homebuilders and labor associations, affordable housing advocates, and community organizations, to solicit the concerns or positions of these groups. (AA 883-884, 923 (SDI 168-69 & 206).) Fourteen community meetings were held throughout the City in order to give the public an opportunity to review and discuss policy options that might be included in a draft ordinance. (*Ibid.*)

On December 9, 2008, the City Council directed staff to prepare a draft inclusionary housing ordinance that would meet specified parameters. (AA 923, 1019 (SDI 206 & 297).) The draft ordinance was released for public review in July 2009. (AA 923 (SDI 206).) Between July 2009 and October 2009 nine public meetings were held in order to discuss the components of the ordinance. (AA 865 (SDI 150).)

2. The Adoption of the Inclusionary Housing Ordinance

The Council adopted the Ordinance on January 26, 2010. (AA 756, 762-819 (SDI 42 & SDI 48-105).) The Ordinance became effective as of February 26, 2010. (AA 762 (SDI 48).) The operative date

of the Ordinance was to be 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. (AA 671-672 (San Jose Municipal Code ("SJMC") §5.080.300).)

3. The Terms of the Ordinance

(a) The Purposes of the Ordinance.

At SJMC section 5.08.020, the City identified its purposes in adopting the Ordinance, including:

a. To enhance the public welfare by establishing policies requiring 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).

In addition, the City Council made a number of findings, including:

a. Housing in San Jose, both rental and owner-occupied, has become steadily more expensive and in recent years housing costs have escalated sharply, resulting a severe shortage of

adequate, affordable housing for extremely low, very low, lower and moderate income households. (AA 655 (SJMC § 5.08.010).)

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 (SJMC § 5.08.010).)

c. 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 (SJMC § 5.08.010).)

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 (SJMC § 5.08.010).)

e. The ordinance was adopted pursuant to 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 657-658 (SJMC § 5.08.010).)

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 (SJMC §5.08.010).)

(b) The Ordinance's 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 percent of the total on-site dwelling units for purchase at a below-market price to households earning no more than 110 percent of the area median income. (AA 676 (SJMC §5.08.400.A.1.a).) Such units can be sold to households earning no more than 120 percent 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 market rate units in the development. (AA 684-685 (SJMC §5.08.470).)

The Ordinance also contains an inclusionary requirement for rental projects. (AA 676-677 (SJMC §5.08.400.A.2).) However, the rental inclusionary requirement 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 (SJMC § 5.08.400A.1.b).)

(c) Alternative Compliance Options.

The Ordinance is not a fee ordinance and it does not require a developer to pay any fee; nor does it require a developer to convey any interest in real property. It offers developers several alternative ways to comply with the basic inclusionary requirement that developers may, at their option, request if desired for a particular project. For example, 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. (AA 689-691 (SJMC §5.08.520).) The in-lieu fee 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 percent of the area median income. (AA 689-691 (SJMC §5.08.520B)(1) & (C).) All in-lieu fees collected must be expended exclusively for affordable housing purposes. (AA 691, 705-706 (SJMC §§5.08.520(D) & 5.08.700(B)).) Other optional alternative compliance measures include the construction of on-site below market rental units or below market off-site units, the dedication of land, and the acquisition and rehabilitation of existing market rate units for conversion to affordable units. (AA 687-689, 692-697 (SJMC §§5.08.510 & 5.08.530—5.08.550).)

(d) Incentives.

The Ordinance provides for incentives to developers who build affordable housing. (AA 679-682 (SJMC §5.08.450).) These include the provision of a "density bonus" (allowing the developer to build and sell a greater number of units than the zoning would otherwise permit) equal to the percentage inclusionary requirement (AA 680 (SJMC §5.08.450.A.1)), a reduction in parking requirements (*ibid.*; (SJMC

§5.08.450.A.2)), a reduction in minimum setback requirements (*ibid.*; (SJMC §5.08.450.A.3)), and the allowance of alternative unit type and interior design standards. (AA 681 (SJMC §5.08.450.A.4-5).) These incentives allow a developer to profit from construction of a greater number of units or a reduction in costs.

(e) Waiver of Requirements.

The Ordinance provides that its requirements 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 (SJMC § 5.08.720).)

III. PROCEDURAL HISTORY

A. CBIA's Lawsuit

CBIA filed its complaint in this action on March 24, 2010. (AA 1-74.) CBIA sought a declaration that the Ordinance was invalid under requirements set forth in *San Remo*, *supra*, 27 Cal.4th 643, and *Building Industry Ass'n v. City of Patterson* (2009) 171 Cal.App.4th 886 and as "in excess of the City's police power." (AA 9-10.) CBIA further sought an injunction against the enforcement and implementation of the Ordinance and a writ of mandate. (AA 12-13).

In its briefing below and at trial and in the Court of Appeal CBIA repeatedly stated that it did not bring its case as a facial takings challenge. (*See, e.g.*, AA 3232 (Plaintiff's Supplemental Trial Brief, p. 1:6-7, 1:10-14), AA 3321 (Plaintiff's Post-Trial Brief, p. 2:14-19); Reporter's Transcript on Appeal ("RT") 18:22-19:1, 58:14-16, 80:10-17, 85:17-18, 138:27-139:3; CBIA Respondent's Brief in the Court of Appeal, p. 52.)

Similarly, CBIA stated below that its challenge was not premised on any violation of the Mitigation Fee Act, §§ 66000 et seq. (AA 3121 (Plaintiff's Closing Trial Brief at 4:11-12).) CBIA also stated below that it did not contend that the *Nollan/Dolan* "essential nexus" and "rough proportionality" standard of review applies. (AA 3138 (Plaintiff's Closing Trial Brief—Reply to City's Brief at 21:10-13).)

B. The Trial and Judgment

Beginning on July 11, 2011 the case was tried to the trial court based on the parties' briefing, oral argument, and an agreed set of "Stipulated Documents" that included materials before the City Council during its consideration of the Ordinance, City Council hearing transcripts, and elements of the City's general plan. (RT 1-98; AA 704-2470 (SDI).)

On May 25, 2012, the trial court issued an order enjoining the implementation of the Ordinance. (AA 3348-3353.) In its order the trial court concluded that the City had not shown "reasonable relationships between deleterious public impacts of new residential development and the new requirements to build and to dedicate the affordable housing or pay the fees in lieu of such property conveyances." (AA 3352-3353.) On July 11, 2012, the trial court entered a judgment declaring the Ordinance invalid and permanently enjoining its enforcement or implementation. (AA 3355-3368.)

C. The Court of Appeal's Decision

The court of appeal reversed the judgment, rejecting the proposition that under *San Remo* and *City of Patterson* the Ordinance's requirements must be reasonably related to the impact of new development and noting that *San Remo* and *City of Patterson* were factually distinguishable. It remanded the case for reconsideration of CBIA's claims

under the police power standard of review, with CBIA bearing the burden to show that the Ordinance was invalid under that standard.

IV. STANDARD OF REVIEW

Because the Ordinance's inclusionary requirement had not gone into effect nor had it been applied to any project (AA 648 (Corsiglia Declaration at ¶¶4-6.)), CBIA's complaint presents a "facial" challenge to the Ordinance, rather than an "as applied" challenge.

In a facial challenge, the court addresses only the text of the measure itself, and not its application to the particular circumstances of an individual. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) A facial takings challenge is predicated on the theory that "the mere enactment of the . . . ordinance worked a taking of plaintiff's property . . . ." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 24.)

This Court has articulated several tests for facial invalidity. For example, it has stated that to succeed in a facial challenge, "the plaintiff has a heavy burden to show the statute is unconstitutional in all or most cases, and "cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute." (*Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39." It has also stated that one making a facial attack must demonstrate that a challenged act's provisions "inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*Pacific Legal Foundation v. Brown* (1981) 29 Cal.3d 168, 180–181; accord, *Tobe v. City of Santa Ana*, *supra*, 9 Cal.4th at p. 1084.) It has further stated that "the challenger must establish that no set of circumstances exists under which the Act would be valid." (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 278, conc. & dis. opn. of Cantil–

Sakauye, C.J., quoting *United States v. Salerno* (1987) 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697.)

In *San Remo*, this Court applied an apparently more lenient standard under which one making a facial challenge cannot succeed without a "minimum showing" that the regulation is invalid "in the generality or great majority of cases." (*San Remo, supra*, 27 Cal.4th at 673, italics omitted.)

Whatever test is adopted, CBIA's burden remains a heavy one. (*Coffman Specialties, Inc. v. Dep't of Transp.* (2009) 176 Cal. App. 4th 1135, 1145.)

V. ARGUMENT

A. CBIA's New Assertion that Its Claims Are Based on the Takings Clauses of the U.S. and California Constitutions is Fatal to Its Facial Challenge as a Threshold Matter

1. CBIA's About-Face.

In its Opening Brief CBIA states: "This case is a facial challenge to the constitutional validity of the [City's inclusionary] Ordinance under the Takings Clauses of the United States and California Constitutions." (Opening Brief, p. 5.) Both in the trial court and the court of appeal, however, CBIA argued repeatedly and emphatically that it was *not* bringing a takings claim. This reversal in CBIA's position conclusively establishes defenses to CBIA's facial challenge that the courts below did not reach.

In the trial court CBIA stated that "the City's new ordinance is properly subject to "facial challenge" since this is not a 'takings' case." (AA 3232 (Plaintiff's Supplemental Trial Brief, p. 1:6-7).) Therefore, CBIA argued, the case *Home Builders Association v. City of Napa* (2001) 90 Cal.App.4th 188, which upheld an inclusionary ordinance against a developers' group's facial takings and due process challenges, was

inapposite: ". . .*City of Napa* was a 'facial takings case' – and was thus held to be 'unripe' because of the peculiar 'ripeness' prerequisites that court has created for 'takings' cases, i.e., the requirement to go through administrative review to see how much of plaintiff's property may be 'taken' by application of the ordinance. ¶ . . . Since this case is not brought as a 'takings' case, however, the 'ripeness' and exhaustion defenses would serve no purpose, and are not applicable." (AA 3232 (Plaintiff's Supplemental Trial Brief, p. 1:10-14) (underscoring in original)(see also RT 18:22-19:1, 58:14-16, 80:10-17, 85:17-18, 138:27-139:3).)

CBIA similarly argued in the trial court that "[i]t should be re-emphasized at the outset that this is NOT a 'takings' case. (See also, Plaintiff's Supplemental Trial Brief, pp. 1-7, repudiating the defendants' efforts to contort this action into some anomalous form of 'federal takings' litigation.) Plaintiff does not allege that any property has been 'taken' by the Ordinance, nor does it seek "just compensation from the City [under the Ordinance]." (AA 3321 (Plaintiff's Post-Trial Brief, p. 2:14-19)(emphasis in original); see also AA 3136 (Plaintiff's Closing Trial Brief, at p. 19:10-21).)

Later, in the court of appeal, CBIA stated: "[U]nlike this case, the [*Homebuilders Ass'n v. City of Napa* (2001) 90 Cal.App.4th 188] complaint was brought as 'a facial takings claim" and was litigated on the 'takings clauses of the federal and state constitutions . . . ." (CBIA Respondent's Brief, p. 52 (underscoring in original).) CBIA insisted that ". . . this action makes no 'takings' claims" (Respondent's Brief 41) and "[the City] invokes inapplicable cases (such as those involving facial takings challenges) . . . ." (Respondent's Brief 55)(underscoring in original.)

Presumably in light of such assertions, the court of appeal did not discuss the facial validity of the City's inclusionary ordinance under the federal and state takings clauses. Rather, it stated that "[t]he case before us involves neither an asserted taking nor a land-use challenge governed by *Nollan* and *Dolan*." (*See California Building Industry Assn. v. City of San Jose*, formerly published at 216 Cal.App. 4th 1373, n.6.)

Thus, CBIA argued below that it was not bringing its facial challenge as a takings case in order to avoid "ripeness" and "exhaustion" defenses applicable to facial takings claims. CBIA was successful in doing so, at least insofar as the trial court did not address these defenses and held the Ordinance invalid.

Having obtained an advantage below by disavowing a takings claim, CBIA takes an opposite position in this Court, stating that "[t]his case is a facial challenge to the constitutional validity of the Ordinance under the Takings Clauses of the United States and California Constitutions." (Opening Brief, p. 5.) As next discussed, CBIA's belated assertion in this Court that its facial challenge is in fact based on the takings clause is fatal to its case.

2. The Waiver Provisions of the Ordinance Preclude any Facial Constitutional Attack.

A regulation such as the Ordinance that contains provisions that allow the local agency to waive its application in a given case cannot be invalidated on its face under the federal or state takings clauses.

It is settled that "a claim that a regulation is facially invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional application to the complaining parties." (*City*

of Napa, supra, 90 Cal.App.4th at 199, *citing San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 547.) When an ordinance contains provisions that allow for administrative relief, a court must presume that the implementing authorities will exercise their authority in conformity with the Constitution. (*Id.*, *citing Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 684.)

In *City of Napa, supra*, 90 Cal. App. 4th 188, a developers' group raised facial challenges to the City of Napa's inclusionary housing ordinance under the constitutional takings and due process clauses. That ordinance permitted a developer to seek an adjustment, reduction or complete waiver of its obligations under the ordinance "based upon the absence of any reasonable relationship or nexus between the impact of the development and . . . the inclusionary requirement." (*Id.* at 192.) Citing the rule that a regulation may not be deemed facially invalid if its terms will permit those administering it to avoid an unconstitutional application, the *City of Napa* court held 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.* at 194.) The court rejected the developers' due process attack on the ordinance for the same reason. (*Id.* at 199.)

This Court should reach the same result here. Like the ordinance at issue in *City of Napa*, the Ordinance provides that the City may waive, adjust or reduce the inclusionary requirement if a developer can show that the inclusionary requirement would take property in violation of the United States and California Constitutions. (AA 706-707 (SJMC §5.08.720(a)).) The Ordinance also allows for a waiver if a developer can demonstrate that there is no reasonable relationship between the impact of a proposed

development and the inclusionary requirement. (*Ibid.*) Under *City of Napa* and the authorities on which it relies, the waiver provisions of the Ordinance preclude a determination that the Ordinance is facially invalid under the takings clause.

This conclusion finds additional support in *Pennell v. City of San Jose* (1988) 485 U.S. 1 [108 S.Ct. 849]). In *Pennell*, the City's rent control ordinance contained provisions allowing a hearing on proposed rent increases to which a tenant objected. (*Id.* at 4-6.) The ordinance required the hearing officer to consider "hardship to a tenant" as a factor in determining whether to grant a rent increase. (*Id.* at 4.) The court rejected a facial takings challenge to the ordinance, holding that any such challenge would be premature because there was no showing of the actual impact of the "tenant hardship" provision of the ordinance. (*Id.* at 10–11.) In so holding, the court stated that "[g]iven the "essentially ad hoc, factual inquiry involved in the takings analysis, we have found it particularly important in takings cases to adhere to our admonition that the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary." (*Ibid.*, citations and internal quotations omitted.) Similarly, the Ordinance's waiver provision affords an administrative remedy that in particular cases may prevent the inclusionary requirement from being applied or having any adverse economic impact on a developer. At the least, the Ordinance's impact in any case cannot be known until it is actually applied to the particular developer.

By all appearances, CBIA asserted below that it had not made a takings claim precisely to avoid such "ripeness" or "exhaustion" defenses, for it argued that *City of Napa*'s "peculiar ripeness rules" were inapposite and any requirement of exhaustion of administrative remedies inapplicable.

(AA 3232 (Plaintiff's Supplemental Trial Brief, p. 1:10-14); RT 18:22-19:1.) This Court should deem CBIA's position below that it was not making a facial takings claim as a concession that it *could not* do so. As CBIA cannot show that the Ordinance will be unconstitutionally applied in the generality or great majority of cases (see *San Remo*, *supra*, 27 Cal.4th at 673), or indeed in any case, its facial challenge must fail.

3. The Ordinance May Not Be Invalidated on its Face Under the Takings Clause in Any Event.

Apart from the effect of the waiver provisions of the Ordinance, CBIA's facial takings challenge claims cannot be sustained. This follows from the nature of legally available takings claims. A taking of property may occur where (1) there is a physical taking of property, (2) a regulation deprives a property owner "all economically beneficial or productive use" of the property, or (3) the regulation "goes too far" based on the application of a set of factors, including the character of the government action, the regulation's economic effect on the landowner, and the extent to which the regulation interferes with distinct investment-backed expectations. (*Penn Central Transportation Co. v. City of New York* (1978) 438 U.S. 104, 123-124.)(*Penn Central*)

The U.S. Supreme Court has held categorically that property is taken when a government regulation compels a property owner to suffer a physical invasion of his property or denies all economically beneficial or productive use of land. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015-1016, 12 S.Ct. 2886, 120 L.Ed.2d 798.)[2]

[2] Unlike the federal takings clause (U.S. Const., 5th Amend.), the takings clause of the California Constitution (Cal.Const. Art.I, § 19) includes "damage" to property as well as its taking. However, apart from that

Footnote continued on next page...

Otherwise, a governmental regulation may constitute a regulatory taking based on the application of the *Penn Central* factors." (*Penn Central, supra*, 438 U.S. 123-124.) In determining whether a government regulation of property works a taking of property, the U.S. Supreme Court has avoided any set formula, preferring to engage in essentially ad hoc, factual inquiries that focus in large part on the economic impact of the regulation. (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal. 4th 952, 964, citing *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1015 [112 S.Ct. 2886, 2893, 120 L.Ed.2d 798.)

As an inclusionary requirement does not call for the physical taking of property, it may not be invalidated as a categorical taking. Nor can it be determined from the face of the Ordinance that its application will deprive any particular development of all economically beneficial or productive use of the developer's property. Also, the application of the *Penn Central* factors calls for a fact-specific inquiry pertaining to the impact of the regulation on a particular property owner. This Court recognized in *Landgate, Inc. v. California Coastal Commission* (1998) 17 Cal.4th 1006, 1016-1017 that unless a takings claim is based on denial of all beneficial use or physical invasion of the property, whether a compensable taking exists requires a "case-specific inquiry." Therefore, a takings claim to a regulation that does not on its face accomplish a physical invasion of property or deprive property of all value cannot be brought as a facial challenge.

...footnote continued from previous page.
difference, which is not relevant here, California courts construe the clauses congruently. (*San Remo, supra*, 27 Cal.4th 643, 664.)

That is especially clear in this case. Apart from the provision by which the City may waive application of the inclusionary requirement, the Ordinance allows for developers to receive incentives such as a density bonus, a reduction in parking requirements, a reduction in minimum setback requirements, or the use of alternative design standards. (AA 679-682; SJMC 5.08.450(A)(4) & (5).)[3] In conjunction with such incentives, the inclusionary requirement may have little or no adverse economic impact on a given developer. Any such impact cannot be known until the Ordinance is actually applied. Hence, CBIA cannot show that the Ordinance will be applied so as to effect a taking of property in any case, let alone "in the generality or great majority of cases." (*San Remo*, *supra*, 27 Cal.4th at p. 673.) CBIA's facial takings claim fails for this reason as well.

CBIA cannot contend that its claims are based on the takings clause because they are governed by *Nollan* and *Dolan*. First, CBIA stated below that it does not claim that *Nollan/Dolan* scrutiny applies. (See, e.g., AA 3138 (Plaintiff's Closing Trial Brief—Reply to City's Brief at 21:10-13). Also, as discussed in Section V(E), below, this Court has repeatedly held that *Nollan/Dolan* scrutiny does not apply in the case of generally applicable regulations. Because *Nollan* and *Dolan* may therefore apply only to adjudicatory, *ad hoc* conditions, a claim based on *Nollan* and *Dolan* cannot be brought as a facial challenge. (See *Action Apartments Ass'n v. City of Santa Monica* (2008) 166 Cal.App.4th 456 (rejecting facial takings challenge and the application of *Nollan/Dolan* scrutiny to inclusionary ordinance).) This is true also because *Nollan/Dolan* scrutiny will not apply

[3] Section 65915 requires cities and counties to grant density bonuses to developers who agree to construct affordable or senior housing.

to a development condition that does not otherwise effect a taking of property. (*Powell v. County of Humboldt* (2014) ___ Cal.App.4th ___ (First Dist., Div. One, A137238, filed January 16, 2014)(slip op. at 13).) As shown, a regulation such as the Ordinance that does not accomplish a physical taking of property or render property valueless will not, on its face, effect a taking.

4. One May No Longer Assert a Facial Takings Challenge on the Ground that a Regulation Fails to Substantially Advance Legitimate State Interests.

In *San Remo* this Court entertained a facial takings claim (*San Remo, supra*, 27 Cal.4th at 643, 672-673) because, at the time, a landowner could establish a taking of property by showing that a challenged regulation failed to "substantially advance legitimate state interests." (*See Agins v. City of Tiburon* (1980) 447 U.S. 255.) An *Agins* takings claim was amenable to a facial challenge because it did not require consideration of individual impacts. In *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, however, three years after *San Remo* had been decided, the U.S. Supreme Court disapproved the *Agins* takings doctrine, and held that a landowner cannot show a taking of property by demonstrating that a challenged regulation that affects property fails to substantially advance a proper governmental interest. (*Id.* at 545.) Thus, after *Lingle*, courts may no longer decide takings claims by inquiring whether a relationship exists between the requirements of a regulation and its purposes. Instead, as shown, where a takings claim does not involve a physical taking or the destruction of the value of property, the courts must look to case-specific factors such as the economic effect of a challenged regulation on particular property and the owner's reasonable investment backed expectations. (*Penn Central, supra*, 438 U.S. at 123-124.)

B. The City Properly Adopted the Ordinance under Its Police Power.

Initially, CBIA alleged that the adoption of the Ordinance was "in excess of the City's authorized zoning powers and constitutionally-limited municipal police power." (AA 11 (Complaint, ¶ 34).) Although CBIA does not advance that claim in this Court, the requirements of the Ordinance bear a reasonable relationship to the public welfare and have been within the City's police power to adopt. Therefore, the Court should uphold the Ordinance, unless CBIA can establish that the Ordinance somehow conflicts with the general laws. That, as discussed in Section V(C), below CBIA cannot do.

1. Judicial Review of Regulations Adopted Pursuant to the Police Power.

A local government's authority to regulate within its jurisdiction arises from the police power delegated to it by Article XI, section 7 of the California Constitution, which authorizes a city or county to "make and enforce within its limits all local, police, sanitary, and other ordinances or regulations not in conflict with the general laws."

The courts give great deference to a municipality's exercise of its police power, especially in land use regulation. An ordinance restricting land use is valid if it has a "real or substantial relation to the public health, safety, morals or general welfare." (*Miller v. Board of Public Works* (1925) 195 Cal. 477, 490 (local government may legitimately use police power to enact zoning ordinances restricting certain areas to single family housing).)

Similarly, regulations limiting the prices a property owner may charge for the possession or ownership of property, such as rent control measures, are generally constitutionally permissible exercises of

governmental authority. (*Santa Monica Beach, supra*, 19 Cal.4th at 962.) In *Pennell, supra*, 485 U.S. 1, the U.S. Supreme Court rejected a challenge to the City's rent and eviction law, reaffirming that "[s]tates have broad power to regulate housing conditions in general . . . without paying compensation for all economic injuries that such regulation entails." (*Id.* at 12.) And, as this Court stated in upholding a rent control measure in *Santa Monica Beach*, "[c]ourts have nothing to do with the wisdom of law or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties." (*Santa Monica Beach, supra*, 19 Cal.4th at 962, quoting *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462.) Hence, "the standard of review for generally applicable rent control laws must be at least as deferential as for generally applicable zoning laws and other legislative land use controls. . . . [T]he party challenging rent control must show that it constitutes an arbitrary regulation of property rights." (*Santa Monica Beach, supra*, 19 Cal.4th at 968 (internal quotations and citation omitted).)

Finally, as this Court explained in *Lockard*, if the reasonableness of the legislative determination is "fairly debatable," the decision will be upheld as it cannot be held unreasonable or arbitrary. (*Lockard, supra*, 33 Cal.2d at 462.) The party challenging the constitutionality of an ordinance has the burden of presenting evidence and documentation needed to perform this analysis. (*Associated Home Builders v. City of Livermore* (1976) 18 Cal.3d 582, 609.)

In this case, the record contains evidence that the inclusionary requirement would be effective and would advance the City's goal of producing affordable housing. (See, e.g., AA 1143-1146, 2564-2565 (SDI 421-424, 1927-28) (reporting that redevelopment inclusionary policy had

generated more than 10,000 affordable units); AA 866 (SDI 151) (specific inclusionary percentages will achieve consistency with State-mandated inclusionary standards applied in redevelopment areas so as to avoid negatively impacting affordable housing development in those areas); AA 1960-1962 (SDI 1203-1205) (reporting inclusionary percentages adopted by various California counties); & AA 1131-1138 (SDI 1131-1138) (discussing economic analysis modeling varying inclusionary percentages).) Also, by encouraging developers to include on-site affordable housing, the inclusionary requirement promotes the City's goal of achieving a mix of housing types throughout the City. (AA 657.) Further, the Ordinance reasonably accommodates the interests of developers by offering incentives for which a developer may apply and which may allow a developer to profit from the construction of a greater number of units or a reduction in costs. (AA 679-682 (SJMC § 5.08.450).)

Courts have recognized that inclusionary housing promotes legitimate public purposes. For example, in *City of Napa*, *supra*, 90 Cal.App.4th 188, the court held that an inclusionary housing requirement that called for the provision of a fixed percentage of affordable units within new housing developments, or the payment of in-lieu fees, on its face advanced substantial state interests. (*Id.* at 195-196.) (*See also Mead v. City of Cotati* (N.D. Cal. 2008) 2008 WL 4963048, *aff'd* (9th Cir. 2010) 389 Fed.Appx. 637 *cert. denied* (2011) 131 S. Ct. 2900.) (holding inclusionary ordinance to be rationally related to legitimate governmental objectives); (*see also Kamaole Pointe Development L.P. v. County of Maui* (D.Hawaii 2008) 573 F.Supp.2d 1354, 1383.) (upholding an inclusionary law having the stated purpose of alleviating "the shortage of workers and resulting downward pull on Maui's economy")

As the reasonableness of the Ordinance and the City Council's determination that inclusionary requirement and its in-lieu fee alternative would advance the City's legitimate interests are thus at least "fairly debatable," this Court should deem that the City properly adopted the Ordinance under its police power. (*Lockard, supra*, 33 Cal.2d at 462.)

C. CBIA Cannot Show that the Ordinance Is Invalid

Because the Ordinance is otherwise valid under the police power, the Court must uphold it unless the Ordinance conflicts with some statute or constitutional provision. (Cal.Const. Art. XI, sec. 7.) Below, CBIA did not identify any constitutional or statutory provision (not even the takings clause) that the Ordinance allegedly violated. Indeed, CBIA disavowed any reliance on the takings clause and the Mitigation Fee Act and stated that its challenge was not subject to *Nollan/Dolan* scrutiny. (See, e.g., AA 3121, 3136, 3138 (Plaintiff's Closing Trial Brief, pp. 4:11-12, 19:19-20, 21:10-13).) CBIA's central claim is that under *San Remo* the only way a legislatively adopted development condition (or "exaction," as CBIA prefers to call it) will pass muster is if it mitigates a public harm proximately caused by the project in a manner that is reasonable in both purpose and amount. (Opening Brief, p. 33.) CBIA's contention cannot withstand scrutiny.

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1. CBIA's Version of *San Remo's* "Reasonable Relationship" Test Does Not Apply.

CBIA principally relies on this Court's decision in *San Remo*. In that case, the owners of a hotel brought an *Agins* takings

challenge against a San Francisco ordinance that limited the conversion of residential hotel rooms to tourist use. (*San Remo*, *supra*, 27 Cal.4th at 649.) The intent of the ordinance was to "benefit the general public by minimizing the adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition." (*Id.* at 650.) To achieve that goal, the ordinance required a hotel converting a residential hotel unit into a tourist unit to replace the residential unit elsewhere, pay a fee in lieu of providing the replacement unit, or take other action that would further replacement. (*Id.* at 651.)

The hotel owners argued that *Nollan/Dolan* heightened scrutiny applied to the Court's review of the replacement in-lieu fee. (*San Remo*, *supra*, 27 Cal.4th at 663-671.) The Court in *San Remo* refused to apply *Nollan/Dolan* scrutiny to the San Francisco ordinance because it was a legislative enactment rather than an *ad hoc* determination specific to a given project. (*Id.* at 670-671.) However, it also stated that "[a]s 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." (*San Remo*, *supra*, 27 Cal.4th at 671.)

The Court in *San Remo* upheld the development mitigation fee. It noted that the purpose of the ordinance was to benefit the general public by minimizing the adverse impact on the housing supply and on displaced individuals from the loss of residential hotel units. (*Id.* at 650.) The ordinance sought to achieve this purpose by requiring developers to replace 100 percent of lost units, or to pay an in lieu fee that was based on a percentage of the cost of replacing the units. (*Id.* at 651, 673.) The Court found that the fees "bear a reasonable relationship to the loss of housing"

because they are based on "the number of rooms being converted from residential to tourist designation . . . ." (*Id.* at 672-73.)

CBIA bases its argument that general legislation that imposes requirements or fees as a condition of development must bear a reasonable relationship to the deleterious public impact of the development on language in *San Remo* that it takes out of context. CBIA applies that language to something *other than* development mitigation fees that were at issue in *San Remo*. CBIA's insistence that the Ordinance must be reasonably related to deleterious public impacts of new development is at odds with the holding and rationale of *San Remo*. Nor can CBIA's proposed "relationship to impacts" test be harmonized with this Court's other cases, including *Associated Home Builders, Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640 and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, on which the Court relied in enunciating the *San Remo* "reasonable relationship" test.

One cannot read the *San Remo* test separately from the legal claim at issue there. In *San Remo*, the hotel owners alleged an *Agins* taking on the theory that the hotel conversion ordinance failed to substantially advance legitimate governmental purposes. By definition, such a claim must depend on the relationship between the requirements of a regulation and its purposes. Therefore, the Court in *San Remo* considered whether there was a "reasonable relationship" between the means and ends of the hotel conversion ordinance. (*Cf. Lingle, supra*, 544 U.S. 528, 542 ("[t]he 'substantially advances' formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose."))

The full context of the *San Remo* "reasonable relationship" test makes clear that it called for a means-ends inquiry that was tailored to the requirements and purposes of the particular regulation at issue:

> Nor are plaintiffs correct that, without *Nollan/Dolan/Ehrlich* scrutiny, 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. (Gov.Code, § 66001; *Ehrlich, supra*, 12 Cal.4th at pp. 865, 867, 50 Cal.Rptr.2d 242, 911 P.2d 429 (plur. opn. of Arabian, J.); *id.* at p. 897, 50 Cal.Rptr.2d 242, 911 P.2d 429 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640, 94 Cal.Rptr. 630, 484 P.2d 606.)

(*San Remo, supra*, 27 Cal.4th at 671.) As the Court was careful to point out, the fees challenged in *San Remo* were "legislatively imposed development mitigation fees." (*San Remo, supra*, 27 Cal.4th at 671.) The Court in *San Remo* also stated that there must be a reasonable relationship between such fees and "the deleterious impacts *for mitigation of which the fee is collected.*" (*Id.* at 667.)(emphasis added)

It does not follow, however, that all legislatively imposed conditions of development, or related in-lieu fees, are valid only if they are reasonably related to deleterious impacts of development, irrespective of the purposes of a challenged regulation. Indeed, to so hold would be inconsistent with the Court's employment of a means-ends inquiry in *San Remo*.

Nor can *San Remo* be so read. In stating 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 Court in *San Remo* looked to (1) the Mitigation Fee Act, § 66001,

(2) the plurality opinion and Justice Mosk's concurring opinion in *Ehrlich*, and (3) the Court's decision in *Associated Home Builders*, *supra*, 4 Cal.3d 633, 640. Each of these authorities militates against adopting CBIA's universal "relationship to impacts" test.

First, CBIA has disavowed any challenge under the Mitigation Fee Act. (AA 3121, 3136 (Plaintiff's Closing Trial Brief at 4:11-12 & 19:19-20).) And, section 66001, which requires a determination that there is a relationship between a development fee and the need for a public facility attributable to development on which the fee is imposed, on its face applies only to mitigation *fees* such as those at issue in *San Remo*. (See discussion at Section V(D), below.)

Second, Justice Mosk's concurring opinion in *Ehrlich* confirms that the *San Remo* "reasonable relationship" test requires scrutiny of the means and ends of a regulation:

> . . . [A] court's constitutional inquiry will vary with the nature of the state interest purporting to justify the monetary exaction under review. If the government's interest is in raising revenue generally, then courts will uphold the tax so long as the special burden it imposes on developers is rationally based. If, as in the case of the art in public places fee at issue in this case, the fee is for the purpose of furthering certain legitimate aesthetic objections [*sic*-objectives], then this fee will be upheld if it can be shown to substantially further those objections [*sic*-objectives]. If the fee is imposed to mitigate the impacts of development, then it will be upheld if there is a reasonable relationship between the fee and the development impact. (See *Associated Home Builders v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640, 94 Cal.Rptr. 630, 484 P.2d 606.) If the fee is defined as a user fee, then the fee will be upheld if there is a reasonable relationship between the government's cost of service and the fee. But in each of these cases, the degree of scrutiny is not appreciably different.

(*Ehrlich*, *supra*, 12 Cal. 4th at 897.)

In other words, in conducting a means-ends inquiry of the type applied in *San Remo*, a court must match the means and ends of the particular regulation under consideration. CBIA would require that there be a reasonable relationship, in nature and amount, between any development condition and the deleterious impacts of the development on which the condition is imposed, but without regard to the purposes of the condition. The Court in *San Remo* did not so hold.

Significantly, although the Court in *Ehrlich* held that there must be a reasonable relationship between a legislatively imposed mitigation fee and the deleterious impacts for mitigation of which the fee is collected, The Court did not apply that test to the art-in-public-places fee, which was not a mitigation fee, and which served different, aesthetic purposes. (*Ehrlich*, *supra*, 12 Cal.4th at 886, 897.) Further, the Court's treatment in *Ehrlich* of the art-in-public-places fee makes plain that courts are not required to examine conditions of development or related in-lieu fees as if they were mitigation measures that must bear a reasonable relationship to the deleterious impacts of new development. To the contrary, the art-in-public places-fee was upheld as a valid exercise of the city's police power. (*Ehrlich*, *supra*, 12 Cal.4th at 886.)[4]

[4] Nor does *San Remo* support the proposition that a regulation that imposes a requirement as a condition of development must be supported by a nexus study or other evidence supporting what CBIA claims to be the required "reasonable relationship." To the contrary, in rejecting the plaintiffs' facial challenge to the housing replacement fees in the case before it under its "reasonable relationship" analysis, the court in *San Remo* considered only the provisions of the ordinance on its face. (*San Remo*, *supra*, 27 Cal.4th at 672-674.)

Indeed, this Court has expressly rejected an argument analogous to CBIA's position that a development condition is valid only to the extent that it mitigates the effects of new development on which the condition is imposed. In *Associated Home Builders v. City of Walnut Creek, supra*, 4 Cal. 3d 633, this Court stated:

> We see no persuasive reason in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required.

(*Id.* at 639-40.) The U.S. Supreme Court has similarly rejected a claim that an ordinance that tries to solve pre-existing problems that were not caused by new development was invalid. In *Penn Central, supra*, 438 U.S. 104, the Court held that New York could enact a landmark preservation law that was designed to mitigate the effects of prior policies that permitted "large numbers of historic structures, landmarks, and areas" to be destroyed. (*Id.* at 108, 138.)

Finally, many local government regulations affecting the use of land are adopted to serve purposes other than the mitigation of effects of new development. These include density and setback requirements, rent control measures, condominium conversion ordinances, second unit requirements, and historical preservation laws. Absent conflict with some statutory or constitutional provision the courts uphold such measures under the police power, even though they may reduce the value of property. (See, e.g., *Griffen Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 263

(California courts have consistently treated condominium conversion regulation as a legitimate exercise of the police power); *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 158 (legislation regulating prices or otherwise restricting contractual or property rights is within the police power if its operative provisions are reasonably related to the accomplishment of a legitimate governmental purpose); *Clemons v. City of Los Angeles* (1950) 36 Cal.2d 95, 101-102 (minimum lot size requirement); *Thille v. Board of Public Works of the City of Los Angeles* (1927) 82 Cal.App. 187, 193-194 (set-back requirements).)

Yet, such regulations could be vulnerable to a facial challenge under CBIA's proposed "reasonable relationship to impacts" test. CBIA fails to articulate any principled distinction between development conditions that constitute "legislatively adopted development exactions," valid only insofar as they mitigate public harms caused by a project, and measures that serve purposes other than the mitigation of impacts, but that also might render development less profitable. In this case, the underlying inclusionary requirement requires developers to set aside for sale at below market prices 3 units for every 20 built. It does not divest a developer of any interest in property or require the developer to convey such an interest to the City. It does not require the dedication of land, for a dedication is the transfer of an interest in real property to a public entity for the public's use. (*Fogarty v. City of Chico* (2007) 148 Cal.App.4th 537, 543.) Rather, the inclusionary requirement operates as a price control, similar to rent control, which likewise limits the price that a property owner can charge for property or an interest in it. As shown, the standard of review for generally applicable rent control measures is at least as deferential as for generally applicable zoning laws and other legislative land use controls. (*Santa Monica Beach,*

supra, 19 Cal.4th at 968.) CBIA's complaint that the Ordinance divests developers of some of the value of their property (Opening Brief, p. 28) affords no workable distinction because it would apply to virtually any legislation affecting the use of land, including rent control.

In short, to adopt CBIA's proposed "relationship to impacts" standard would at best inject significant uncertainty into local land use regulation; at worst, it would upend established rules by which local governments have long operated. Therefore, the Court should reject CBIA's assertion that *San Remo*'s particular means-ends inquiry, tailored to mitigation fees, should apply to all development conditions and related in-lieu fees.

2. The Ordinance Is Valid even if the *San Remo* "Reasonable Relationship" Test Survives *Lingle*.

CBIA's reliance on *San Remo* is also misplaced for another reason. The Ordinance passes muster under the *San Remo* test when applied to the actual goals of the Ordinance.

As shown, the inclusionary requirement of the Ordinance will in fact produce additional affordable housing and so accomplish the purposes of the Ordinance.

As noted, after *Lingle* one may no longer bring a takings claim on the ground that a regulation fails to substantially advance legitimate governmental interests. (*Lingle*, *supra*, 544 U.S. at 548.) In addition, the Court in *Lingle* made clear that the *Agins* test originated in substantive due process jurisprudence. (*Lingle*, *supra*, 544 U.S. at 540-543.) Therefore, to the extent that it retains significance in any context after *Lingle*, *San Remo*'s "reasonable relationship" test (which must be viewed as a form of the "substantially advance" test because the case addressed an *Agins*

takings claim) should be read as similar to the deferential standard applicable to substantive due process challenges. In *Euclid v. Ambler Co.* (1926) 272 U.S. 365 [47 S.Ct.114, 121, 71 L.Ed. 303] the U.S. Supreme Court stated that before a regulation may be declared unconstitutional under the due process clause it must be found "that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." (*Id.* at 395.) (See also *Santa Monica Beach, supra*, 19 Cal.4th at 975 ("substantially advance" *Agins* test is "best understood as a rational relationship test.") (conc. opn. of Kennard, J.) The majority opinion in *San Remo* is fully consistent with this view.[5]

Finally, the Court may uphold the Ordinance even if it were to treat it as a mitigation measure and apply CBIA's "relationship to impacts" test because the Ordinance stated as a finding that "[n]ew development without affordable units reduces the amount of land development opportunities available for the construction of affordable housing." (AA 657-658 (SJMC 5.08.010(F)(1).) The Ordinance ensures that some portion of the City's scarce developable land will not be lost to the production of affordable housing by the building of solely market-rate units.

3. CBIA's Reliance on *Patterson* is Misplaced.

CBIA also argues that *Patterson, supra*, 171 Cal.App.4th 886 properly applied CBIA's proposed "relationship to

[5] CBIA would apply its "reasonable relationship to impacts" test to any development condition without regard to the particular legal challenge brought. But the legal underpinning of a challenge to a regulation is crucial to establishing the standard of review a court should apply to the challenge. (*See, e.g., Lingle, supra*, 544 U.S. 548-549 (conc. opn of Kennedy, J (failure of a regulation to achieve stated objective, though no longer relevant to a takings claim, may nonetheless bear on a due process challenge.)

impacts" test to affordable housing fees. (Opening Brief, pp 19-23.) *Patterson*, however, is inapposite.

In *Patterson*, the city required a developer as a condition of development to satisfy the city's "affordable housing objectives." (*Patterson, supra*, 171 Cal.App.4th at 890.) At the time the developer's subdivision maps were approved, the City of Patterson allowed developers to pay an in-lieu fee of $734 per house instead of building affordable housing. (*Id.* at 888.) The fee was based on the cost of providing affordable units. (*Id.* at 891.) The City of Patterson later adopted a new methodology to calculate the in-lieu fee, by looking to the cost of subsidizing the entire lower-income county regional needs assessment allocated to it and dividing this amount, which totaled $73.5 million, by the number of unentitled housing units left in the City of Patterson. The developer sued.

On appeal from a judgment for the City of Patterson, the court reversed, stating that the increase in the affordable housing in-lieu fee was not "reasonably justified" because the record contained nothing "that demonstrate[d] or impl[ied] that the increased fee was reasonably related to the need for affordable housing associated with the project." (*Patterson, supra*, 171 Cal.App.4th at 899.) In so holding, the court relied on *San Remo*, indicating that it viewed the fees at issue as substantively the same as the replacement in-lieu fee challenged in *San Remo*. (*Id.* at 898.)

However, in *Patterson* the City of Patterson implicitly agreed that the *San Remo* "relationship to impacts" test applied, for as the court noted, the City of Patterson argued for no different test. (*Id.* at 898.) The court in *Patterson* did not address the contention the City makes here, that an inclusionary requirement is not subject to a "relationship to impacts" test

and that it is valid under the police power. Therefore, *Patterson* is not authority on these points. (*General Motors Acceptance Corp. v. Kyle* (1960) 54 Cal. 2d 101, 114.)(prior case not authority on contention not presented)

Also, unlike the fees in *Patterson*, San Jose's optional in-lieu fee alternative is related to its purposes in adopting the Ordinance because in-lieu fees must be expended exclusively for affordable housing purposes. (AA 705-706 (SJMC §5.08.700(B).) The fees are also related to the cost of affordable housing foregone by a developer who elects to pay in-lieu fees rather than build affordable units. (AA 689-691(SJMC §5.08.520B(1) & (C)).) An in-lieu fee will be held valid where, as here, it is related to a valid underlying obligation for which it is meant to substitute. (*Ehrlich*, *supra*, 12 Cal.4th at 886.)

Finally, unlike the developer in *Patterson*, CBIA has challenged an inclusionary requirement, not a fee amount. Also, the court in *Patterson* did not decide whether the affordable housing in-lieu fee was facially invalid. (*Patterson*, *supra*, 171 Cal.App.4th at 898, n 14.) Rather, it held invalid the particular methodology the City of Patterson had used in calculating an in-lieu.

D. This Court's *Sterling Park* Decision Does Not Affect the Standard of Review that Applies to CBIA's Facial Challenge.

CBIA argues that the Ordinance is an exaction under *Sterling Park*, *supra*, 57 Cal.4th 1193, and that consequently the Ordinance is subject to the CBIA's "relationship to impacts" standard rather than the police power standard that would apply to a land use regulation.

In *Sterling Park* this Court considered whether, as a matter of statutory interpretation, the Mitigation Fee Act's protest and limitations

provisions contained in section 66020 applied to the City of Palo Alto's enforcement of its below-market-rate housing program. Palo Alto conditioned its approval of certain residential development applications upon the developer's compliance with its below market rate (BMR) housing program. In implementing its BMR program Palo Alto took a purchase option in the property of developers subject to the BMR requirement. Two such developers sued, challenging the BMR conditions applied to them. The trial court granted summary judgment for Palo Alto, finding the complaint untimely under the 90–day limitations period set forth in section 66499.37 of the Subdivision Map Act. The trial court rejected the contention that the action was governed by section 66020 of the Mitigation Fee Act, which sets forth a different limitations period. The court of appeal affirmed.

This Court reversed, stating that section 66020 applies to conditions "on development a local agency imposes that divest the developer of money or a possessory interest in property, but not restrictions on the manner in which a developer may use its property." (*Sterling Park, supra*, 57 Cal.4th at 1207.) This Court went on to hold that compelling a developer to give the city a purchase option is an exaction under section 66020. (*Ibid.*) The Court stated, nevertheless, that it was not deciding whether having the developer sell some units below market value, by itself, would constitute an exaction under section 66020. (*Ibid.*)

CBIA contends that if a development condition is an "exaction" for purposes of the Mitigation Fee Act "then it is one for general purposes, and it is therefore not a land use regulation." (Opening Brief, p. 27.) CBIA claims that the Ordinance meets the Court's description of an "exaction" under *Sterling Park* because "it divests home builders of money and

interests in property." (*Ibid.*) As such, CBIA argues, it is subject to the *San Remo* "relationship to impacts" test rather than the police power standard that would apply to a land use measure. (Opening Brief, p. 31.) CBIA's reliance on *Sterling Park* is misplaced.

First, in *Sterling Park* this Court held that the requirement that a developer grant an option in property subject to the BMR condition was an "exaction" under section 66020. It expressly did not decide whether a BMR requirement by itself would likewise be an exaction under that statute. There is no reason to reach that reserved issue in this case. CBIA has stated that it does not bring its claim under the Mitigation Fee Act (AA 3121 (Plaintiff's Closing Trial Brief, p. 4:11-16). Nor has it argued that the procedural protest and limitation provisions of section 66020 provide a substantive legal ground for its facial challenge.

In any event, a designation that the Ordinance imposes an "exaction" under section 66020 would simply mean that the Ordinance, when applied to particular developers, would be subject to section 66020's protest and limitations provisions. *Sterling Park* does not hold that labeling a condition an "exaction" under section 66020 would affect the standard of review applicable to the condition. Indeed, this Court stated in *Sterling Park* that it expressed no opinion regarding the underling merits of the case. (*Sterling Park, supra*, 57 Cal.4th at 1209.)

The procedural protest and limitations provisions of section 66020 are distinct from the substantive provisions of the Mitigation Fee Act. Section 66001 requires local agencies to make a nexus determination between fees imposed as a condition of development and a development's impact. Notably, section 66001 refers only to a "fee," which is defined in turn in section 66000(b) as "a monetary exaction, whether established for a

broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project . . . ." In *Ehrlich* this Court described language in section 66021 that is essentially identical to the language of section 66020 as "consistent with the view that the Legislature intended to require all protests to a development fee that challenge the sufficiency of its relationship to the effects attributable to a development project—*regardless of the legal underpinnings of the protest*—to be channeled through the administrative procedures mandated by the [Mitigation Fee] Act." (*Ehrlich, supra*, 12 Cal.4th at 866 (emphasis added).) This language suggests that the Legislature intended section 66020's protest and limitation provisions to apply to substantive claims other than challenges to fees brought pursuant to section 66001. Also, section 66001 by its terms applies only to fees, whereas section 66020 refers to "fees, dedications, reservations, or other exactions" imposed on a development project.

Even if *Sterling Park* somehow afforded a substantive basis for a facial challenge to a development condition, which it does not, the Ordinance is distinguishable from Palo Alto's BMR program. The Court in *Sterling Park* held that compelling a developer to convey a purchase option, a compensable interest in property, was an exaction. Unlike the Palo Alto BMR program, however, the San Jose Ordinance does not require developers to convey a compensable interest in property to the City. It is true that the Ordinance contains a mechanism to insure that a purchaser of an affordable unit cannot later sell the unit at market value, which would defeat the purpose of the Ordinance. To this end, documents may be

recorded against a development subject to the Ordinance and inclusionary units, potentially including inclusionary housing agreements, regulatory agreements, promissory notes, deeds of trust, resale restrictions, rights of first refusal, purchase options, "and/or other documents." (SJMC 5.08.600(A).) It is not the case, however, as CBIA asserts, that the application of the Ordinance will *necessarily* result in the City acquiring a recorded lien or other compensable property interest. (Opening Brief, p. 29.) (*Cf. Pennell, supra*, 485 U.S. 1, 10 (mere fact that a hearing officer must consider hardship to the tenant in fixing a landlord's rent without any showing in a particular case as to the consequences of that requirement does not present a sufficiently concrete factual setting to adjudicate a facial takings claim.)

Moreover, the shared appreciation provisions will operate not against a developer but against subsequent purchasers. Also, although CBIA argues that the Ordinance divests a property owner of the difference between a property's market value and its affordable price, the same may be said of any zoning regulation, such as reduced density requirements. Most land use regulations have "the inevitable effect of reducing the value of regulated properties." (*Fisher, supra*, 37 Cal.3d at 686.) Such reduction in property value does not, by itself, render a regulation unconstitutional. (*Griffin Dev. Co., supra*, 39 Cal. 3d at 267.) And, as noted, the Ordinance offers developers otherwise unavailable countervailing benefits that may offset any reduction of profit from the sale of units at below-market prices.[6]

[6] The Ordinance does not require that a developer avail itself of the in-lieu fee or other alternatives to the basic inclusionary requirement. Consequently, it cannot be said from the face of the Ordinance that any of

Footnote continued on next page...

Finally, CBIA does not explain why, if a development condition is an "exaction" under section 66020, the condition is thereby subject to CBIA's proposed "relationship to impacts" standard under *San Remo*. (Opening Brief, p. 31.) CBIA's conclusion does not follow from its premise. As noted, *San Remo* examined a mitigation fee that had been expressly adopted for the purpose of mitigating deleterious impacts of the conversion of residential hotel units. It did not consider the validity of "other exactions" under section 66020.

E. *Koontz* Does Not Alter the Standard of Review of a Facial Challenge to an Ordinance of General Applicability.

CBIA argues that the U.S. Supreme Court's decision in *Koontz, supra*, __ U.S. ___, 133 S.Ct. 2586 casts doubt on the validity of this Court's ruling in *Ehrlich* that Culver City's "art in public places" fee was an ordinary aesthetic zoning requirement under the police power and not subject to heightened scrutiny. (CBIA Opening Brief, pp. 35-38.) CBIA also claims that, after *Koontz*, there are only two possible standards of review for development in-lieu fees, and that in-lieu fees in California are always subject to the standards of either *Nollan/Dolan/Ehrlich* or *San Remo*. (*Ibid.*) CBIA cannot square these contentions with this Court's cases holding that legislatively imposed development conditions, including fees, are not subject to *Nollan/Dolan* scrutiny. Moreover, CBIA's reading of the *San Remo* "reasonable relationship" test does not apply, for the reasons stated.

Throughout this case CBIA has insisted that it does not claim that *Nollan/Dolan* scrutiny applies. (See, e.g., AA 3138 (Plaintiff's Closing

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these alternatives will apply in any particular case. Accordingly, they are not amenable to a facial challenge.

Trial Brief—Reply to City's Brief at 21:10-13)("As previously explained, the plaintiff does not contend that the enactment of the Ordinance is subject to 'heightened scrutiny' (as used in *Nollan/Dolan/Ehrlich*) regardless of what it is 'labeled.' ")(underscoring in original) The court of appeal did not address such a contention and this Court should not do so now.

Moreover, *Koontz* involved a challenge to an *ad hoc* requirement imposed by a water district on a landowner to mitigate the loss of wetlands resulting from a proposed development by either (1) reducing the size of the development and deeding an easement to the district or (2) making improvements on other district-owned land. In the relevant part, the Court held that the government's demand for property from a land-use permit applicant must satisfy the requirements of *Nollan* and *Dolan* even when its demand is for the payment or expenditure of money. (*Id.* at 2603.) The Court reasoned that because there was a direct link between the government's demand and a specific parcel of real property, the case implicated the central concern of *Nollan* and *Dolan*: the risk that the government may deploy its substantial power and discretion in land-use permitting to pursue governmental ends lacking an essential nexus and rough proportionality to the effects of the proposed use of the property. (*Id.* at 2590.)

However, *Koontz* is inapposite. Unlike the instant case, which involves an ordinance of general applicability, *Koontz* addressed a challenge to *ad hoc* development conditions. Moreover, the art-in-public-places requirement and in-lieu fee alternative at issue in *Ehrlich* were legislatively imposed measures whose application entailed no official discretion. The art-in-public-places fee was calculated simply on the basis of one percent of the total building valuation. (*Ehrlich*, *supra*, 12 Cal.4th at

862-863, 885.) Neither this Court nor the United States Supreme Court has held that *Nollan/Dolan* scrutiny applies to legislatively adopted development conditions. Indeed, this Court has repeatedly affirmed that generally applicable development fees or conditions are *not* subject to *Nollan/Dolan* scrutiny.

For example, in *Ehrlich*, *supra*, 12 Cal.4th 854 this Court held that *Nollan* and *Dolan* standards could apply to development fees imposed on an individualized basis as a condition for development (as the U.S. Supreme Court in *Koontz* would later similarly hold). (*Id.* at 868.) At the same time, this Court stated that a different standard of scrutiny would apply to development fees that are generally applicable through legislative action "because the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present." (*Id.* at 876; *see also id.* at 897 (conc. opn. of Mosk, J.); *id.* at 903 (conc. and dis. opn. of Kennard, J.)(See also *Santa Monica Beach*, *supra*, 19 Cal.4th at 966-967 ("generally applicable development fees warrant the more deferential review that the *Dolan* court recognized is generally accorded to legislative determinations.")

In *San Remo*, *supra*, 27 Cal.4th at 670, this Court explained: "The 'sine qua non' for application of *Nollan/Dolan* scrutiny is thus the 'discretionary deployment of the police power' in 'the imposition of land-use conditions in individual cases.'" (*Id.* at 670, *quoting Ehrlich*, *supra*, 12 Cal.4th at 869 (plur. opn. of Arabian, J.).) "Only 'individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*.'" (*San Remo*, *supra*, 27 Cal.4th at 670, quoting *Santa Monica Beach*, *supra*, 19 Cal.4th at 966–967; see also *Landgate, Inc.*, *supra*, 17 Cal.4th at 1022 (heightened scrutiny applies to

"development fees imposed on a property owner on an individual and discretionary basis"); accord, *Action Apartment Ass'n, supra*, 166 Cal. App. 4th 456, 469-70 (*Nollan/Dolan* scrutiny cannot apply to a facial challenge to an inclusionary ordinance).

Hence, *Koontz*, which did not address a development condition of general application, does not compel this Court to abrogate prior decisions holding that *Nollan/Dolan* scrutiny does not apply to generally applicable legislation such as the Ordinance.

F. The In-Lieu Fee and Other Alternative Means of Compliance, if Held Invalid, May Be Severed from the Underlying Inclusionary Requirement.

As shown, the Ordinance is valid under the City's police power and survives CBIA's facial takings challenge. Nevertheless, should the Court deem provisions of the Ordinance allowing developers alternatively to comply with the underlying inclusionary requirement by the payment of an in-lieu fee or otherwise, it should sever those provisions and uphold the remainder of the Ordinance. This is so notwithstanding CBIA's position that such alternative compliance options "are properly viewed as an integrated program of exactions, the constitutionality of which should be considered as a whole . . . ." (CBIA Brief, p. 5.)

Under the City's Municipal Code, the provisions of any City ordinance are presumptively severable:

> If any section, subsection, sentence, clause, or phrase of any ordinance heretofore or hereafter adopted by the city council of the city of San José is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portion of such ordinance. Each and every section, subsection, sentence, clause or phrase of any ordinance is severable from all other sections,

> subsections, sentences, clauses or phrases unless such ordinance contains a provision which states that the council would not have passed the remainder of such ordinance if it had known that any section, subsection, sentence, clause or phrase of the ordinance would subsequently be declared invalid or unconstitutional.

(SJMC 1.04.160.)

Although not conclusive on the question, a severance clause normally calls for sustaining the valid part of the enactment. (*McMahan v. City & County of San Francisco* (2005) 127 Cal. App. 4th 1368, 1373-7, citing *Santa Barbara Sch. Dist. v. Superior Court* (1975) 13 Cal.3d 315, 331.) Invalid provisions of an ordinance may be severed and the remainder upheld if the text to be severed is volitionally, grammatically, and functionally severable. (*McMahan, supra,* 127 Cal.App.4th at 1374.)

A provision is grammatically severable if it is a distinct and separate provision which can be removed as a whole without affecting the wording of any other provision. (*Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal. 3d 805, 822.) A law is functionally severable if it is capable of independent application and enforcement. (*McMahan, supra*, 127 Cal.App.4th 1378-1379.) The provisions not severed must stand on their own, unaided by invalid provisions nor rendered vague by their absence nor inextricably connected to them by policy considerations. (*Ibid.*) Finally, text is volitionally severable "it can be said with confidence that the [enacting body]'s attention was sufficiently focused upon the parts to be [validated] so that it would have separately considered and adopted them in the absence of the invalid portions." (*Gerken v. Fair Political Practices Comm'n* (1993) 6 Cal.4th 707.)

The in-lieu fee and other compliance alternatives meet these tests. Moreover, the Ordinance was adopted to accomplish the production of affordable housing throughout the City; that purpose is served directly by the building of inclusionary units. The in-lieu fee and other options are for the convenience of developers. However, those options are not integral to the statutory scheme.

VI. CONCLUSION.

The City properly adopted the inclusionary housing ordinance under its police power. In a facial challenge, CBIA fails to show that the Ordinance is in conflict with any statutory or constitutional provision or general law. The City respectfully requests the Court to hold that the Ordinance is reviewable under the police power standard and that it survives CBIA's facial challenge.

DATED: JANUARY 31, 2014

RICHARD DOYLE, CITY ATTORNEY

AND

BERLINER COHEN

By _____

ANDREW L. FABER
THOMAS P. MURPHY
ATTORNEYS FOR THE CITY OF SAN JOSE AND CITY COUNCIL AND MAYOR OF THE CITY OF SAN JOSE

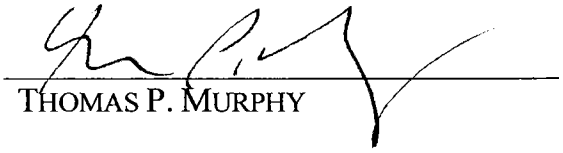
VII. CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court Rule 8.204 (c)(1), counsel for Plaintiffs and Appellants City of San Jose and City Council and Mayor of the City of San Jose certifies that exclusive of this certification, this City of San Jose's Answer Brief on the Merits contains 13,899 words, as determined by the word count of the computer program used to prepare the brief.

DATED: JANUARY 31, 2014

RESPECTFULLY SUBMITTED

BERLINER COHEN

By 

THOMAS P. MURPHY

CERTIFICATE OF SERVICE

Supreme Court, Case No. S212072 Court of Appeal, Sixth District, Case No. H038563

Santa Clara County Superior Court Case No.: 110-CV-167289

I, Elizabeth Sierra Garcia, declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of eighteen years, and not a party to the within action. I am an employee of Berliner Cohen, and my business address is Ten Almaden Boulevard, Suite 1100, San Jose, California 95113-2233. On January 31, 2014, I served the following document(s):

CITY OF SAN JOSE'S ANSWER BRIEF ON THE MERITS

in the following manner:

[X] by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California addressed as set forth below.

Damien M. Schiff
Anthony L. Francois
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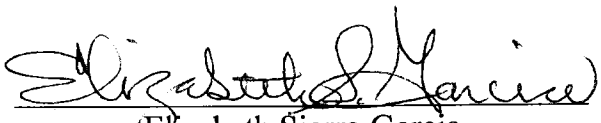

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