S212072

LIU, J.

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. ____________________

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE,

Respondent.

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

Intervenors.

SUPREME COURT
FILED

JUL 16 2013

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Deputy

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

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

PETITION FOR REVIEW

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

QUESTION PRESENTED FOR REVIEW 1

REASONS FOR GRANTING REVIEW 1

PROCEDURAL HISTORY 4

FACTUAL SUMMARY 5

ARGUMENT 7

I. *CITY OF PATTERSON* AND THE OPINION CONTRADICT EACH OTHER ON WHETHER *SAN REMO HOTEL* APPLIES TO INCLUSIONARY HOUSING ORDINANCES 7

A. *City of Patterson* Holds That *San Remo Hotel* Applies to Inclusionary Housing Ordinances 8

B. The Opinion Holds That *San Remo Hotel* Does Not Apply to Inclusionary Housing Ordinances 9

II. INCLUSIONARY HOUSING ORDINANCES ARE A QUESTION OF SIGNIFICANT AND GROWING IMPORTANCE IN CALIFORNIA, AND THE COURT SHOULD GRANT THE PETITION TO SETTLE THIS IMPORTANT QUESTION OF LAW 14

III. THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT* UNDERMINES THE OPINION, AND THIS COURT SHOULD GRANT THE PETITION TO ADDRESS THE IMPORTANT LEGAL QUESTION OF WHETHER DEVELOPMENT FEES SHOULD EVER BE REVIEWED AS MERE EXERCISES OF THE POLICE POWER 16

CONCLUSION 19

Page

CERTIFICATE OF COMPLIANCE 20

DECLARATION OF SERVICE BY MAIL

TABLE OF AUTHORITIES

Page

Cases

Building Industry Association of Central California v. City of Patterson, 171 Cal. App. 4th 886 (2009) .... passim

California Building Industry Association v. City of San Jose, 216 Cal. App. 4th 1373 (2013) 1, 4

Dillon v. Municipal Court, 4 Cal. 3d 860 (1971) 5

Dolan v. City of Tigard, 512 U.S. 374 (1994) 17

Ehrlich v. City of Culver City, 12 Cal. 4th 854 (1996) 3, 11-12, 17-18

Koontz v. St. Johns River Water Management District, No. 11-1447, 2013 WL 3184628 (U.S. June 25, 2013) 3, 12, 16-19

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 17

San Remo Hotel L.P. v. City & County of San Francisco, 27 Cal. 4th 643 (2002) .... passim

Sterling Park v. City of Palo Alto, No. S204771 (filed Aug. 27, 2012) 18

Tobe v. City of Santa Ana, 9 Cal. 4th 1069 (1995) 5

California Statutes

Gov't Code § 66020(a) 18

§ 66499.37 18

City Ordinances

San Jose Municipal Code § 5.08.205 5

§ 5.08.310 5

Page

§ 5.08.400(A)(1) 6, 9

§ 5.08.400(A)(2) 6

§ 5.08.470(B) 12

§ 5.08.510 . . . . 6, 9

§ 5.08.520(A) 6, 9

§ 5.08.520(B)(1) 6

§ 5.08.530(A) 6, 9

§ 5.08.550 . . . . 6, 9

Rules of Court

Cal. R. Ct. 8.264(b)(1) 5

8.500(a)(1) 1, 5

8.500(b)(1) 2-3, 7, 14, 16, 19

8.500(e)(1) 5

Miscellaneous

Calavita, Nico, et al., *Inclusionary Zoning: The California Experience*, NHC Affordable Housing Policy Review 3(1), Feb. 2004, *available at* http://www.nhc.org/media/documents /IZ_CA_experiencet.pdf (last visited July 15, 2013) 15

Cray, Adam F., *The Use of Residential Nexus Analysis in Support of California's Inclusionary Housing Ordinances: A Critical Evaluation*, Goldman School of Public Policy, University of California, Berkeley, Nov. 2011, *available at* http://www.cbia.org/go/linkservid/06D3172D-35C3-4C71-9A9098D439C63874/showMeta/0/ (last visited July 10, 2013) 1-2

Page

Ellickson, Robert C., *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. Rev. 983 (2010) 14

Inclusionary Zoning: Legal Issues, California Affordable Housing Law Project, Dec. 2002, *available at* http://pilpca.org/wp-content/uploads/2010/10/IZLEGAL __12.02.pdf (last visited July 10, 2013) 15

Inclusionary Zoning: Pro and Con, 1 Land Use Forum 1 (Cal. CEB, Fall 1991) 15

Mandelker, Daniel R., *The Effects of Inclusionary Zoning of Local Housing Markets: Lessons from the San Francisco, Washington D.C., and Suburban Boston Areas*, A.L.I.-A.B.A. Land Use Inst., Aug. 2008 15

Pursuant to California Rule of Court 8.500(a)(1), Plaintiff and Petitioner California Building Industry Association (CBIA) hereby submits the following Petition for Review (Petition) of the published decision of the Court of Appeal, Sixth Appellate District, filed on June 6, 2013, entitled *California Building Industry Association v. City of San Jose*, 216 Cal. App. 4th 1373 (June 6, 2013), a copy of which is attached hereto as Exhibit A (Opinion).

QUESTION PRESENTED FOR REVIEW

Must inclusionary housing ordinances which exact property interests or in-lieu development fees as a condition of development permit approval be reasonably related to the deleterious impact of the development on which they are imposed, as set forth in *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 670 (2002)?

REASONS FOR GRANTING REVIEW

Inclusionary housing ordinances are legislative exactions, usually imposed by cities, which require builders of new homes, as a condition of permit approval, to set aside a number of the new homes themselves, or pay the equivalent value through in-lieu fees, for low income residents to purchase at below market prices. They are an increasingly common tool being implemented or considered by local governments in California to meet local needs for affordable housing. *See generally* Adam F. Cray, *The Use of Residential Nexus Analysis in Support of California's Inclusionary Housing*

Ordinances: A Critical Evaluation, Goldman School of Public Policy, University of California, Berkeley, Nov. 2011, at 4.[1] Local governments, housing advocates, purchasers of affordable housing, developers, and purchasers of market-rate housing all need to have a clear legal standard to determine whether such ordinances are constitutionally valid.

This Court should grant the Petition under Rule of Court 8.500(b)(1) to secure uniformity of decision on whether inclusionary housing ordinances must, as set forth in *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 670 (2002) (*San Remo Hotel*), be reasonably related to any deleterious impacts of new residential developments on which they are imposed. This uniform rule of law is necessary because conflicting published opinions of two districts of the Court of Appeal have now come to opposite answers to that question.

Building Industry Association of Central California v. City of Patterson, 171 Cal. App. 4th 886, 898 (2009), holds that *San Remo Hotel* applies to inclusionary housing ordinances. The Opinion of the court below holds that *San Remo Hotel* does not apply to such ordinances. These two published decisions deal with materially identical inclusionary housing ordinances, and so cannot be distinguished on any principled ground. Trial

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[1] *Available at* http://www.cbia.org/go/linkservid/06D3172D-35C3-4C71-9A9098D439C63874/showMeta/0/ (last visited July 10, 2013).

courts and appellate courts will have no basis on which to decide whether the facts of a challenged inclusionary housing ordinance are more like those in *City of Patterson* or more like those in the Opinion, because the facts in these two cases are materially the same. As a consequence, future courts will have to choose which case to follow, and the result will be a patchwork of legal standards across the state.

This Court should also grant review to settle the important legal question of the extent to which the United States Supreme Court's recent decision in *Koontz v. St. Johns River Water Management District*, No. 11-1447, 2013 WL 3184628 (U.S. June 25, 2013) (*Koontz*), governs the judicial review of in-lieu development fees in California. *Koontz* clarifies that all in-lieu fees are land use exactions, which calls into serious question the Opinion's holding that in-lieu fees in inclusionary housing ordinances can be upheld as mere exercises of a city's police power. This Court should grant review under Rule 8.500(b)(1) to settle the important legal question of whether, under *Koontz*, in-lieu development fees in California must always be subject to the more rigorous standards of judicial review required by this Court's decisions in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996), and *San Remo Hotel.*

PROCEDURAL HISTORY

CBIA commenced this action by filing its timely Complaint and Petition for Writ of Mandate on March 24, 2010 (Appellant's Appendix (AA) 0001-0074), as a facial challenge to the City of San Jose's Inclusionary Housing Ordinance, No 28689 (Ordinance), adopted January 26, 2010, and effective February 26, 2010. (AA 0017.) Following a bench trial, the trial court issued its Order Granting Plaintiff's Request for Temporary, Preliminary, and Permanent Injunctive Relief (Order) on May 25, 2012. (AA 3348-3354.) In the Order, the trial court applied *San Remo Hotel*, found that the City of San Jose (San Jose) had not identified any evidence that the Ordinance was reasonably related to any impact of new market rate housing development in the city, and permanently enjoined San Jose from enforcing the Ordinance absent such an evidentiary showing in the future. (AA 3353.) The Court entered Judgment After Trial on July 11, 2012, AA 3355-68, and Defendants appealed on July 18, 2012. (AA 3391-3395.) The Court of Appeal, Sixth Division, filed its published opinion, *CBIA v. City of San Jose*, 216 Cal. App. 4th 1373 (2013) (Opinion), on June 6, 2013. The Opinion reverses the Order and holds that *San Remo Hotel* is not applicable to the Ordinance, which is instead reviewable only as an exercise of the City's police power. Opinion, slip op. 16. The Opinion remands the case to the trial court for further proceedings subject to the revised standard of review. Opinion, slip op. at 19.

Both Plaintiff and Defendants filed timely petitions for rehearing in the Court of Appeal on June 21, 2013, which petitions were denied on July 1, 2013. The Opinion is final in the Court of Appeal as of July 6, 2013. Cal. R. Ct. 8.264(b)(1). CBIA now files this timely Petition in this Court under Rules of Court 8.500(a)(1) & (e)(1).

FACTUAL SUMMARY

This case is a facial challenge to the constitutional validity of the Ordinance. As such, the relevant facts are the provisions of the Ordinance itself. *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995) (citing *Dillon v. Municipal Court*, 4 Cal. 3d 860, 865 (1971)).

The Ordinance applies to all new, non-exempt residential housing developments of more than 20 units in San Jose. San Jose Municipal Code (SJMC) § 5.08.310;[2] Opinion, slip op. at 3. The Ordinance defines "inclusionary units" as residential units affordable to buyers with from extremely low up to moderate incomes, SJMC § 5.08.205, and requires that new for-sale developments set aside 15% of their units as inclusionary units,

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[2] The Ordinance is codified in the San Jose Municipal Code (SJMC), Title 5, Chapter 5.08. Future section references are to the SJMC (*available at* http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:sanjose_ca).

id. § 5.08.400(A)(1).[3] Opinion, slip op. at 3. In the alternative, developers may substitute one of the following exactions:

(1) Build inclusionary units offsite equal to 20% of the number of market rate units, SJMC § 5.08.510.

(2) Pay an in-lieu fee.[4] *Id.* § 5.08.520(A). City staff projected that the in-lieu fee would be approximately $122,000 per inclusionary unit. AA 0944. (Attachment D to October 26, 2009 memorandum from Leslye Krutko, San Jose City Director of Housing, to Mayor and City Council, AA 0921-0944.)

(3) Dedicate land that is suitable for construction of inclusionary units and whose value is at least that of the applicable in-lieu fee. SJMC § 5.08.530(A).

(4) Acquire and/or rehabilitate existing units for use as inclusionary units. *Id.* § 5.08.550.

The trial court found that San Jose could point to no evidence in the record that any of these exactions are reasonably related to any deleterious public impacts of new residential developments. Order at 6, AA 3353.

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[3] A suspended provision, SJMC § 5.08.400(A)(2), requires that new rental developments set aside 20% of their units as inclusionary units.

[4] The amount of the in-lieu fee is the difference between the median sales price of an attached market rate unit in the prior 36 months and the affordable housing cost for a household of 2½ persons earning no more than 110% of the area median income. SJMC § 5.08.520(B)(1).

ARGUMENT

I

CITY OF PATTERSON AND THE OPINION CONTRADICT EACH OTHER ON WHETHER *SAN REMO HOTEL* APPLIES TO INCLUSIONARY HOUSING ORDINANCES

In the nine California counties that comprise the Fifth District Court of Appeal (Fresno, Kern, Kings, Madera, Mariposa, Merced, Stanislaus, Tulare, and Tuolumne Counties), inclusionary housing ordinances are subject to legal review under the *San Remo Hotel* standard. *Bldg. Indus. Ass'n of Cent. Cal. v. City of Patterson*, 171 Cal. App. 4th 886, 898 (2009). In the four neighboring counties comprising the Sixth District Court of Appeal (Santa Clara, San Benito, Santa Cruz, and Monterey Counties), inclusionary housing ordinances are *not* subject to legal review under the *San Remo Hotel* standard. Opinion, slip op. at 16 ("We thus conclude that the standard articulated in *San Remo* is inapplicable here, and that the Ordinance should be reviewed as an exercise of the City's police power."). The inclusionary housing ordinances reviewed in each of these cases are materially indistinguishable, yet the decisions come to opposite holdings on the application of *San Remo Hotel*. This Court should grant the Petition under Rule of Court 8.500(b)(1) to resolve this conflict.

A. *City of Patterson* Holds That *San Remo Hotel* Applies to Inclusionary Housing Ordinances

In *City of Patterson*, the ordinance in question required developers of new residential housing to meet one of four requirements, as a condition of development permit approval, in furtherance of the city's affordable housing policy: "(1) build affordable housing units; (2) develop senior housing within the project; (3) obtain a sufficient number of affordable residential unit credits from other residential developments within City; or (4) pay an in-lieu fee at the time the building permit is issued for a market rate housing unit." *City of Patterson*, 171 Cal. App. 4th at 890.

The essential requirements of Patterson's inclusionary housing ordinance are (1) providing affordable units as part of the development, (2) paying an in-lieu fee, or (3) offsite compliance (in this case, through credit transfers from other residential developments). These are the same essential elements of the Ordinance, as demonstrated below.

In *City of Patterson*, a home builder challenged the in-lieu fee requirement when the city increased the fee from $734 to $20,946 per new single family home. *Id.* at 891, 893. The Court of Appeal concluded in *City of Patterson* that the ordinance in question was "not substantively different" from the housing replacement fee considered in *San Remo Hotel*, and held that under *San Remo Hotel*, the ordinance in question could only be upheld if it had a reasonable relationship to the "deleterious public impact of the

development." *City of Patterson*, 171 Cal. App. 4th at 897-98 (discussing *San Remo Hotel*, 27 Cal. 4th at 671).

The Court of Appeal then concluded that Patterson's in-lieu fee was not reasonably related to the impact of the plaintiff's development, or any new development, because it was calculated on the number of affordable housing units allocated to Patterson by Stanislaus County, rather than any need for new housing caused by plaintiff's development or any of Patterson's pending residential developments. *City of Patterson*, 171 Cal. App. 4th at 899.

B. The Opinion Holds That *San Remo Hotel* Does Not Apply to Inclusionary Housing Ordinances

The Ordinance reviewed in the Opinion requires the developers of new residential projects of at least 20 units, as a condition of permit approval, to surrender one of the following exactions: (1) provide 15% of the units as inclusionary units (defined in terms of affordability to those with moderate to extremely low incomes);[5] (2) pay an in-lieu fee of $122,000,[6] or dedicate land of an equivalent value,[7] per required inclusionary unit; or (3) comply off-site through construction, acquisition, or rehabilitation of inclusionary units.[8]

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[5] SJMC § 5.08.400(A)(1).

[6] *Id.* § 5.08.520(A); AA 0944.

[7] SJMC § 5.08.530(A).

[8] *Id.* §§ 5.08.510, 5.08.550

The court below considered whether *San Remo Hotel* applies to the Ordinance, and held that it does not. Opinion, slip op. at 16. The Opinion first notes that the plaintiffs in *San Remo Hotel* were challenging a development fee whose purpose was to mitigate the loss of residential housing caused by the conversion of residential hotels to tourist use. Opinion, slip op. at 11 (citing *San Remo Hotel*, 27 Cal. 4th at 671, 673). The Opinion proceeds to observe that it was reasonable for this Court to require a reasonable relationship between the housing replacement fee and the hotel conversions in question because the fee was a mitigation fee for the hotel conversions. Opinion, slip op. at 11. The Opinion next concedes that the Ordinance is not intended to mitigate any loss of affordable housing caused by new residential development, but then remarkably concludes that "whether the Ordinance was reasonably related to the deleterious impact of market-rate residential development in San Jose *is the wrong question to ask in this case*." Opinion, slip op. at 11 (emphasis added).

By analyzing *San Remo Hotel* in this way, the court below goes beyond contradicting *City of Patterson*, to vitiating this Court's holding in *San Remo Hotel*. The Opinion reads *San Remo Hotel* as only requiring a reasonable relationship between a development fee and the deleterious public impacts of the development in those (soon to be rare) cases where a local government is foolish enough to claim that the fee is to mitigate harm caused by the

development. Under the Opinion, local governments are free of the *San Remo Hotel* standard if they are savvy enough to deny that a legislative development fee has any relationship to any negative impacts of the development. This contradicts *San Remo Hotel,* which requires that *all* legislative monetary exactions bear a reasonable relationship, in amount and purpose, to the deleterious impacts of the development. 27 Cal. 4th at 670.

The Opinion also makes a fundamental error when it concludes that the Ordinance should be reviewed as an exercise of the police power. Opinion, slip op. at 16. The only authority under which the Opinion could have applied this standard is *Ehrlich v. City of Culver City,* 12 Cal. 4th at 886, although the Opinion does not cite this case. *Ehrlich* held that a legislative development fee to fund public art was similar to conventional zoning ordinances that govern color schemes, landscaping, and architectural features. As such, the in-lieu fee was equivalent to an ordinary aesthetic or landscaping requirement enacted under the police power and hence not subject to any heightened scrutiny. *Id.* This Court has never extended this holding of *Ehrlich* beyond the context of aesthetic zoning regulations. But the Opinion provides no analysis at all of whether the Ordinance has anything to do with aesthetic elements of residential developments, and makes no conclusions on that subject.[9] Absent

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[9] The Ordinance is not an aesthetic zoning ordinance. It requires that the exterior aesthetics of inclusionary units be the same as market rate units within (continued...)

such a finding to support a conclusion that *Ehrlich* applies, the remaining option is that the Ordinance is a legislative monetary exaction, subject to *San Remo Hotel*. *Accord Koontz*, 2013 WL 3184628, at *12 (in-lieu development fees are "functionally equivalent to other types of land use exactions.").

Despite these problems, the Opinion holds that *San Remo Hotel* does not apply to the Ordinance. As with Patterson's inclusionary housing ordinance, the essential requirements of San Jose's Ordinance are: (1) providing affordable units as part of the development, (2) paying an in-lieu fee, or (3) offsite compliance (in this case, through building, buying, or rehabilitating offsite inclusionary units). Despite considering materially identical ordinances, the Opinion came to the opposite holding as *City of Patterson* on whether *San Remo Hotel* applies to inclusionary housing ordinances. Opinion, slip op. at 16.

As a result, *City of Patterson* and the Opinion create a conflict between two districts of the Court of Appeal on whether inclusionary housing ordinances must be reasonably related to the impacts of the developments on which they are imposed (as *City of Patterson* holds), or whether they may

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[9] (...continued)
a development, *i.e.*, to the extent the Ordinance deals at all with design, it expressly imposes no different exterior aesthetic requirements. SJMC § 5.08.470(B). In any event, the in-lieu fee in the Ordinance has nothing to do with what the inclusionary units look like, only what they cost.

simply be reasonably related to any legitimate public purpose (as the Opinion holds).

The Opinion attempts to distinguish *City of Patterson*, Opinion, slip op. at 12, but fails to do so on any principled basis that would legitimately divide the two cases. The facts in these two cases are the same in all material respects, and the pertinent legal question is the same in both cases. Future courts will have no basis on which to determine whether the facts of a particular inclusionary housing ordinance are more analogous to the facts in *City of Patterson*, or to the materially identical facts in the Opinion. Future courts will thus be left with the independent choice of which decision's holding to follow, and will create a patchwork of different legal rules across the state.

In arguing for a distinction, the court below notes that *City of Patterson* did not involve a facial challenge, and hence the plaintiff in that case was not required to meet the burden of showing the ordinance to be unconstitutional in the "generality or great majority of cases," the test *San Remo Hotel* applies for facial challenges. Opinion, slip op. at 12; *San Remo Hotel*, 27 Cal. 4th at 673. But that confuses the legal standard this Court established for legislative development fees in *San Remo Hotel* with the burden a plaintiff must meet when applying that test in a facial challenge. *San Remo Hotel* ruled on both a facial and an as-applied challenge to the San Francisco Housing

Conversion Ordinance. *See San Remo Hotel*, 27 Cal. 4th at 672 ("Plaintiffs attack the housing replacement provisions of the HCO both on their face and as applied to the San Remo Hotel."). *San Remo Hotel* applied the same rule in resolving both the facial and as-applied challenges, by examining whether the in-lieu fees in question were reasonably related to loss of residential hotel units in general, and whether the San Remo Hotel's calculated fee was reasonably related to the specific loss of its residential units. *Id.* at 672-74, 677-79. There is no basis for the Opinion to distinguish *City of Patterson*'s application of the *San Remo Hotel* rule on the basis that *City of Patterson* was an as-applied challenge.

The Opinion and *City of Patterson* directly conflict, and this Court should grant the Petition under Rule of Court 8.500(b)(1) to resolve this conflict.

II

INCLUSIONARY HOUSING ORDINANCES ARE A QUESTION OF SIGNIFICANT AND GROWING IMPORTANCE IN CALIFORNIA, AND THE COURT SHOULD GRANT THE PETITION TO SETTLE THIS IMPORTANT QUESTION OF LAW

"The exaction of inclusionary housing from developers . . . is most prevalent in states where housing is exceptionally expensive, such as California . . . ." Robert C. Ellickson, *The False Promise of the Mixed-Income Housing Project*, 57 UCLA L. Rev. 983, 1020 (2010). In the 1980s, only

about 35 California cities and counties adopted inclusionary housing programs, some of which may have included voluntary programs rather than exactions. *Inclusionary Zoning: Pro and Con*, 1 Land Use Forum 1 (Cal. CEB, Fall 1991). By 1996, however, this number grew to 75 locally mandated inclusionary housing programs across California. Nico Calavita et al., *Inclusionary Zoning: The California Experience*, NHC Affordable Housing Policy Review 3(1), Feb. 2004, at 6.[10] By 2002, the number was more than 100, and rising rapidly. *Inclusionary Zoning: Legal Issues*, California Affordable Housing Law Project, Dec. 2002, at 2.[11]

Supporters of inclusionary housing ordinances consider them to be "an important evolution in affordable housing policy" because they reduce the need for direct public payments for affordable housing. Daniel R. Mandelker, *The Effects of Inclusionary Zoning of Local Housing Markets: Lessons from the San Francisco, Washington D.C., and Suburban Boston Areas*, A.L.I.-A.B.A. Land Use Inst., Aug. 2008. However, as this Petition and *City of Patterson* attest, inclusionary housing ordinances raise significant constitutional and legal issues which require uniform resolution. As California's housing market recovers and housing affordability concerns

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[10] *Available at* http://www.nhc.org/media/documents/IZ_CA_experiencet.pdf (last visited July 15, 2013).

[11] *Available at* http://pilpca.org/wp-content/uploads/2010/10/IZLEGAL__12.02.pdf (last visited July 10, 2013).

increase, many more of California's 482 cities will likely consider inclusionary housing ordinances to advance affordable housing goals. In order to ensure orderly and effective consideration of such policies going forward, this Court should grant the Petition under Rule 8.500(b)(1) to settle the important legal question of whether *San Remo Hotel* applies to inclusionary housing ordinances.

III

THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *KOONTZ V. ST. JOHNS RIVER WATER MANAGEMENT DISTRICT* UNDERMINES THE OPINION, AND THIS COURT SHOULD GRANT THE PETITION TO ADDRESS THE IMPORTANT LEGAL QUESTION OF WHETHER DEVELOPMENT FEES SHOULD EVER BE REVIEWED AS MERE EXERCISES OF THE POLICE POWER

The Opinion holds that in-lieu fees under inclusionary housing ordinances are subject to the most lenient standard of judicial review, that applicable to the exercise of the police power, under which the Ordinance may be deemed valid if it has a substantial and reasonable relationship to a legitimate public interest. Opinion, slip op. at 16.

Subsequent to the filing of the Opinion, and while CBIA and San Jose's petitions for rehearing were pending,[12] the United States Supreme Court issued

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[12] CBIA filed a Notice of Supplemental Authority with the court below on July 1, 2013.

its decision in *Koontz v. St. Johns River Water Management District*, 2013 WL 3184628, which holds in relevant part that a government's demand for property from a land use applicant must satisfy the requirements of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), even when the demand is for money. *Koontz*, 2013 WL 3184628, at *16. *Koontz* discusses the relationship between exactions of interests in real property and in-lieu fees, finding in-lieu fees to be commonplace and "functionally equivalent to other types of land use exactions." *Id.* at *12. The connection between a demand for money and a specific parcel of real property in the context of a development permit application is the essential factor in whether *Nollan* and *Dolan* apply to monetary exactions. *Id.* at **12-13.

Koontz's statement that all development in-lieu fees are simply a type of land use exaction undermines the Opinion's holding that development fees such as those in inclusionary housing ordinances can be reviewed under the deferential police power standard. This Court has applied higher standards of review to adjudicatory development fees, in *Ehrlich*, 12 Cal. 4th at 859 (*Nollan* and *Dolan* scrutiny apply to adjudicatory development fees imposed to replace recreational zoned land rezoned for development), and an intermediate standard of review to legislative development fees in *San Remo Hotel*. By making clear that all development in-lieu fees are exactions, *Koontz* indicates

at the least that these are the only two options for California courts to apply, and that in-lieu fees in California are always subject to the standards of either *Ehrlich* or *San Remo Hotel.*[13]

The Court is currently addressing a related question in the case of *Sterling Park v. City of Palo Alto*, No. S204771 (filed Aug. 27, 2012). In that case, the issue is whether an action challenging a city's imposition of conditions on a development project under a local ordinance is subject to the 90 day statute of limitations of the Subdivision Map Act, Gov't Code § 66499.37, or the 180 day statute of limitations of the Mitigation Fee Act, which is applied when challenging the imposition of "any fees, dedications, reservations, or other exactions." Gov't Code § 66020(a). The ordinance in question in the *Sterling Park* case is similar to the inclusionary housing ordinances considered in *City of Patterson* and the Opinion, and both the trial court and the court of appeal in *Sterling Park* ruled that these ordinances are not "other exactions" within the meaning of the Mitigation Fee Act.

In *Sterling Park*, this Court will resolve the statutory question of whether inclusionary housing ordinances impose exactions for purposes of judicial review under the Mitigation Fee Act. Granting review in this case will

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[13] *Koontz* also casts doubt on the continuing validity of this Court's ruling in *Erlich* 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. *Ehrlich*, 12 Cal. 4th at 886.

allow the Court to resolve the broader constitutional question of whether inclusionary housing ordinances are exactions under *San Remo Hotel* and *Koontz*. This Court should grant the Petition under Rule of Court 8.500(b)(1) to address the important question of law inherent in how *Koontz* applies to development in-lieu fees in California.

CONCLUSION

This Court should grant the Petition under Rule of Court 8.500(b)(1) to resolve the conflict created by the Opinion and *City of Patterson* over whether *San Remo Hotel* applies to inclusionary housing ordinances, and to settle the important legal question of how the United States Supreme Court's decision in *Koontz* applies to in-lieu development fees in California.

DATED: July 15, 2013.

Respectfully submitted,

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California Building Industry Association

CERTIFICATE OF COMPLIANCE

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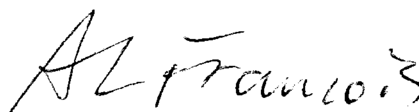

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CALIFORNIA BUILDING INDUSTRY ASSOCIATION, Plaintiff and Respondent, v. CITY OF SAN JOSE, Defendant and Appellant. AFFORDABLE HOUSING NETWORK OF SANTA CLARA COUNTY, et al., Interveners and Appellants.	H038563 (Santa Clara County Super. Ct. No. 1-10-CV167289)

Respondent California Building Industry Association (CBIA) brought this action for declaratory and injunctive relief against the City of San Jose, the City Council, and the mayor (collectively, "the City") to invalidate the City's "Inclusionary Housing" ordinance on its face. The superior court granted the requested relief, on the ground that the City had failed to demonstrate a nexus between the challenged ordinance and the "deleterious public impacts of new residential development." The City appeals. Also separately appealing are several nonprofit entities that intervened in the action. We find the appellants' arguments to be well taken. Accordingly, we must reverse the judgment and remand the matter for further consideration.

Background

Repeatedly throughout Title 7 of the Government Code the Legislature has highlighted the "severe shortage of affordable housing" in this state, "especially for persons and families of low and moderate income." (Gov. Code, § 65913, subd. (a).)[1] In the Housing Accountability Act the Legislature stated that the lack of housing "is a critical problem that threatens the economic, environmental, and social quality of life in California." (§ 65589.5, subd. (a)(1).) The Legislature further recognized that "California housing has become the most expensive in the nation." (§ 65589.5, subd. (a)(2).)

Accordingly, the Legislature has expressly declared that the availability of housing for every Californian is "of vital statewide importance." (§ 65580.)[2] To that end, local governments are charged with the responsibility of facilitating the provision of housing for "all economic segments of the community." (*Ibid.*) Each locality, however, is acknowledged as "best capable of determining what efforts are required by it to

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

[2] "The Legislature finds and declares as follows: [¶] (a) The availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian, including farmworkers, is a priority of the highest order. [¶] (b) The early attainment of this goal requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels. [¶] (c) The provision of housing affordable to low- and moderate-income households requires the cooperation of all levels of government. [¶] (d) Local 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. [¶] (e) The Legislature recognizes that in carrying out this responsibility, each local government also has the responsibility to consider economic, environmental, and fiscal factors and community goals set forth in the general plan and to cooperate with other local governments and the state in addressing regional housing needs."

contribute to the attainment of the state housing goal," by addressing regional housing needs through the implementation of "housing elements" as part of the community's general plan. (§§ 65581, 65582.) Section 65583 delineates the components of those housing elements, including an assessment of housing needs for all income levels, the identification of adequate housing sites, and a program that assists in the development of such housing "to meet the needs of extremely low, very low, low-, and moderate-income households." (§ 65583, subd. (c)(2).) The housing element is presumptively valid. (§ 65589.3.)

The City's effort to implement the state's policy took the form of Ordinance No. 28689, the Inclusionary Housing Ordinance (IHO or the Ordinance), which the city council passed on January 12, 2010. In the measure, the city council cited its "legitimate interest" in alleviating the shortage of affordable housing in San Jose for "Very Low, Lower, and Moderate Income Households." The "Inclusionary Housing Requirement" of the new law called for residential developments of 20 or more units to set aside 15 percent for purchase at a below-market rate to households earning no more than 110 percent of the area median income, though the units could be sold to households earning at most 120 percent of the area median income.[3] The inclusionary housing requirement could also be satisfied by constructing affordable housing on a different site at specified percentages. However, incentives were available if the affordable units were constructed on the same site as the market-rate units.

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[3] Nine percent of the total dwelling units were to be made available for rent by moderate-income households, and six percent to be available to "Very Low Income Households." "Moderate Income Household" for purposes of this provision was defined as a household earning no more than 80 percent of the area median income. "Very Low Income Household" was defined in the Ordinance by reference to Health & Safety Code section 50105. This provision, however, was to take effect only if *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396 became "overturned, disapproved, or depublished by a court of competent jurisdiction or modified by the state legislature to authorize control of rents of Inclusionary Units."

The Ordinance provided an alternative to setting aside the "inclusionary units": developers could pay an "in-lieu fee." The fee was not to exceed the difference between the median sale price of a market-rate unit in the prior 36 months and the cost of an "affordable housing" unit for a household earning no more than 110 percent of the area median income. All in-lieu fees collected were destined for the Affordable Housing Fee Fund, to be used exclusively to provide affordable housing to the designated households. The housing requirement could also be satisfied by dedication of land. A "waiver, adjustment or reduction" provision allowed the developer to show, "based on substantial evidence, that there is no reasonable relationship between the impact of a proposed Residential Development and the requirements of this Chapter, or that applying the requirements of this Chapter would take property in violation of the United States or California Constitution."

Respondent CBIA filed its complaint on March 24, 2010, seeking declaratory and injunctive relief and a writ of mandate to set aside the Ordinance. On May 9, 2011, two months before the July 11 trial, the court permitted a motion by several nonprofit entities and one individual to intervene in opposition to the complaint.[4] In May 2012, after extensive briefing and oral argument revolving around a set of stipulated documents, the superior court granted the relief CBIA had sought. In its July 11, 2012 judgment the court declared Ordinance No. 28689 invalid and enjoined the City from implementing it "unless and until the City of San Jose provides a legally sufficient evidentiary showing to demonstrate justification and reasonable relationships between such Inclusionary Housing Ordinance exactions and impacts caused by new residential development." The City and Interveners separately filed timely notices of appeal.

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[4] The interveners were Affordable Housing Network of Santa Clara County, California Coalition for Rural Housing, Housing California, Non-Profit Housing Association of Northern California, Southern California Association of Non-Profit Housing, San Diego Housing Federation, and Janel Martinez.

Discussion

1. Basis of the Relief Granted

In its complaint CBIA alleged that the City had adopted the inclusionary housing requirements in the Ordinance "without demonstrating any reasonable relationship between the requirements imposed by the new Ordinance and any increased public needs for additional affordable housing caused by such new residential development or any reasonable basis for the allocation of the burdens and public costs of providing additional affordable housing to such new residential development subject to the Ordinance, and without substantial evidence in the public record purporting to demonstrate the necessary reasonable relationships to justify the IHO." These "actions," CBIA alleged, violated "controlling state and federal constitutional standards governing such exactions and conditions of development approval, and the requirements applicable to such housing exactions as set forth in *San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643 [*San Remo*], and *Building Industry Association of Central California v. City of Patterson* [(2009)] 171 Cal.App.4th 886."

In its trial brief CBIA elaborated on its position, contending that appellate precedent had established that "cities seeking to establish inclusionary housing mandates such as the IHO must—at least—provide an evidentiary showing that the fees and exactions to be imposed on new development are 'reasonably related' and limited to the city's reasonable costs of addressing 'the deleterious public impacts' caused by the new development." According to CBIA, the City had failed to show a "reasonable relationship between affordable housing exactions and demonstrable impacts of new development." The City Council staff reports endorsing the proposed ordinance lacked any "attempt to identify, much less to quantify, any 'deleterious public impacts' on City needs for affordable housing <u>caused by new market rate development</u>." The fixed percentages applicable to the set-aside requirements were "arbitrary" and the in-lieu fees

rested on a "house of cards." Because these deficiencies could not be cured, CBIA argued, the Ordinance was invalid on its face.

CBIA added that it had no quarrel with the legitimacy and importance of the City's objective of making affordable housing available in the community. It *repeatedly* emphasized that "this is not a takings case." Indeed, during the hearing counsel explained that a taking would arise if a developer could not build his project because of the City's permit conditions. But "[w]e don't get there because we're not looking at the impact on the individual developer." Even without such an *individual* impact, "there has to be a showing that it's related to some impact caused by the developer."

In defense of the IHO, the City posited two arguments: (1) CBIA's facial challenge could not succeed because CBIA could not show that the Ordinance could *never* be legally applied and (2) CBIA was misstating the law and relying on the wrong standard of judicial review. In the City's view, the Ordinance should be regarded as a land use restriction similar to a zoning regulation adopted pursuant to the local government's police power. It thus must be accorded a "highly deferential standard of judicial review" and must be upheld if it "merely has a reasonable relation to the public welfare." The Interveners more precisely argued that the Ordinance was reasonably related to the legitimate government *purpose* of creating affordable housing and therefore was within the City's police power. The Interveners also disputed CBIA's assertion that the inclusionary requirements were arbitrary, because it rested on "the false premise that inclusionary requirements are development fees or exactions." In any event, they argued, the percentage requirements were not arbitrary; they were based on "extensive stakeholder outreach and analysis" to ensure that its goal of producing new affordable housing could be reached without overburdening developers.

The superior court carefully considered the parties' respective arguments. In its ruling it stated at the outset that "[n]obody seriously disputes the proposition that the

South Bay Area is an expensive place in which to live." Nor was there any argument that "increasing the availability of affordable housing is a legitimate and important public policy objective" or that "inclusionary housing laws increase the availability of housing to people with lower incomes." The court ruled, however, that the City was obligated to demonstrate "its legal ability to require that a developer sell a home at a level which may be potentially below its costs in building that home."

After considering the parties' extensive arguments the court concluded that "the challenged portion of the ordinance bears no reasonable relationship to permissible outcomes in the generality or great majority of cases." [5] The court did not explain what outcomes would have been permissible, but it subsequently stated that the City had been unable "to demonstrate where in the record was there evidence demonstrating the constitutionally required 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." Thus, the City had "adopted this ordinance in derogation of controlling state law without providing any evidence purporting to meet the legal standards required."

2. Standard of Review

Because CBIA's action is a purely facial challenge, we address "only the text of the measure itself, not its application to the particular circumstances of an individual." (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084; *County of Sonoma v. Superior Court* (2009) 173 Cal.App.4th 322, 337.) The parties have posited different tests for facial invalidity, but we will apply the more lenient standard articulated in *San Remo*.

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[5] The court also cited the takings clauses of the state and federal Constitutions (U.S. Const., art. V, Cal. Const., art. I, § 19) and section 66001 of the Mitigation Fee Act (Gov. Code, § 66000, et seq.); but its ruling appears to be based exclusively on *San Remo, supra,* 27 Cal.4th 643.

Accordingly, CBIA cannot succeed without a "minimum showing" that the ordinance is invalid "in the generality or great majority of cases." (*San Remo, supra,* 27 Cal.4th at p. 673, italics omitted.)[6] That burden remains a heavy one, however. "A claimant who advances a facial challenge faces an 'uphill battle.' [Citation.] ' "A claim that a regulation is *facially* invalid is [tenable only] if the terms of the regulation will not permit those who administer it to avoid an unconstitutional *application* to the complaining parties." ' [Citations.]" (*Home Builders Ass'n of Northern California v. City of Napa* (2001) 90 Cal.App.4th 188, 194.)

3. The Parties' Positions on Appeal

The City and Interveners restate the position they took below, characterizing the IHO as a land use regulation adopted pursuant to the City's police power. As such, Interveners argue, the Ordinance is valid if its terms are "reasonably related to purposes protecting or advancing the public welfare." The City adds that the Ordinance may not

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[6] Our Supreme Court has also articulated a stricter standard: "[T]o support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular *application* of the statute . . . . Rather, petitioners must demonstrate that the 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; *Arcadia Unified School Dist. v. State Dept. of Education* (1992) 2 Cal.4th 251, 267; see also *Sierra Club v. Napa County Bd. of Sup'rs* (2012) 205 Cal.App.4th 162, 172-173.) Under this more stringent standard, a plaintiff "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; *American Academy of Pediatrics v. Lungren* (1997) 16 Cal.4th 307, 347; *Arcadia Development Co. v. City of Morgan Hill* (2011) 197 Cal.App.4th 1526, 1535.) Instead, " 'the challenger must establish that no set of circumstances exists under which the Act would be valid.' [Citation.]" (*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.) Were we to adhere to this stricter standard, we would entertain the City's assertion that the waiver provision of the Ordinance precludes a finding of facial invalidity.

be declared invalid unless it was "arbitrary, capricious, wholly lacking in evidentiary support, or [procedurally unlawful]." (See *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 786.)

Both appellants rely primarily on *Home Builders Ass'n of Northern California v. City of Napa, supra,* 90 Cal.App.4th 188 (*Home Builders*). There the City of Napa passed an ordinance requiring 10 percent of new development units to be "affordable" as defined by the city, with alternative provisions for compliance, including off-site construction and an in-lieu fee. As in the instant case, the ordinance also offered benefits to developers for compliance and included a procedure for requesting an adjustment or waiver of the conditions.

The plaintiff builders' association sought invalidation of the Napa ordinance on its face, calling it an unconstitutional taking. The First District, Division 5, rejected this challenge, holding that the ordinance would increase the supply of low- and moderate-income housing and thereby " 'substantially advance' the important governmental interest of providing affordable housing for low[-] and moderate-income families." (*Id.* at p. 195.)[7]

CBIA responds that the IHO imposes an exaction which cannot withstand analysis under *San Remo, supra,* 27 Cal.4th 643 and *Building Industry Association of Central California v. City of Patterson, supra,* 171 Cal.App.4th 886 (*Patterson*). CBIA emphasizes that this is neither a zoning ordinance nor a regulation of the *use* of property; instead, it imposes a requirement that a developer seeking a permit "dedicate or convey property (new homes) for public purposes," or alternatively, pay a fee in lieu of "such

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[7] CBIA contends that the City's reliance on *Home Builders* is misplaced, in part because the association had brought a facial *takings* claim. CBIA omits mentioning that *San Remo*, which it insists is the applicable authority in this case, was also a facial takings challenge.

compelled transfers of property." It is "at its core" a dedication requirement which "clearly calls for the highest scrutiny."

This alternative portrayal of the inclusionary housing requirement misses the mark. The IHO does not prescribe a dedication. A "dedication" typically means "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; cf. *Branciforte Heights, LLC v. City Of Santa Cruz* (2006) 138 Cal.App.4th 914, 927.) " 'Dedication has been defined as an appropriation of land for some public use, made by the fee owner, and accepted by the public. By virtue of this offer which the fee owner has made, he is precluded from reasserting an exclusive right over the land now used for public purposes.' " (*Friends of the Trails v. Blasius* (2000) 78 Cal.App.4th 810, 820.) "A dedication is said to have the characteristics of a contract, in that it requires both an offer and acceptance and is not binding until there has been an acceptance. [Citation.] As in a contract, an expectation of performance is created—an expectation which in its barest essentials means that the land dedicated will be put to the use contemplated." (*Clay v. City of Los Angeles* (1971) 21 Cal.App.3d 577, 583.)

Apparently retracting its own espousal of the "highest scrutiny" standard, CBIA nonetheless maintains, citing *San Remo*, that the City failed to provide "the required evidentiary justification" for the IHO by showing a reasonable relationship between the burden of the asserted "exaction" and "identified public needs or impacts created by the development." We consider this argument first, as it was the one accepted by the trial court in its ruling.

The *San Remo* plaintiffs asserted a constitutional foundation in their complaint: a *taking* in violation of the California Constitution. (Cal. Const., art. I, § 19.) Here, by contrast, CBIA continues to insist that this is *not* a takings case; indeed, it faults the City for seeking to "apply inapt 'regulatory takings' defenses and arguments to this case."

CBIA does not identify a specific constitutional infirmity or statutory violation. It nonetheless maintains that *San Remo* prescribes the required analysis.

We disagree. In *San Remo* the plaintiff hotel owners challenged a development impact "housing replacement" fee that was specifically designed to *mitigate* the loss of housing caused by the conversion of residential units to tourist use. (*San Remo, supra,* 27 Cal.4th at pp. 673, 671.) The fee was an alternative to replacement of the lost units with new residential units "comparable to those converted." (*Id.* at p. 651.) The focus of the Supreme Court's decision was the fee, not the housing replacement condition.

The "reasonable relationship" required by the Supreme Court in *San Remo* was between the development *mitigation fee* and the "deleterious public impact of the development." (*San Remo, supra,* 27 Cal.4th at p. 671.) Thus, it was appropriate to require a connection between the in-lieu fee and the loss of housing—that is, the "deleterious public impact" of the conversion. (*Ibid.*) Unlike the *mitigation* fee challenged in *San Remo,* the Ordinance at issue here does not appear to have been enacted for the purpose of mitigating housing loss *caused by* new residential development. Its express purposes were to "enhance the public welfare by establishing policies which require the development of housing affordable to households of very low, lower, and moderate incomes" and to promote the use of available land for those households, thereby alleviating the demand for affordable housing. Thus, whether the Ordinance was reasonably related to the deleterious impact of market-rate residential development in San Jose is the wrong question to ask in this case.

The Supreme Court also made it clear that it was not San Francisco's burden to make a showing of the requisite connection; it was the *plaintiffs'* obligation to show that the challenged fee provision was *not* reasonably related to housing loss through conversion. The plaintiffs failed to meet this burden. (*San Remo, supra,* 27 Cal.4th at p. 673; see also *Building Industry Assn of Cent. California v. County of Stanislaus* (2010) 190 Cal.App.4th 582, 591 [trial court improperly placed burden on county and Farm

Bureau to show facial validity of program designed to mitigate the loss of farmland resulting from residential development].)

CBIA also relies on *Patterson, supra*, 171 Cal.App.4th 886, but that case, too, is inapposite. The action in *Patterson* was brought by a developer who was subject to a development agreement that provided for an "affordable housing in-lieu fee." (*Id.* at p. 891.) The Fifth District applied the *San Remo* test to a provision in the development agreement that allowed the City to increase the in-lieu fee if "reasonably justified." (*Id.* at p. 889.) The appellate court interpreted "reasonably justified" to conform to the requirement of *San Remo* that the amount of the increase bear a reasonable relationship to the deleterious public impact of the Patterson Gardens development. (*Id.* at p. 898.) Notably, the city did not propose or advocate any different test. (*Ibid.*)

The *Patterson* court went on to find no connection between the amount of the increase and the "need for affordable housing associated with [the project.]" (*Id.* at p. 899.) The developer did not assert any facial invalidity of the fee, and thus did not assume the formidable burden encountered by those attacking legislation on its face, such as the plaintiffs in *San Remo*. (*Id.* at p. 898 & fn. 14.) Furthermore, the court did not analyze the issue by reference to the city's stated objectives, but focused instead on its method of calculating the revisions to the fee, in light of the terms providing for fee updates in the development agreement. (*Id.* at p. 895.)

CBIA cites a number of other decisions that have limited application to the facts presented here. *Bixel Associates v. City of Los Angeles* (1989) 216 Cal.App.3d 1208, 1216, for example, involved a challenge to a fire hydrant fee which the plaintiffs alleged was a "special tax" in violation of the California Constitution. In *Ocean Harbor House Homeowners Assn v. California Coastal Commission* (2008) 163 Cal.App.4th 215 the plaintiff homeowners' association protested a fee the *purpose* of which was to mitigate the loss of an acre of beach resulting from the construction of a proposed seawall. This

court upheld the lower court's finding of a nexus between the Coastal Commission's fee condition and the "direct impact" of the seawall on recreational use. (*Id.* at p. 237.)

Shapell Industries, Inc. v. Governing Board (1991) 1 Cal.App.4th 218 (*Shapell*) involved a school district's resolution authorizing a fee on new residential development to fund new school facilities. The developer sought a writ of mandate to invalidate the resolution on the ground that it was "arbitrary and capricious and without evidentiary support." (*Id.* at p. 228.) We held that while development fees were a valid exercise of police power, they could not exceed the cost of "increased services made necessary by virtue of the development." (*Id.* at p. 235.) The test we applied, however, was drawn from *California Hotel & Motel Assn v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212: "A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute."

In *Shapell* the very purpose of the school facilities fee was to accommodate a growing student population and reduce overcrowding of schools *caused by* new development. The fee was improper to the extent that the assessment was based on an estimated increase in student population overall rather than on the increase generated by the new housing itself. We declined to second-guess the district's methods of deriving its supporting data, but we insisted that a "reasoned analysis" be conducted "to establish the requisite connection between the amount of the fee imposed and the burden created" by the development. (*Shapell, supra,* 1 Cal.App.4th at p. 235.) The district was required only to "make a reasonable choice after considering the relevant factors." (*Id.* at p. 237.) Thus, it had to "demonstrate that development contributes to the need for the facilities, and that its choices as to what will adequately accommodate the influx of students are *reasonably based.*" (*Id.* at p. 239, italics added.)

Also inapplicable is *City of Hollister v. McCullough* (1994) 26 Cal.App.4th 289, an eminent domain action involving a required dedication of a strip of the defendants' land for sewer and drainage improvements. The dedication requirement, we concluded, was not supported by evidence that it was reasonably related to the defendants' use of the property, or to any additional burdens on city services associated with the defendants' proposed subdivision; instead, it reflected an objective to promote "general municipal objectives." (*Id.* at p. 298.) In so holding we followed *Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463, 1470, in which the Fifth District explained that dedications of property for public use must be reasonably related to the landowner's proposed use. If instead such conditions are "imposed by a public entity to shift the burden of providing the cost of a public benefit to one not responsible, or only remotely or speculatively benefiting from it, there is an unreasonable exercise of police power."

The parties are at odds over the significance of *Trinity Park, L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, where this court considered the issue of whether the below-market housing requirement imposed by the City of Sunnyvale was subject to the limitations period established in section 66020, subdivision (d)(2), of the Mitigation Fee Act, which applied to protests over "fees, dedications, reservations, or other exactions to be imposed on a development project." The city's below-market ordinance required Trinity Park to sell five houses in the subdivision at below-market prices as a condition of development approval. The parties agreed that this condition was not a fee, a dedication, or a reservation; their dispute was over the meaning of "other exaction." After examining the relevant Mitigation Fee Act provisions, we determined that the 180–day limitations period was intended to apply to "an exaction imposed for the purpose of 'defraying all or a portion of the cost of public facilities related to the development project.' " (*Id.* at p. 1035, quoting definition of "fee" in § 66000.) Applying this definition, we held that the challenged condition in Sunnyvale was not an "other exaction" within the meaning of section 66020, because neither the language of the

ordinance nor even the plaintiff's complaint indicated that the city's purpose was to defray all or a portion of the cost of public facilities related to the development project. (Cf. *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 696 [section 66020 applies only to development fees that "alleviate the effects of development on the community and does *not* include fees for specific regulations or services"]; but see *Williams Communications, LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, 658-659 [charge imposed for license to install cable in city streets was "other exaction" within the meaning of sections 66020 and 66021].) It is unnecessary to compare *Trinity Park* with the instant case, as CBIA did not contest the Ordinance as an "other exaction" under the Mitigation Fee Act.

Cwynar v. City and County of San Francisco (2001) 90 Cal.App.4th 637, 663 is also of no assistance to CBIA. That case involved primarily a takings challenge to an ordinance restricting property owners from evicting tenants to allow the owners to use the properties as a residence for themselves or their family members. The court held that the plaintiffs should have been permitted to prove that the restrictions did not "substantially advance legitimate state interests." (*Id.* at p. 663.) Although the United States Supreme Court later rejected this standard in regulatory takings cases (see *Lingle v. Chevron USA Inc.* (2004) 544 U.S. 528, 540-545 [125 S.Ct. 2074] (*Lingle*)),[8] the appellate court did not remove the burden from the *property owners* to make the requisite showing.

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[8] CBIA cites *Lingle* for the distinction between regulatory takings and land-use " 'exactions' cases such as this." That was not the comparison the high court delineated. *Lingle* explained that government regulation of private property will amount to a Fifth Amendment taking if it causes a "permanent physical invasion" of the owner's property or if the regulation completely deprives the owner of " '*all* economically beneficial us[e]' of the property." (*Id.* at p. 538.) If it does not fall within one of "these two relatively narrow categories," then the takings challenge is governed by *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104 (98 S.Ct. 2646), which identified factors such as the economic impact of the regulation and the degree to which the regulation interfered with "investment-backed expectations." (*Id.* at p. 124.) Alternatively, a land-use

We thus conclude that the standard articulated in *San Remo* is inapplicable here, and that the Ordinance should be reviewed as an exercise of the City's police power. As we caution below, however, this does not entail unthinking acquiescence to the City's stated goals.

A local government's police power is derived from article XI, section 7 of the California Constitution, which provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." " 'We have recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state.' " (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151, quoting *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782.)

"A land use ordinance is a valid exercise of the police power if it bears a substantial and reasonable relationship to the public welfare. [Citation.] It is invalid only if it is arbitrary, discriminatory, and [without a] reasonable relationship to a legitimate public interest." (*Arcadia Development Co. v. City of Morgan Hill, supra,* 197 Cal.App.4th at p.1536.) "The core issue is whether there is any rational reason related to

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exaction can be a taking if it violates the standards set forth in *Nollan v. California Coastal Com'n* (1987) 483 U.S. 825 (107 S.Ct. 3141) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 (114 S.Ct. 2309). In the course of its analysis, the court decided that the test for a regulatory taking -- whether the regulation substantially advances a legitimate state interest—is "doctrinally untenable" and "has no proper place in our takings jurisprudence." (*Lingle*, *supra*, 544 U.S. at pp. 544, 548, italics omitted.)

The case before us involves neither an asserted taking nor a land-use challenge governed by *Nollan* and *Dolan*. Our Supreme Court made it clear in *San Remo* that those cases "involved the government's exaction of an interest in specific real property, not simply the payment of a sum of money from any source available." (*San Remo, supra,* 27 Cal.4th at pp. 671-672.) Aside from an oblique suggestion that *Nollan* and *Dolan* are applicable by citing *Lingle*, CBIA does not attempt to reintroduce heightened scrutiny as a standard for measuring the City's regulation. Likewise, its new vague suggestion that due process is a ground for invalidation of a development exaction is of no consequence, as CBIA has not asserted any due process violation here.

the public welfare for the restriction imposed." (*Id.* at p. 1537; *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 607.) "In deciding whether a challenged ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor." (*Associated Home Builders etc., Inc. v. City of Livermore, supra,* 18 Cal.3d at pp. 604-605.) Accordingly, a land use ordinance that is asserted to exceed a municipality's police power will withstand constitutional attack "if it is fairly debatable" that the ordinance "reasonably relates to the welfare of those whom it significantly affects," including the surrounding region if affected. (*Id.* at p. 606-607; see also *Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 339 [applying *Associated Home Builders* to rezoning ordinance].)

Thus, a "[c]ity's exercise of its constitutionally derived police power is subject to substantial deference from the judicial branch." (*Arcadia Development Co. v. City of Morgan Hill, supra,* 197 Cal.App.4th at p. 1536.) Consistent with the presumption of constitutionality, a trial court reviewing a local government's legislative function "does not inquire whether, if it had power to act in the first instance, it would have taken the action taken by the local government. Rather, the court's authority is limited to determining whether the action was arbitrary, capricious, entirely lacking in evidentiary support, or unlawfully or procedurally unfair." (*Building Industry Assn. of Cent. California v. County of Stanislaus, supra,* 190 Cal.App.4th at pp. 589-590.) "The burden rests with the party challenging the constitutionality of an ordinance to present the evidence and documentation which the court will require in undertaking this constitutional analysis." (*Associated Home Builders etc. Inc. v. City of Livermore, supra,* 18 Cal.3d at p. 609.)

Nevertheless, as CBIA points out, a local government's police power is not unlimited. "[J]udicial deference is not judicial abdication. The ordinance must have a *real and substantial* relation to the public welfare," and "[t]here must be a reasonable

basis in fact, not in fancy, to support the legislative determination." (*Associated Home Builders etc. Inc. v. City of Livermore, supra,* 18 Cal.3d at p. 609; see also *City of Los Angeles v. County of Kern* (2013) 214 Cal.App.4th 394, 422.) "[W]here the exercise of that power results in consequences [that] are oppressive and unreasonable, courts do not hesitate to protect the rights of the property owner against the unlawful interference with his property. In other words, the governmental power is not unlimited, and a regulation of the use of property must rest upon a reasonable exercise of the police power. [Citation.] Legislatures may not, under the guise of the police power, impose restrictions that are unnecessary and unreasonable upon the use of private property or the pursuit of useful activities. [Citation.]" (*Skalko v. City of Sunnyvale* (1939) 14 Cal.2d 213, 215-216.) Accordingly, "[i]f, in the opinion of the court, a statute or ordinance purporting to be enacted to protect the public health, safety, morals, comfort, convenience or general welfare has no real or substantial relation to any of those objects, it is the duty of the court to so declare." (*McKay Jewelers v. Bowron* (1942) 19 Cal.2d 595, 600-601.)

To the extent that evidence supplied by CBIA is material and relevant to its attack on the Ordinance, the trial court is entitled to review it under the proper standard. We will therefore remand the matter for that purpose. We again emphasize, however, that it is *CBIA's* burden to establish the facial invalidity of the IHO, not the City's to prove that it survives the challenge. (Cf. *Building Industry Assn of Cent. California v. County of Stanislaus, supra,* 190 Cal.App.4th at p. 590 [party attacking the regulation must demonstrate its invalidity]; see also *Action Apartment Ass'n v. City of Santa Monica* (2008) 166 Cal.App.4th 456, 468 [party asserting facial takings claim must demonstrate that its "mere enactment constitutes a taking"].) We thus leave it to the superior court to determine whether CBIA has rebutted the presumption that the inclusionary housing conditions are reasonably related to the City's legitimate public purpose of ensuring an adequate supply of affordable housing in the community.

Disposition

The judgment is reversed, and the matter is remanded to permit the superior court to reconsider respondent CBIA's complaint in accordance with the appropriate legal standards. Costs on appeal are awarded to the City and Interveners.

____

ELIA, J.

WE CONCUR:

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PREMO, Acting P. J.

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MÁRQUEZ, J.

Cal. Bldg. Industry Assn. v. City of San Jose

H038563

Trial Court:	Santa Clara County Superior Court
Trial Judge:	Hon. Socrates P. Manoukian
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DECLARATION OF SERVICE BY MAIL

I, Barbara A. Siebert, declare as follows:

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

On July 15, 2013, true copies of PETITION FOR REVIEW were placed in envelopes addressed to:

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

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 15th day of July, 2013, at Sacramento, California.

BARBARA A. SIEBERT