**IN THE SUPREME COURT OF THE STATE OF CALIFORNIA**

No. S212072

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

vs.

CITY OF SAN JOSE,

Respondent.

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

Intervenors.



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

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

# APPELLANT/DEFENDANT INTERVENORS' ANSWER BRIEF ON THE MERITS

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## I. ISSUE ON APPEAL

The question before this Court on appeal is: what standard of review applies in a facial challenge to a city's inclusionary housing ordinance? Is the appropriate standard for evaluating inclusionary housing policies like San Jose's the reasonable relationship standard for legislative decisions enacted pursuant to a local government's police power, as applied by the Court of Appeal, or is it some heightened standard, as advocated by Petitioner California Building Industry Association ("CBIA")?[1]

## II. INTRODUCTION AND SUMMARY OF ARGUMENT

Intervenors are organizations of advocates and non-profit housing developers seeking to increase the availability of below-market-rate housing throughout California. They seek in this litigation to affirm the power of local governments to chart a path away from exclusionary land use practices by requiring future residential development to include units affordable to lower-income households, who comprise the workforce of much of the state. Over 170 communities, along with the State of California, have embraced

[1] CBIA's attempted restatement of the issue on appeal is inappropriate because it presumes that inclusionary housing ordinances "exact property interests"—a core question of dispute and definition among the parties. (See Petitioner's Opening Brief ["POB"] at p. 1.)

inclusionary housing programs as a critical strategy toward inclusionary communities and away from systemic segregation and sprawl.

The threshold standard of review in a facial constitutional challenge of any local ordinance is whether the ordinance is a valid exercise of the police powers conferred by Article 7 of the California Constitution. The essential question is whether the requirements of the ordinance are reasonably related to a legitimate public purpose. (*Associated Homebuilders of the Greater East Bay, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 604-605 ["*Livermore*"].) This standard reflects the substantial deference that the judicial branch gives to a local government's legislative function in accordance with the separation of powers. The standard is essentially the same when local land use and development legislation of general application is attacked as a taking. (*San Remo Hotel L.L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643, 670 ["*San Remo Hotel*"].) If the attack focuses on price control, such as the price restriction aspects of inclusionary housing ordinances, then there is a reasonable relationship as long as the restriction provides the opportunity for a fair return on investment. (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 967 ["*Santa Monica Beach*"].)

Accordingly, the basic question regarding the below market-rate housing set-aside in San Jose's Inclusionary Housing Ordinance ("Ordinance") is whether it is reasonably related to any legitimate governmental purposes articulated in the Ordinance. The attendant question regarding the in-lieu fee provision is whether the fee is reasonably related to the underlying set-aside requirement. Answering these questions involves assessing the nature and purpose of the specific requirements and applying the appropriate refinement of the threshold standard.

Consistent with state housing goals and the City's general plan, the overarching objective of the Ordinance is to ensure that there will be a sufficient supply of housing dispersed throughout the city to meet existing and projected housing needs of all economic segments of the community as San Jose grows. The needs include those of current and future residents, the City's workforce, and a share of the regional housing need. The Ordinance establishes that the 15 percent set-aside is reasonably related to that goal, and that its in-lieu fee is directly related to the set-aside. The Ordinance, therefore, is a valid exercise of the City's police power, and the Court of Appeal correctly reversed the trial court decision. Whether viewed a species of land use regulation or a variation of development exactions as CBIA contends, the validity of the obligation ultimately turns on the sufficiency of

the relationship between the obligation and its effectuation of the legitimate purposes it sets out to further.

Petitioner CBIA asserts that the Court's *San Remo Hotel* decision compels application of a heightened standard of review to so-called "exactions" placed on new development by legislation of general application like San Jose's Ordinance. But *San Remo Hotel* simply adapted the basic reasonable relationship standard to conditions imposed to mitigate the impacts of development in the context of a takings challenge. Drawing from its decision in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, cert. den., 519 U.S. 929 [136 L. Ed. 2d 218, 117 S. Ct. 299] ("*Ehrlich*"), this Court stated that "as a matter of both statutory and constitutional law" fees imposed for the purpose of mitigating development impacts "must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development." (*San Remo Hotel, supra*, 27 Cal.4th at 671.)

CBIA turns the reasonable relationship test on its head. It asserts that *San Remo Hotel* requires the purpose as well as the "extent" of an inclusionary ordinance be "reasonably related to some negative public impact proximately caused by the new home projects. . . ." (POB at p. 17.) In CBIA's view, the only legitimate purpose of an inclusionary housing

ordinance is to mitigate the impact of new residential development. CBIA arrives at this contorted formulation based on its assumptions that inclusionary set-aside and in-lieu fee requirements are development exactions distinct from other land use and development conditions and that they are only permissible if related to the mitigation of development impacts. Arguing now for the first time that the Ordinance constitutes a taking (when it repeatedly disavowed a takings claim in all prior proceedings), CBIA mischaracterizes *San Remo Hotel*'s articulation of the reasonable relationship test as a different, "intermediate" standard of review akin to the heightened standard of review required by *Nollan/Dolan* (and now *Koontz*) for ad hoc land dedications and fees required from developers during an adjudicatory permit application process for an individual development. (*Nollan v. California Coastal Com.* (1987) 483 U.S. 825 ["*Nollan*"]; *Dolan v. City of Tigard* (1994) 512 U.S. 374 ["*Dolan*"]; *Koontz v. St. Johns River Water Management Dist.* (2013) __ U.S. __,133 S. Ct. 2586 ["*Koontz*"].) From this false premise it incorrectly concludes that the Ordinance's requirements must be reasonably related, not to their stated purposes, but to the very narrow, singular purpose of mitigating the need for affordable housing created by new market-rate residential development in San Jose.

Neither this Court's recent *Sterling Park* decision nor the high court's *Koontz* decision support CBIA's position. The Court in *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193 ("*Sterling Park*") found that two aspects of the Palo Alto inclusionary housing ordinance—the in-lieu fee and the reservation to the City of a first option to purchase—constituted "other exactions" for the limited purpose of triggering the notice and protest provisions under the Mitigation Fee Act. (*Id.* at 1207.) As CBIA concedes, the Court expressly did not decide whether the underlying set-aside requirement constituted an impact mitigation exaction for purposes of the requirements of the Act. (POB at p. 26.) Because inclusionary housing ordinances like San Jose's and Palo Alto's are generally imposed for legitimate purposes other than the mitigation of impacts, application of the Act would be inappropriate except possibly to the in-lieu fee provisions, which by their terms are directly related to the set-aside requirements.

Likewise, *Koontz* does not compel the application of heightened scrutiny when testing an ordinance of general application that allows for payment of a fee in lieu of compliance with a development condition. *Koontz* held the *Nollan/Dolan* essential nexus/rough proportionality standard of review applicable to fees in lieu of dedication of property that are imposed on an ad hoc basis as a condition of approval of a project (*Koontz*,

*supra*, 133 S. Ct. at 2600.) As this Court explained in *Ehrlich*, land use conditions imposed by legislation of general application do not present the heightened risk of abuse of police power inherent in discretionary decisions of local permitting agencies in individual cases. (*Ehrlich*, *supra*, 12 Cal.4th at 868-869.) Accordingly, *Koontz* does not support extending the *Nollan/Dolan* heightened standard of review to local legislation like the Ordinance.

## III. STATEMENT OF FACTS

### A. Local Governments Throughout California and the United States Have Long Employed Inclusionary Housing Laws to Increase the Supply of Affordable Housing in Their Communities.

#### 1. National History and Context

Inclusionary housing, also known as inclusionary zoning, generally refers to policies that require developers of new multifamily housing to include units that are designated as affordable to lower- or moderate-income households.[2] In 1973, in response to diminishing affordability of housing, Palo Alto became the first California city, and one of the first in the country, to adopt an inclusionary housing ordinance. (Appellant's Appendix ("AA")

[2] Different inclusionary housing policies require different levels of affordability. Generally, affordability requirements refer to Department of Housing and Urban Development income limits, which are based on percentages of area median income (AMI). Extremely low-income is up to 30 percent of AMI; very low-income is up to 50 percent of AMI; low-income is up to 80 percent of AMI; and moderate-income is up to 120 percent of AMI. The term "lower-income" is usually used to refer to extremely low-, very low-, and low-income. (*See, e.g.*, HEALTH & SAF. CODE, § 50079.5.)

718 [Non-Profit Housing Association of Northern California, *Affordable by Choice: Trends in California Inclusionary Housing Programs*, at p. 9 (2007), *available at* <http://www.nonprofithousing.org/pdf_attachments/IHIReport.pdf> (as of Jan. 30, 2014) ("*Affordable by Choice*")].) Orange County and the City of Irvine quickly followed suit. (AA 718-719 [Nico Calavita, *Inclusionary Zoning: The California Experience*, National Housing Conference (NHC) Affordable Housing Policy Review, vol. 3, issue 1, at p. 5 (Feb. 2004), *available at* <http://www.nhc.org/media/documents/IZ_CA_experiencet.pdf>) (as of Jan. 30. 2014) ("*Affordable Housing Policy Review*")].)

Other major regions of the country, including the Washington D.C. metropolitan area and the State of New Jersey, adopted inclusionary housing programs shortly after these California jurisdictions. AA 719 [Nico Calavita & Alan Mallach, *Inclusionary Housing in International Perspective*, Lincoln Inst. of Land Policy, at pp. 22-24 (July 2010) ("*Inclusionary Housing*")].) Montgomery County, Maryland enacted an inclusionary zoning policy in 1974 that has helped create over 15,000 affordable units over the past 35 years. (AA 719 [*Id.* at p. 23]; *see also* AA 719 [Chicago Metropolitan Agency for Planning, *Inclusionary Zoning Strategy Report*, at p. 4 (June

2008), *available at* <http://www.cmap.illinois.gov/strategy-papers/inclusionary-zoning> (as of Jan. 30. 2014)].) A year later, the New Jersey Supreme Court ruled in *Southern Burlington County N.A.A.C.P. v. Township of Mount Laurel* (N.J. 1975) 336 A.2d 713 ("*Mount Laurel*") that all municipalities have an obligation to provide a fair share of current and prospective housing needs to low- and moderate-income families. (*See* AA 719 [*Inclusionary Housing, supra*, at p. 24].) As a result of the *Mount Laurel* decision and subsequent acts of the New Jersey legislature, nearly every municipality in New Jersey has an inclusionary zoning ordinance. (*See* AA 719 [*Affordable Housing Policy Review, supra*, at p. 1].)

Thirteen states now have inclusionary housing-enabling legislation. Seven more states, including California, have municipalities that have adopted inclusionary housing programs, including communities as diverse and widespread as New York City; Boulder, Colorado; Santa Fe, New Mexico; and Chapel Hill, North Carolina.[3] (AA 719 [Timothy S. Hollister, Allison M. McKeen & Danielle G. McGrath, *National Survey of Statutory Authority and Practical Considerations for the Implementation of*

[3] Only two states expressly prohibit inclusionary zoning by statute—Texas and Oregon. (AA 719 [Timothy S. Hollister, Allison M. McKeen & Danielle G. McGrath, *National Survey of Statutory Authority and Practical Considerations for the Implementation of Inclusionary Zoning Ordinances,* Homebuilders Ass'n of Bucks/Montgomery Counties, at p. 2 (June 2007), *available at* <http://www.hbahomes.com/site/publisher/files/NatlSurveyofStatAuthorityforIZO.pdf> (as of Jan. 30, 2014)].)

*Inclusionary Zoning Ordinances,* Homebuilders Ass'n of Bucks/Montgomery Counties, at pp. 2, 6, 8, 37 (June 2007), *available at* <http://www.hbahomes.com/site/publisher/files/NatlSurveyofStatAuthorityforIZO.pdf> [as of Jan. 30, 2014] (*National Survey*)]; *see also* AA 720 [Town of Chapel Hill: Inclusionary Zoning, *available at*<http://www.ci.chapel-hill.nc.us/index.aspx?page=1298> (as of Jan. 30. 2014)].) Nationwide, approximately 400 municipalities and counties have adopted inclusionary housing policies and laws. (AA 720 [*National Survey, supra*, at p. 49].)

Most recently, a national study examining eleven inclusionary housing programs across the country, including ordinances long in place in Irvine and Santa Monica, found that inclusionary zoning programs generally have been shown to provide significantly increased access to low-poverty schools and neighborhoods for lower-income households. (Heather L. Schwartz, Liisa Ecola, Kristin J. Leuschner & Aaron Kofner, *Is Inclusionary Zoning Inclusionary? A Guide for Practitioners*, RAND Corporation, at p. 27 (2012), *available at* <http://www.rand.org/content/dam/rand/pubs/technical_reports/2012/RAND_TR1231.pdf> [as of Jan. 30, 2014]; *see also* Jonathon Rothwell, *Housing Costs, Zoning and Access to High-Scoring Schools*, Brookings, at p. 1 (Apr.

2012), *available at* <http://www.brookings.edu/~/media/research/files/papers/2012/4/19%20school%20inequality%20rothwell/0419_school_inequality_rothwell.pdf> [as of Jan. 30, 2014].)

The U.S. Department of Housing and Urban Development (HUD) in 2013 published a study with similar findings, concluding that "[l]ow-income residents who have relocated to these neighborhoods enjoy affordable housing, better living spaces and environments, improved health, and markedly increased feelings of safety and security." (U.S. Department of Housing and Urban Development Office of Policy Development and Research, *Confronting Concentrated Poverty with a Mixed-Income Strategy*, at p. 3 (Spring 2013), *available at* <http://www.huduser.org/portal/periodicals/em/spring13/highlight1.html> [as of Jan. 30, 2014].)

**2. Inclusionary Housing in California**

Inclusionary housing is widely used in California, furthering state housing goals and required in the Coastal Zone and all redevelopment areas. By 2003, 107 California jurisdictions had adopted inclusionary housing programs, comprising one-fifth of all localities in the state. (AA 720 [*Affordable Housing Policy Review*, *supra*, at p. 1].) In 2007, just four years

later, a study found that the number of local communities with inclusionary programs had grown to 170, a 59 percent increase. (AA 720 [*Affordable by Choice, supra*, at p. 9].)

While California has yet to adopt a statewide inclusionary housing law, California law encourages use of inclusionary policies by local jurisdictions. Since 1980, California's Housing Element Law has required all local governments to adopt housing elements to their local general plans that "make adequate provision for the existing and projected housing needs of all economic segments of the community." (Gov. Code, § 65583.) Adopted on the heels of New Jersey's *Mt. Laurel* decision, the statute requires each local government to accommodate its designated share of the regional need for affordable housing. (Gov. Code, §§ 65583(a)(1), 65584.) Indeed, the counsel for the state Department of Housing and Community Development (HCD) opined at the time of the adoption of the Law that inclusionary housing programs were a likely response. (*See* Carolyn Burton, *California Legislation Prohibits Exclusionary Zoning, Mandates Fair Share, Inclusionary Housing Programs Are Likely to Follow* (1981) 9 San Fern. V. L. Rev. 19.)

The Legislature has long provided the impetus for local inclusionary policies, repeatedly declaring the importance and obligation of local

government to make adequate provision for affordable housing needs. Enacting the Housing Element Law in 1980,[4] it declared that "local governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community." (Gov. Code, §65580(d).) The Law sets forth the state housing goal that the "availability of housing is of vital statewide importance, and the early attainment of decent housing and a suitable living environment for every Californian . . . is a priority of the highest order." (Gov. Code, § 65580(a).) And the Legislature states its intent is to "assure that counties and cities recognize their responsibilities in contributing to the attainment of the state housing goal." (Gov. Code, § 65581(a); *see Bruce v. City of Alameda* (1985)166 Cal.App.4th 18, 21; *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1182).

California law also requires that developments in redevelopment areas and the Coastal Zone include affordable housing. (*See* Gov. Code, § 65590 [requiring that new housing developed in the Coastal Zone "provide housing units for persons and families of low or moderate income" where feasible];

[4] Stats. 1980, ch. 1143 § 3 (Gov. Code, §§ 65580 – 65589.8); *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1182.

HEALTH & SAF. CODE, § 33413 [requiring local redevelopment areas to include affordable housing if housing is developed in the area].[5])

Three other state statutes expressly acknowledge the use of inclusionary zoning by cities and counties. The Least Cost Zoning Law requires communities to zone sufficient land to meet the housing needs for all income levels as identified in the jurisdiction's housing element. (Gov. Code, § 65913.1.) It provides that "nothing in this section shall be construed to enlarge or diminish the authority of a city, county, or city and county to require a developer to construct such housing." (Gov. Code, § 65913.1(b).) The Housing Element Law requires the housing elements of municipal jurisdictions to include analysis of affordable housing units produced through local inclusionary programs if those units are threatened with conversion to market-rate housing. (Gov. Code, § 65583(a)(9).) Finally, a developer may comply with a local inclusionary housing program by constructing rental units. (Gov. Code, § 65918.8.)

The extensive use of inclusionary housing by California local governments did not face a serious legal challenge until 1999, where the

[5] Although ABX1 26 [Stats 2011, ch. 5] established a process that dissolved redevelopment agencies and began winding down state financing of redevelopment, it did not repeal the California Redevelopment Law (CRL) including Health & Safety Code, § 33413 which requires that a portion of housing produced in a redevelopment area be affordable to lower and moderate income households. *See* CAL. HEALTH & SAFETY CODE, § 34173(b).

Court of Appeal upheld the City of Napa's inclusionary housing ordinance against a variety of claims; in the published portions of the court's opinion, the court held that Napa's inclusionary housing ordinance was a valid exercise of the city's police power and did not work a facial taking. (*See Home Builders Ass'n. of Northern California v. City of Napa* (2001) 90 Cal.App.4th 188, 193 ("*Home Builders*"); *see also Action Apartment Ass'n v. Santa Monica* (2008) 166 Cal. App. 4th 456 ("*Action Apartment Ass'n*") (rejecting a similar challenge to Santa Monica's inclusionary housing ordinance.)

### 3. Inclusionary Housing Has Substantially Increased the Supply of Affordable Housing in California Communities.

Faced with a daunting lack of housing affordable to lower-income households, municipalities' use of the inclusionary zoning policies upheld in *Home Builders* has ensured the continued development and existence of affordable housing in California. Forty-four percent of all Californians—more than 16 million people—spend a disproportionate share of their income on housing. (AA 721 [*Affordable by Choice*, *supra*, at p. 8].) Although no state agency tracks the production of affordable housing in California, surveys of 91 California cities and counties revealed that inclusionary policies created an estimated 29,281 affordable units between January 1999 and June 2006 alone. (AA 722 [*Id.* at p. 5].) In the preceding

thirty years, an estimated 34,000 affordable units were developed as the result of inclusionary housing ordinances. (AA 722 [*Id.* at pp. 10, 36].)

Nearly all of these inclusionary units were built on-site, meaning they were integrated within or adjacent to a market-rate development. Specifically, 58 percent of inclusionary units were built on-site by a market-rate developer working alone. (AA 722 [*Id.* at pp. 14-16].) Another 32 percent were built on-site by a market-rate developer working in partnership with an affordable housing developer or a government agency. (*Ibid.*)

### B. San Jose Adopted a Balanced Citywide Inclusionary Housing Ordinance to Respond to Its Affordable Housing Crisis and to Further the Goals of Its General Plan.

After an extensive public participation process, the City adopted an inclusionary housing ordinance that addressed its critical ongoing shortage of affordable housing while accommodating the interests of the building industry and the City's residents. The Ordinance provides several alternatives to an on-site set-aside of affordable units and affords developers significant incentives and benefits.

#### 1. The Purposes of the Ordinance.

The City adopted the Ordinance to address "a severe shortage of adequate, affordable housing for Extremely Low, Very Low, and Moderate Income Households . . ." and further its General Plan policies of dispersing affordable housing throughout the City "to enhance the social and economic

well-being of all residents. . . ." (AA 655-658 [San Jose Mun. Code, § 5.08.010].) These purposes are consistent with the City's Housing Element goals to protect 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. (*Ibid.*) The specific purposes are discussed in more detail in Section VI.C.1., *infra*.

**2. The Ordinance Was Adopted After a Long and Inclusive Public Process.**

In developing and adopting the Ordinance, the City undertook a long and inclusive public review process. In December 2007, the City Council held a special study session to discuss inclusionary housing, and its potential benefits and impacts. (AA 922 [Memorandum from Leslie Krutko, Director of Housing, to Honorable Mayor and City Council (Oct. 26, 2009), p. 2 ("Krutko Oct. Memo.")].) In early 2008, the City retained David Paul Rosen and Associates to conduct an economic feasibility study concerning a citywide inclusionary housing policy. (AA 1570-1870 [City of San Jose Inclusionary Housing Analysis Executive Summary by David Paul Rosen & Associates to City of San Jose (May 12, 2008)].) The study was prepared using input from over 700 individuals, affordable housing advocates, developers, and community organizations; and it concluded that inclusionary housing could be economically feasible in most product types, under better

economic circumstances and given certain developer incentives. (AA 922 [Krutko Oct. Memo. at p. 2].) Between June and December of 2008, the City Housing Department held a total of 56 meetings to discuss inclusionary housing. (AA 864 [Memorandum from Leslie Krutko, Director of Housing, to Honorable Mayor and City Council (Dec. 7, 2009), p. 2 ("Krutko Dec. Memo.")]; 922 [Krutko Oct. Memo. at p. 2].) Two public meetings were held for the purpose of educating interested community members. (AA 883-884 [Krutko Dec. Memo. Attachment B]; 922-923 [Krutko Oct. Memo. at pp. 2-3.) Forty one-on-one meetings were held with stakeholders, including businesses, homebuilders and labor associations, affordable housing advocates, and community organizations, in order to solicit the concerns or positions of these groups. (*Ibid.*) Finally, 14 community meetings were held throughout the City in order to give the public an opportunity to review and discuss potential policy options that might be included in a draft ordinance. (*Ibid.*) In City Council meetings prior to the vote adopting the Ordinance, the City Council received extensive public comments from developer and real estate industry representatives, affordable housing advocates, and others, as well as numerous documents, letters, and memoranda requesting modifications, and expressing objection to and support for the Ordinance.

### 3. The Ordinance Allows Developers to Choose From a Variety of Alternate Compliance Options.

The Ordinance allows developers to choose from a menu of alternative means of compliance, including the payment of a fee, off-site development and dedication of land. (AA 686-700 [San Jose Mun. Code, §§ 5.08.500-5.08.580].) The purpose of the alternatives is to facilitate the development of the affordable homes that the developer elects to forego when opting not to build inclusionary units. (*Ibid.*) The alternatives are discussed in more detail in Section VI.C.2.b, *infra*.

### 4. The Ordinance Provides Substantial Benefits and Regulatory Relief to Developers.

The Ordinance provides various incentives for the production of on-site affordable housing. (AA 679-682 [San Jose Mun. Code, §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, a reduction in parking requirements, a reduction in minimum setback requirements, and the permitting of alternative unit type and interior design standards. (AA 679-681 [San Jose Mun. Code, § 5.08.450(A)(1-5)].) These incentives allow a

developer to profit from the construction of a greater number of units or a reduction in costs. (*Ibid.*)

### 5. The Ordinance Provides for Waiver of the Inclusionary Requirement if Its Application Would Produce an Unconstitutional Result.

Similar to the Ordinance that was upheld in *Home Builders, supra*, 90 Cal.App.4th at 195, San Jose Municipal Code section 5.08.720 provides that the requirements of the Ordinance may be waived, adjusted or reduced if an applicant can demonstrate that there is no reasonable relationship between the impact of a proposed development and the requirements of the Ordinance, or that applying those requirements would take property in violation of the United States or California Constitutions. (AA 706-707 [San Jose Mun. Code, § 5.08.720].)

In summary, the primary goal of the inclusionary requirement and the in-lieu fee alternative is not to mitigate deleterious impacts caused by the new development but, rather, to ensure that future housing development in the City will include affordable housing units.

## IV. PROCEDURAL BACKGROUND

Intervenors adopt the City of San Jose's description of the procedural background of the case found in the City's Answer Brief on the Merits.

## V. STANDARD OF REVIEW ON APPEAL

This appeal regarding the validity of San Jose's Ordinance presents questions of law which are subject to *de novo* review. (*See 420 Caregivers, LLC v. City of Los Angeles* (2012) 219 Cal.App.4th 1316, 1331.)

## VI. ARGUMENT

### A. The General Standard of Review in a Facial Constitutional Challenge to a Local Legislative Action Is the Reasonable Relationship Test.

#### 1. Local Legislative Bodies Have Broad Discretion to Enact Land Use and Development Regulations Under Their Police Power, so Long as Those Regulations Are Reasonably Related to a Legitimate Government Interest.

The Court of Appeal properly applied the reasonable relationship test in its analysis of the Ordinance. (*Cal. Bldg. Industry Ass'n. v. City of San Jose* (2013) 157 Cal.Reptr. 3d 813, 823-824, review granted Sept. 11, 2013, S212072 ["*Opinion*"].) Its holding is consistent with longstanding precedent regarding the ability of local jurisdictions to enact land use regulations pursuant to their police power. Local governments have broad authority to impose restrictions on the use and development of land in order to promote the public's health, safety, and welfare. (*See, e.g., Euclid v. Amber Realty Co.* (1926) 272 U.S. 365 [affirming the power of local governments to establish zoning regulations]; *Miller v. Bd. of Public Works* (1925) 195 Cal. 477, 490 [acknowledging a year before *Euclid* a city's authority under its

police power to create zones that allow only single-family dwellings]. Local enactments are presumed to be a legitimate exercise of the City's police power so long as they are reasonably related to the locality's interest in promoting the health, safety and general welfare. (*Livermore, supra*, 18 Cal.3d at 604-605.)

In the context of a takings challenge, in *Ehrlich*, this Court drew a distinction between legislative enactments of general applicability and ad hoc exactions imposed as conditions of development. While both types of restrictions on development may be imposed for purposes related to the public health and welfare, the context of their imposition determines the proper standard of review. For ad hoc exactions—whether land dedications or monetary exactions—there is heightened risk "that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation" because the jurisdiction exercises discretion over an individual project. (*Ehrlich, supra*, 12 Cal.4th at p. 869 [citing *Nollan, supra,* 483 U.S. at p. 825] (emphasis omitted).) For such ad hoc conditions, the essential nexus and rough proportionality tests laid out in *Nollan* and *Dolan* apply. (*Ehrlich, supra*, 12 Cal.4th at 868.)

In contrast, land use and development regulations of general applicability that are adopted through a legislative process to promote the public welfare, to protect the public's health, or to further other legitimate public purposes are not subject to heightened scrutiny. (*Id.* at 886.) Such regulations "do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property." (*Ibid.*) Instead, such legislatively imposed regulations need only be reasonably related to the legitimate public purpose they set out to further. (*Ibid.*)

Inclusionary housing ordinances of general application like San Jose's are exercises of a city's land use and development authority pursuant to its police power. The test for evaluating the constitutionality of such ordinances, accordingly, is the reasonable relationship test. The Court of Appeal in *Home Builders* properly applied this test to the City of Napa's inclusionary housing ordinance which, like San Jose's Ordinance, required a certain percentage of homes in new multi-family housing developments to be made affordable to low- and moderate-income households. (*Home Builders, supra*, 90 Cal.App.4th at 188.) The court held that meeting the housing needs of low- and moderate-income households was a legitimate state interest. (*Id.* at 195.) It went on to hold that the ordinance's

inclusionary housing requirements substantially advanced[6] that interest and, as such, were a valid exercise of the city's police power. (*Id.* at 195-197.)

In the instant case, CBIA argued before the trial court and the Court of Appeal that the holding in *Home Builders* was inapplicable, primarily claiming that *Home Builders* was decided on takings principles and that CBIA's challenge to San Jose's inclusionary housing Ordinance was not a takings claim. (*See* Respondent's Brief on Appeal at p. 52; AA 3136 [Plaintiff's Closing Trial Brief at p. 19]; *see also* Opinion, *supra*, 157 Cal.Reptr.3d at 817-818.) Now, as CBIA contends for the first time that the Ordinance constitutes a taking, it conspicuously makes no mention of *Home Builders* in its opening brief. (*See* POB at p. 2.) *Home Builders*' holding that a local inclusionary housing ordinance is a valid exercise of a city's police power, however, is directly on point.

**2. In A Facial Takings Challenge to A Law Enacted Pursuant to the Police Power, the Party Challenging the Law Bears the Burden of Proving the Law's Unconstitutionality.**

The Court of Appeal properly allocated the burden of proof in its remand to the trial court. Citing *Building Industry of Central California v.*

[6] The "substantially advances" test established in *Agins v. Tiburon* (1980) 447 U.S. 255 and referenced by the Court of Appeal in *Home Builders* was later invalidated as a freestanding takings analysis by *Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528 ("*Lingle*"). However, as noted in *Action Apartment Association v. City of Santa Monica*, (2008) 166 Cal.App.4th 456, 470, the decision in *Lingle* did not create a new test for facial takings challenges, nor did it make *Nollan/Dolan* scrutiny applicable to facial claims.

*County of Stanislaus* (2010) 190 Cal.App.4th 582, 587-588 ("*Stanislaus*") and *Action Apartment Ass'n*, the Court of Appeal instructed the trial court "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." (Opinion, *supra*, 157 Cal.Rptr.3d at 825) [emphasis in original].)

Here, CBIA bears the burden of proving that the Ordinance is not reasonably related to its stated purposes. This Court has noted that, when analyzing regulations enacted pursuant to cities' police powers, courts must exercise deference to the policy determinations of the legislative body:

> Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties. The duty to uphold the legislative power is as much the duty of appellate courts as it is of trial courts, and under the doctrine of separation of powers neither the trial nor appellate courts are authorized to "review" legislative determinations. The only function of the court is to determine whether the exercise of legislative power has exceeded constitutional limitations.

(*Santa Monica Beach, supra*, 19 Cal.4th at 962 [quoting *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462].)

In the type of facial challenge mounted by CBIA here, this Court has held that "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* (1995) 9 Cal.4th 1069, 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 Supervisors* (2012) 205 Cal.App.4th 162, 172–173.) CBIA "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 [emphasis omitted]; *see 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." (*California Redevelopment Ass'n. 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].)

### B. None of the Cases Cited by CBIA Alters the Reasonable Relationship Test.

CBIA argues that generally applicable land use and development conditions that constitute "exactions" on new development "can only be sustained if both its purpose and extent are reasonably related to some negative public impact proximately caused by the new home projects on which the exaction would be imposed." (POB at p. 17.) CBIA essentially asks for a heightened standard of review similar to the test developed in *Nollan* and *Dolan* for ad hoc development conditions rather than the reasonable relationship standard applicable to policies enacted pursuant to a local government's police power. However, none of the cases cited by CBIA supports its position.

#### 1. *San Remo Hotel* Did Not Create a Heightened Standard of Review.

CBIA argues that, in deciding *San Remo Hotel*, this Court articulated a special, "intermediate" standard for analyzing local polices placing certain conditions and fees on development. (POB at pp. 17-19.) However, CBIA misreads *San Remo Hotel* which, rather than creating a new standard of review, applied the reasonable relationship test to an ordinance whose express purpose was to mitigate the "deleterious public impacts" of new development. (*San Remo Hotel, supra*, 27 Cal.4th at 671.) The case

addressed a challenge to the City and County of San Francisco's Residential Hotel Unit Conversion and Demolition Ordinance (HCO), an ordinance that sought to mitigate the loss of affordable residential hotel units by the conversion of those units to tourist use. (*Id.* at 649.) The plaintiffs brought both facial and as-applied challenges to the HCO, arguing that its in-lieu fee provision should be subject to heightened *Nollan/Dolan* scrutiny rather than the more deferential reasonable relationship test. (*San Remo Hotel, supra*, 27 Cal.4th at 664-666.) This Court rejected the plaintiffs' argument, holding that the in-lieu provision of the HCO was valid because its calculation and use bore "a reasonable relationship to loss of housing" caused by conversion of residential hotels to tourist use. (*Id.* at 673.) Far from making a generalized statement that *every* ordinance regulating land use or development must be "reasonably related . . . to the deleterious public impact of the development," this Court carefully examined both the stated purposes and the terms of the ordinance. (*Id.* at 671.) Because the HCO's stated purpose was to mitigate the loss of residential hotel units, the Court analyzed whether its terms were related to that purpose and found that they were. (*Ibid.*)

CBIA argues that the Court of Appeal's opinion in the instant case ignores the holding in *San Remo Hotel* because the court below held that a

legislatively imposed development fee need not be reasonably related to "negative public impacts proximately caused by the development" unless its purpose is to mitigate the deleterious public impact. (POB at p. 32.) However, the Court in *San Remo Hotel* distinguished the HCO's fees as fees whose express purpose was to mitigate the impacts of new development:

> Nor are plaintiffs correct that, without *Nollan/Dolan/Ehrlich* scrutiny, legislatively imposed *development mitigation fees* are subject to no meaningful means-end review. As a matter of both statutory and constitutional law, such fees [i.e., development mitigation fees] must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development.

(*San Remo Hotel, supra*, 27 Cal.4th at 671 [emphasis added].)[7] Because the development fees at issue were development mitigation fees, they had to be reasonably related to mitigation of the impact.[8] Therefore, a proper application of *San Remo Hotel* to the Ordinance is not to force the

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[7] The statutory law referenced is the Mitigation Fee Act. (*San Remo Hotel L.P. v. City & County of San Francisco*, (2002) 27 Cal.4th 643, 671.)

[8] "We decline plaintiffs' invitation to extend heightened scrutiny to all development fees, adhering instead to the distinction we drew in *Ehrlich, supra, 12 Cal.4th 854, Landgate, supra*, 17 Cal.4th 1006, and *Santa Monica Beach, supra,* 19 Cal.4th 952 between ad hoc exactions and legislatively mandated, formulaic *mitigation fees.*" (*San Remo Hotel, supra*, 27 Cal.4th at pp. 670-671 [emphasis added].)

Ordinance's inclusionary requirements to be reasonably related to the HCO's stated purpose of mitigating the impact of new development, but, instead, to ask whether the Ordinance is reasonably related to its own stated purposes. (*See* Section VI.C., *infra.*, for a discussion of the relationship between the Ordinance's purposes and its terms.)

**2. *Patterson* Did Not Apply a Heightened Version of the Reasonable Relationship Standard.**

CBIA cites *Building Industry Association of Central California v. City of Patterson* (2009) 171 Cal. App.4th 866 ("*Patterson*") for the proposition that CBIA's interpretation of *San Remo Hotel* applies to all inclusionary housing policies. (POB at pp. 19-21.). In *Patterson*, however, the court applied the reasonable relationship test to a fee provision that was *explicitly designed to address the impacts of new development* in an as-applied challenge to the imposition of that fee on a particular project. (*Patterson, supra*, 171 Cal.App. at 891-892, 898-899.) Interpreting a provision of the development agreement that required any in-lieu fee increase to be "reasonably justified" based on the impact of the proposed development, the Court of Appeal applied the reasonable relationship test as articulated by *San Remo Hotel*. (*Patterson, supra*, 171 Cal.App. at 898-899.) Because the fee was designed to mitigate the impacts of new development—and because the city advanced no alternative interpretation of the standard—the court held

that the fee was invalid because it was not "reasonably related to the need for affordable housing associated with the project." (*Ibid.*)

As with *San Remo Hotel*, *Patterson* does not endorse heightened scrutiny for legislatively imposed development conditions or fees. Instead, it applied the well-established reasonable relationship test to the way in which a particular fee had been calculated and found that fee to be invalid where the amount of the fee was not reasonably related to its stated purpose.

### 3. This Court's Recent Decision in *Sterling Park* Did Not Alter the Standard of Review.

CBIA's proposed modification of the standard of review rests in part on an unsupported expansion of this Court's recent holding in *Sterling Park*. In *Sterling Park*, the Court decided the meaning of the term "exactions" for the purpose of determining whether the notice and protest requirements of one section of the Mitigation Fee Act (Gov. Code, §§ 66000-66025)—Government Code section 66020—applied to certain requirements of Palo Alto's inclusionary housing ordinance. (*Sterling Park*, *supra*, 57 Cal.4th at 1207.) It did not decide, as CBIA suggests, that "other exactions" as defined by section 66020 call for a unique standard of review under the state or federal constitution.[9] (POB at p. 25.) *Sterling Park* did not address whether

[9] Just as Justice Kennard pointed out in her concurring and dissenting opinion in *Ehrlich* that there was no need to construe the Mitigation Fee Act because the case was brought under the takings clause (*Ehrlich*, *supra*, 12

a heightened constitutional analysis is required for a development condition imposed through an ordinance of general application for legitimate purposes other than mitigation of the impacts of development.

The *Sterling Park* court found that only two aspects of Palo Alto's inclusionary ordinance were "exactions," and only for the purposes of the application of section 66020. As used in that section, this Court held that "other exactions" "includes actions that divest the developer of money or a possessory interest in property." (*Sterling Park, supra*, 57 Cal.4th at 1204.) Applying this principle to Palo Alto's ordinance the court held:

> The imposition of the in-lieu fees is certainly similar to a fee. Moreover, the requirement that the developer sell units below market rate, *including the City's reservation of an option to purchase the below market rate units*, is similar to a fee, dedication, or reservation.

(*Id.* at 1207 [emphasis added].) The Court concluded that the reservation by the City of the option to purchase the set aside units was "a sufficiently strong interest in property" to qualify as an exaction under section 66020 of the Act and thereby trigger the notice and protest requirements. (*Ibid.*) It did

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Cal.4th at 903 (conc. & dis. opn. of Kennard, J.), in *Sterling Park* there was no need to determine the constitutional standard because the Court addressed only the construction of the Act.

not decide whether an in-lieu fee or below-market-rate set-aside requirement in an inclusionary housing ordinance of general application (whether denominated an exaction or something else) necessitated an elevated standard of review for purposes of a constitutional analysis. (*Id.* at 1209)

Indeed, "exaction" is a perilously imprecise term, and its assignment to a development condition does not serve as the touchstone for determining the constitutional standard of review for local legislation. As this Court pointed out in *Sterling Park*, courts have had to resort to dictionaries and the rule of *ejusdem generis* to parse the meaning of the term.[10] (*Sterling Park, supra*, 57 Cal.App.4th at 1204.) The definitions provide little guidance because the dictionaries narrowly define exactions as something not lawful. (*Ibid.*) Yet, the Mitigation Fee Act's use of "exaction" does not imply that exactions are *per se* unlawful. In fact, the purpose of the Act is to ensure that any exactions imposed on development are imposed lawfully. (*Id.* at 1205 [citing *Ehrlich, supra*, 12 Cal.4th at 864].)

[10] The treatises are likewise uncertain regarding the meaning of the term. One explains: "The definition is expansive. It includes . . . [t]he process by which developers are required, as a condition of development approval, to dedicate sites for public or common facilities; construct or dedicate public or common facilities; . . . or otherwise provide other specifically agreed upon public amenities." (William W. Abbot, et al., EXACTIONS AND IMPACT FEES IN CALIFORNIA, ch. 2, *Defining the Terms*, p. 15 (Solano Press, 3rd ed. 2012).) Another book from the same publisher indicates the term is generally used in the contest of property dedication or impact fee requirements. (Cecily T. Talbert, CURTAIN'S CALIFORNIA LAND USE AND PLANNING LAW, ch. 12, *Exactions: Dedications and Development Fees,* p. 353 (Solano Press, 33rd ed. 2013).)

CBIA suggests that, under *Sterling Park*, a legislatively enacted below-market-rate unit set-aside is a form of exaction that must be held to a stricter standard than required for review of other local actions exercised pursuant the police power. (POB at pp. 25-28.) According to CBIA, this class of development conditions must be reasonably related to the "deleterious public impact" of the development rather than any other legitimate purpose that undergirded the local legislation. CBIA is essentially attempting to achieve via another route what this Court rejected in *San Remo Hotel* –an extension of the *Nollan/Dolan* heightened standard of review to ordinances of general application any time a condition required by an ordinance can be deemed an "exaction." (*San Remo Hotel, supra*, 27 Cal.4th at 670-671.) CBIA insists that such a condition must have an essential nexus and rough proportionality to a direct impact of the development regardless of the purpose of the set-aside. (POB at pp. 25-28.)

In making this assertion, CBIA incorrectly assumes that an exaction within the meaning of section 66020 cannot pass constitutional muster unless it is shown to be reasonably related to the *impact* of development. This Court in *Sterling Park* was careful to distinguish between the purview of the notice and protest requirements of section 66020 and the other requirements of the Mitigation Fee Act. A development regulation may

constitute an "other exaction" for purposes of triggering the notice and protest procedures of section 66020, but the Court refrained from deciding whether all other exactions would have to satisfy the nexus requirements of the Act, let alone the essential nexus/rough proportionality requirements of *Nollan/Dolan*. (*Sterling Park, supra* 57 Cal.4th at 1207.) As the Court explained in *Ehrlich*, it construed the Act's reasonable relationship test as "consistent with the high court's decisions in *Nollan* and *Dolan* so that *a development fee imposed pursuant to the act*, and that satisfies its requirements, will not be subject to challenge on constitutional grounds." (*Ehrlich, supra*, 12 Cal.4th at 867 [emphasis added].) "[T]he term "reasonable relationship" embraces both constitutional and statutory meanings which, for all practical purposes, have merged *to the extent* that the *Dolan* decision applies to development fees. . . ." (*Ibid.* [emphasis in original].)

The Ordinance authorizes the City's inclusionary housing guidelines to include options to purchase, which were held in *Sterling Park* to be interests in property constituting exactions under section 66020. (AA 700-701 [San Jose Mun. Code, § 5.08.600(A)]; *Sterling Park, supra*, 57 Cal.4th at 1207.) But the Ordinance does not itself reserve a purchase option in the City or otherwise require divestment of an interest in property. At most, if

the City were to require reservation of an option to purchase for approval of a specific development, the *Sterling Park* decision may require that the City follow section 66020 notice and protest procedures.[11]

**4. The High Court's *Koontz* Decision Applied *Nollan/Dolan* Scrutiny to Ad Hoc Exactions but Did Not Extend It to Ordinances of General Application.**

CBIA argues that the U.S. Supreme Court decision in *Koontz* compels this Court to hold the in-lieu fee provision of the Ordinance to a heightened "intermediate" reasonable relationship test, that, in CBIA's view, the Court imposed in *San Remo Hotel*. (POB at p. 37.) CBIA suggests that, because *Koontz* extended *Nollan/Dolan* scrutiny to the ad hoc in-lieu fees required by a water management district, the case casts doubt on this Court's decision in *Ehrlich* that development fees of general application are not subject to *Nollan/Dolan* scrutiny. However, *Koontz* said nothing to warrant

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[11] CBIA also asserts that the Ordinance's authorization of the City's recording deed restrictions and deeds of trust to enforce the affordability restrictions on below-market units effectively conveys to the City a recorded lien. (POB at p. 29.) Nothing, however, is conveyed. The recorded instruments merely enforce conformance with the price and use restrictions validly imposed by the Ordinance so that the owners of below-market-rate units to not reap a windfall by selling at market price. (AA 700-702 [San Jose. Mun. Code, § 5.08.600].) The restriction ensures the property will not be illegally conveyed without the restrictions (and is the standard mechanism for local governments to ensure conformance with a wide array of development conditions). (AA 702-706 [San Jose Mun. Code, §§ 5.08.610 , 5.08.710].)

overturning *Ehrlich* and extending heightened scrutiny to legislatively imposed development fees. (*Koontz, supra*, 133 S.Ct. at 2599.) In *Koontz,* the in-lieu mitigation fees at issue were not based on generally applicable local legislation but, rather, were imposed as a condition of a permit approval for one development. (*Ibid.*) And, unlike the in-lieu fee in the Ordinance, which is an alternative to a legislated set-aside requirement, the fee in *Koontz* was an alternative to a demanded ad hoc dedication of land. (*Ibid.*)

CBIA once again tenders an artificial distinction between its so-called "intermediate" standard that it contends applies to development fees and a lesser "police power standard." (POB at p. 35) But, as Justice Mosk observed in his concurrence in *Ehrlich* after reviewing many kinds of legislated development fees, including taxes, aesthetic fees, impact fees and user fees: "[T]he degree of scrutiny is not appreciably different. Courts will for federal constitutional purposes, defer to the legislative capacity of the states and their subdivisions to calculate and charge fees designated for legitimate government objectives unless the fees are plainly arbitrary or confiscatory." (*Ehrlich, supra*, 12 Cal.4th at 897 [conc. opn. of Mosk, J].)

*Koontz* found that a local water district's discretionary demand of a payment in lieu of a dedication of real property amounted to an

unconstitutional condition for issuance of a development permit triggering the heightened intermediate scrutiny of *Nollan/Dolan*. (*Koontz, supra*, 133 S.Ct. at 2594-2595.) However, this has been the law in California since this Court's decision in *Ehrlich,* which held that the *Nollan/Dolan* tests apply to monetary fees imposed on an ad-hoc basis as a condition for approval of a development application. (*Ehrlich, supra*, 12 Cal.4th at 867-868.)

The instant case is decidedly not a case of the imposition of ad hoc unconstitutional conditions. San Jose's Inclusionary Housing Ordinance provides for a non-discretionary in-lieu fee as one alternative to its 15 percent below market unit set-aside requirement. As legislation of general application rather than an individualized fee imposed on a developer on an ad-hoc basis after the developer has applied for a permit, as was the case in *Koontz*, *Nollan*, and *Dolan*, the Ordinance does not present the same possibility of abusive leveraging of the permit power to unconstitutionally condition permit approval on a previously undisclosed fee. Justice Alito explained in *Koontz* that the central concern of *Nollan* and *Dolan* was "the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value

of the property." (*Koontz, supra*, 133 S.Ct. at 2600 [emphasis added]; *see also Dolan, supra*, 512 U.S. at 385 [noting that "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel"].) Similarly, in *Ehrlich*, this Court noted that Justice Scalia's concern in *Nollan* was that "such a discretionary context presents an inherent and heightened risk that local government will manipulate the police power to impose conditions *unrelated* to legitimate land use regulatory ends. . . ." (*Ehrlich, supra*, 12 Cal.4th at 868 [emphasis in original]; *see also San Remo Hotel, supra*, 27 Cal.4th at 666-667.)

As some commentators have pointed out, *Nollan/Dolan* heightened scrutiny for discretionary land dedication and fee requirements arose in part out of a concern that an application of the reasonable relationship test by itself to such requirements could dilute the means-end requirements of the "substantially advance" test set out in *Agins v. City of Tiburon* (1980) 447 U.S. 255, 260. (*See* Timothy M. Mulvaney, *The Remnants of Exaction Takings* (Spring 2010) 33 Environmental Law & Policy J. 189, 199, 204-205.) The concern was similar to the purported concern of CBIA here—that the basic reasonable relationship test would be used to substitute a police power objective for the actual purpose of effectuating a regulatory taking without compensation. (*Ibid.*) *Lingle v. Chevron U.S.A., Inc.* (2005) 544

U.S. 528 ("*Lingle*"), however, abrogated the focus on the means-end analysis by dispensing with the substantially advance test;[12] instead, the court held a regulatory takings challenge to the application of a local ordinance is subject to the test laid out in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104 ("*Penn Central*"), which places a greater burden on the party challenging the ordinance. Under *Penn Central,* a litigant attacking legislation as a regulatory taking must demonstrate the law causes a severity of economic harm that is confiscatory given the *particular* circumstances of the case. (*Id.* at 124-125.) Neither *Lingle* nor *Koontz* did anything to extend the *Nollan/Dolan* test to facial attacks on development regulations of general application.

In contrast to the in-lieu fee considered in *Koontz, San* Jose's Ordinance provides no discretion to the City to increase the in-lieu fee on an ad hoc basis. As an ordinance adopted through the legislative process, moreover, it necessarily discloses the formula for determining the fee in advance of the permitting process. The in-lieu fee is determined based on a calculation of the cost of developing the affordable units otherwise required

[12] And as the Court pointed out, means-end scrutiny also carries strong potential for abuse by plaintiffs. "[S]erious practical difficulties" ensue if courts must conduct "heightened means-end review of virtually any regulation of private property." (*Lingle*, *supra*, 544 U.S.at 544.)

by the Ordinance's set-aside provision. (AA 689-692 [San Jose Mun. Code § 5.08.520].) (*See also* section VI.C.2. c., *infra.*)

### C. San Jose's Inclusionary Housing Ordinance Is a Valid Exercise of Police Power Because It Is Reasonably Related to Its Legitimate Purposes.

#### 1. The Broad Purposes of the Ordinance Are Legitimate Public Purposes.

The threshold question in determining whether a legislative enactment is a valid exercise of the jurisdiction's police power is whether the purpose underlying the law is a "legitimate state interest." (*Home Builders, supra,* 90 Cal.App.4th at 195.) There is no serious debate as to whether the purposes of San Jose's inclusionary ordinance pass this threshold. As this Court has held, the assistance of low and moderate-income households with their housing needs is recognized in this state as a legitimate governmental purpose. (*Santa Monica Beach, supra,* 19 Cal.4th at 970 [citing Gov. Code, § 65583(c)(2)].)

> As noted in *Home Builders* . . .
>
> . . . creating affordable housing for low and moderate income families is a legitimate state interest. Our Supreme Court has said that the "assistance of moderate-income households with their housing needs is recognized in this state as a legitimate governmental purpose." This conclusion is consistent with

> repeated pronouncements from the state Legislature which has declared that "the development of a sufficient supply of housing to meet the needs of all Californians is a matter of statewide concern," and that local 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."

(*Home Builders, supra*, 90 Cal.App.4th at 195 [citing, *inter alia*, *Santa Monica Beach, supra*, 19 Cal.4th at 970]; *see also Mead v. City of Cotati* (N.D. Cal. Nov. 19, 2008) No. C 08-3585 CW, 2008 WL 4963048, at *10, *aff'd* (9th Cir. 2010) 389 Fed. Appx. 637, cert. denied (2011) 131 S. Ct. 2900 [finding that the purposes of Cotati's inclusionary housing ordinance were legitimate public purposes within the police power. The purposes included encouraging the development of affordable housing, offsetting the demand on housing created by new development, mitigating environmental and other impacts from development by protecting the economic diversity in the City's housing stock, reducing traffic, promoting jobs/housing balance and implementing policies of the housing element of the general plan].) Indeed, CBIA has repeatedly conceded at trial and on appeal, as well as in its Opening Brief to this Court, that "increasing the supply of affordable

housing" is a "valid public purpose." (POB at p. 11.)

San Jose's Inclusionary Housing Ordinance's purposes fit squarely within this legislative mandate. By its terms, the Ordinance seeks "to enhance the public welfare" and further the City's General Plan goals by ensuring that the City can accommodate its need for housing for its workforce, accommodate its need for housing its lower-income residents, and assist in addressing the regional need for housing. (AA 765-770 [San Jose Mun. Code, §§ 5.08.010, 5.08.020].) The Ordinance endeavors to accomplish these objectives without over-concentration of affordable housing in one or a few areas of San Jose in order to achieve a more racially and economically balanced community. (*Ibid.*)

### 2. The Requirements of the Ordinance Are Reasonably Related To Its Purposes.

The City established a substantial factual basis linking requirements of the Ordinance to the important and legitimate purposes described above. CBIA focuses on the below-market-rate unit set-aside requirement and alternative in-lieu fees. The Ordinance, like most other inclusionary housing ordinances, however, is a blend of different types of local regulations and fees. These ordinances regulate the use, users, and price of a proportion of all new residential developments; and they contain alternatives that include off-site development, in-lieu fees, acquisition of existing units, rental

assistance for existing units and land dedications. (*See* AA 686-700 [San Jose Mun. Code §§ 5.08.500 – 5.08.570].); *see also* section III.A.1-3, *infra.* San Jose's Ordinance has all of these features, and all are reasonably related to the broad purposes of the Ordinance. (AA 686-700 [San Jose Mun. Code, §§ 5.08.500 – 5.08.570].)

CBIA has not offered any evidence contradicting the factual basis for the Ordinance, choosing instead to rest on its argument that the facts do not demonstrate a link to any "deleterious public impact" of new residential development.

**(a) The city-wide set-aside proportion**

In *Livermore*, this Court described the standard of review and process to determine whether a land use ordinance falls within the authority of the police power. It began its analysis by reaffirming "the established constitutional principle that a local land use ordinance falls within the authority of the police power if it is reasonably related to the public welfare." (*Livermore, supra*, 18 Cal.3d at 607.) *Livermore* articulates the general rule that ordinances are presumed to reasonably relate to the general welfare[13] if it is "fairly debatable" that the requisite relationship exist. (*Id.* at

[13] *Livermore* determined that for the land use measures at issue, the appropriate public welfare to consider was the "regional welfare" because the measures' effects went beyond municipal boundaries. *Livermore, supra,* 18 Cal.3d at 609-610; As discussed *infra,* one purpose of the

605.) The Court explained that a reasonable relationship is established if there is reasonable factual basis for the relation to the public welfare. (*Id.* at 609.) It is the burden of the challenging party, however, "to present the evidence and documentation" showing the lack of factual basis. (*Ibid.*)

The Ordinance provides clear factual basis for its requirement that 15 percent of for-sale units developed throughout the City be affordable to very low-, low- and moderate-income households. The Ordinance first establishes that *60 percent* of the City's share of the 2007-2014 Regional Housing Needs Allocation (RHNA) for new housing assigned by the Association of Bay Area Governments (ABAG) pursuant to Government Code §65584 is for housing affordable to extremely low-, very low-, low-, and moderate-income households. (AA 765-768 [San Jose Mun. Code, § 5.08.010].) The findings indicate, moreover, that the this allocation represents a substantial increase from the previous (1999-2006) planning period, with the low-income and very low-income need increasing by 45 percent and 121 percent, respectively. (*Ibid.*) The Ordinance continues along these lines, finding that 46 percent of San Jose homeowners and 48 percent of the city's renters are overpaying for housing. (*Ibid.*) Finally, the Ordinance specifies that "nearly 27,000 Extremely Low Income, 23,000

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Ordinance is to address San Jose's share of the regional need for housing.

Very Low Income, and 20,000 Lower Income Households" were either paying more than 30 percent of their income for housing or living in overcrowded conditions or both.[14] (*Ibid.*)

These findings provide a solid factual basis for the *need* for the 15 percent requirement. On these facts, the City could have justified a higher percentage. The City, however, also considered the *effect* of the set-aside requirement on the economics of development. It settled on the 15 percent proportion after extensive analysis and stakeholder feedback, which included input from market rate housing developers and their advocates. (*See* AA 1577-1578, 1604-1605, 1762-1774, 1819-1859, 1956-1957, [Rosen Report, *supra*, analyzing advantages and disadvantages of various percentage requirements at various levels of affordability].) In fact, the City rejected a 20 percent inclusionary housing requirement in response to stakeholder feedback. (AA 1199-2000 [Attachment B to the Memorandum from Leslie Krutko, Director of Housing, to Community and Economic Development Committee (Nov. 19, 2008), at pp. 5-6 of Chart titled Comments Received During The Public Outreach Process (detailing stakeholder feedback on the proposed inclusionary housing policy)].)

[14] The findings in the ordinance explain that "[p]roviding decent housing at affordable costs allows households to utilize their resources for other necessary pursuits, such as education, food, investment, and saving for retirement." (AA 765-768 [San Jose Mun. Code, § 5.08.010].)

The Ordinance's base inclusionary housing provision requires affordable units to be included in each market rate unit development and thereby directly furthers the purpose of the San Jose 2020 General Plan that affordable housing will be dispersed throughout the city "in order to avoid concentrations of low income households and encourage racial and economic integration." (AA 661 [San Jose Mun. Code, § 5.08.110]; *see also* AA 657-660 [San Jose Mun. Code, §§ 5.08.010 -5.08.020].) The requirement helps ensure that future development will not (deleteriously) exacerbate existing patterns of segregation and will contribute to creating more inclusive neighborhoods.

The 15 percent obligation finds further support in the statewide inclusionary housing requirement of California's Community Redevelopment Law (CRL). (HEALTH & SAF. CODE, §§ 33000 *et seq.*) Under the CRL, at least 15 percent of all housing developed in a redevelopment area must be affordable to very low, low and moderate income households. (*Id.* at § 33413.) If a local redevelopment agency is involved in a residential development at least *30 percent* of the units must be affordable. (*Ibid.*)

*Stanislaus* offers a helpful comparison in assessing the reasonableness of the 15% set aside. The County's agricultural element of its general plan

included a policy to preserve its limited supply of agricultural land that was critical to its economy by requiring 100 percent replacement of agriculture land rezoned for development. (*Stanislais, supra,* 190 Cal.App.4th at 587-588.) Like CBIA here, the BIA did not question the legitimacy of the public interest served. (*Id.* at 592.) Like CBIA here, the BIA argued that requirement did not demonstrate a reasonable relationship to the public interest goal. (*Ibid.*) The court found, however, that on its face the 100 percent replacement requirement was reasonably related to the legitimate public purpose of preserving farmland to protect the County's agricultural economy. (*Id.* at 593.) Here, the City determined that future residential development of land throughout the City must include affordable housing to meet the needs of its low- and moderate-income households and workforce. It enacted an ordinance requiring future residential developments to include only 15 percent affordable housing or provide an in lieu fee related to the cost of developing that housing elsewhere in the city. The 15 percent requirement is reasonably related to the purpose of ensuring the City's limited supply of developable land will include affordable housing to accommodate existing and future residents and workers.

Accordingly, the basis for the 15 percent obligation is adequately demonstrated in the San Jose's IHO and supported by the record. In the

words of the Court in *Livermore,* the point cannot even be said to be "fairly debatable." (*See Livermore, supra*, 18 Cal.3d at 605.)

**(b)The in-lieu fee and other alternative compliance options**

In *San Remo Hotel,* this Court found the in-lieu fee for San Francisco's residential hotel conversion ordinance reasonably related to its purpose because it was set by formula and proportional to the cost of replacing the converted residential rooms. (*San Remo Hotel, supra*, 27 Cal.4th at 668-671.) The San Jose in-lieu fee is likewise formulaic and proportional to the cost of the affordable units. The Ordinance provides that the fee is directly related to the cost of developing the forgone below market-rate unit and must be used for that purpose: the fee "shall be no greater than the difference between the median sales price of an attached Market Rate Unit in the prior thirty six (36) month reporting period specified in the Inclusionary Guidelines and the Affordable Housing Cost. . . ." (AA 689-692 [San Jose Mun. Code, §§ 5.08.520].) The fee is redetermined by the City Council annually based on analysis of current costs of construction and administration. (AA 691 [San Jose Mun. Code, § 5.08.520(C)].) Finally, the fee must be used for the development of affordable housing. (AA 692 [San Jose Mun. Code, § 5.08.520(F)].)

The other alternative compliance options are similarly reasonably related to both the Ordinance's stated purposes and its underlying inclusionary housing requirement. Each is designed to be a meaningful and comparable substitute for the affordable units that the developer has opted to forego. The land proposed for dedication for below market-rate unit development in the alternative to on-site development must have a value that is equivalent to the amount of the in-lieu fee alternative and must comply with the City's Affordable Housing Dispersal Policy or be located near transit. (AA 692-694 [San Jose Mun. Code, § 5.08.530].) Surplus inclusionary unit credits, acquisition and rehabilitation of affordable units, and HUD restricted units must be related to the underlying on-site unit requirement. (AA 694-699 [San Jose Mun. Code, §§ 5.08.540 -5.08.560].) The Ordinance also permits a developer to combine alternative methods providing maximum flexibility. (AA 700 [San Jose Mun. Code, § 5.08.570].)

**(c) The price restrictions**

"In the context of price control, which includes rent control, courts generally find that a regulation bears 'a reasonable relation to a proper legislative purpose' so long as the law does not deprive investors of a 'fair return' and thereby become 'confiscatory.'" (*Kavanau v. Santa Monica*

*Rent Control Bd.* (1997) 16 Cal.4th 761, 771 (citations omitted); *Santa Monica Beach, supra*, 19 Cal.4th at 967.) After discussing the Court's analysis of the proper application of the *Nollan/Dolan* standard of review in the context of rent control, the Court in *Santa Monica Beach* rejected the plaintiff's contention that *Nollan/Dolan* scrutiny applies to rent control ordinances. "Rather, 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." (*Santa Monica Beach, supra*, 19 Cal.4th at 967.)

The Ordinance consequently ensures that its price restrictions on the set aside units may not deprive developers of a reasonable return on investment. Just as in the City of Napa's ordinance (*Home Builders, supra*, 90 Cal.App.4th at 194), the San Jose ordinance provides the City the ability to waive, adjust or reduce the requirements imposed by the ordinance if application of the requirements would result in a taking in violation of the United States or California Constitutions. (AA 706-707 [San Jose Mun. Code, § 5.08.720].)

**(d) The user restrictions**

The Ordinance restricts the purchasers or renters of the below market-rate units to households meeting the requisite income category for which

those units were developed. (AA 700-702 [San Jose Mun. Code, § 5.08.600].) Ordinances are generally held to a higher standard "when they command inquiry into who are the users." (*City of Santa Barbara v. Adamson* (1980) 27 Cal.3d 123, 133.) The Court made that statement, however, in the context of a zoning law that prohibited more than five unrelated persons from living together in certain zones. (*Id.* at 127). *Adamson* held that the prohibition interfered with the right to marriage and the family derived from the right to privacy. (*Id.* at 129-130.) No right to privacy issue is implicated here because the ordinance limits users of the below market units by income, not implicating any fundamental right. Instead, California law expressly authorizes local government to extend "preferential treatment to . . . residential developments or emergency shelters intended for the occupancy by persons and families of low and moderate income. . . ." (Gov. Code, § 65008(e)(2).)[15]

[15] Intervenors also note that nothing in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396, 1410-1411, prohibits local jurisdictions from restricting occupancy of a portion of new development to lower and moderate income households. *Palmer* held only that the Costa-Hawkins Rental Housing Act (CIV. CODE §§ 1954.50 *et seq.*) preempted the power of local government to place rent restrictions on below market units in new rental housing developments. It did not prohibit Los Angeles from enforcing limiting the occupancy of those units to the households with the targeted incomes.

### 3. The Requirements Of The Ordinance Are Also Reasonably Related to the "Deleterious Public Impact" Of New Development.

In one sense, the debate over whether the reasonable relationship test requires a relationship between some "deleterious public impact" of market rate housing development and the inclusionary set-aside is more about the nature of the impact rather than the presence of an impact. CBIA argues that the new development must be shown to cause the need for the specific set-aside, whereas one goal of the City for the set-aside is to ensure that new residential development does not negatively impact its ability to make adequate provision for its existing and projected affordable housing needs by failing to include affordable housing. CBIA provides no authority compelling the level of causation it seeks for ordinances of general application.

As explained above, there is no serious dispute that ensuring the inclusion of affordable homes in a community's housing stock as that housing stock develops is a legitimate public purpose. New residential development that uses the community's finite land resources but fails to include below-market rate housing, therefore, will have a negative impact on that legitimate purpose. Viewed in this light, the Ordinance's set-aside and

in-lieu fee option meet the reasonable relationship test as articulated specifically for impact mitigation ordinances in *San Remo Hotel.*

The purposes of the Ordinance, in fact, encompass assisting in the alleviation of "the use of available residential land solely for the benefit of households that are able to afford market rate housing . . . and . . . the impacts of the service needs of households in new market-rate residential development by making additional affordable housing available." (AA 659-660 [San Jose Mun. Code, § 5.08.020].) They also include encouraging "the geographic dispersal of affordable housing throughout the City to enhance the social and economic well-being of all residents . . . ." (AA 655--660 [San Jose Mun. Code, §§ 5.08.010, 5.08.020].)[16] Market-rate development occurring without inclusionary affordable units compromises the City's ability to meet its policy goals as set forth in its general plan and elsewhere, negatively impacts the City's ability to meet its share of regional housing needs, and exacerbates an existing shortage of workforce housing. (*See, e.g.*, AA 655-658 [San Jose Mun. Code, § 5.08.010]; AA 2175-2176 [City of San Jose General Plan, pp. 50-51]; AA 2723-2724 [Five-Year Housing Investment Plan FY 2007 – FY 2012, pp. 16-17].)

[16] This dispersal policy is found throughout the San Jose 2020 General Plan and related policies. (AA 655-658 [San Jose Mun. Code, §5.08.010].)

The Ordinance's stated findings reflect these purposes:

1. Rising land prices have been a key factor in preventing development of new affordable housing. New market-rate housing uses available land and drives up the price of remaining land. New development without affordable units reduces the amount of land development opportunities available for the construction of affordable housing.
2. New residents of market-rate housing place demands on service provided by both public and private sectors, creating a demand for new employees. Some of these public and private sector employees needed to meet the needs of the new residents earn incomes only adequate to pay for affordable housing. . . .

(AA 658 [San Jose Mun. Code, §5.08.010(F)(1)-(F)(2)].)

In summary, the Ordinance and the record establish that both the existing and future need for affordable housing in the City is unmet and that future housing development must necessarily include below-market-rate housing if the City hopes to surmount its goal to overcome this critical exclusion. The Ordinance put in place a limited, economically feasible set-aside for affordable housing that is actually lower than the existing and projected needs would justify. The Ordinance, therefore, is reasonably

related to alleviation and avoidance of the negative impacts of new residential development.

## VII. CONCLUSION

As Justice Mosk said when considering the validity of park land dedication requirement in the seminal *Associated Home Builders v. City of Walnut Creek*:

> We see no persuasive reason in the face of these urgent needs caused by the 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.

(*Associated Home Builders, Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 639-640; s*ee also Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 628.)[17] Likewise, there is no reason in the face of the

[17] Twenty-five years later Justice Mosk, in his concurrence in *Ehrlich, supra*, 12 Cal.4th at p. 897, succinctly explained the narrow application of test for an impact fee: "*If* the fee is imposed to mitigate the impacts of

urgent existing and projected need for affordable housing and the scarcity of land to hold that San Jose's inclusionary housing ordinance may be justified only upon the ground that the particular developer will, solely by its development, increase the need for affordable housing. This Court should affirm the opinion of the Court of Appeal.

Dated: January 31, 2014

Respectfully submitted,

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development, then it will be upheld if there is a reasonable relationship between the fee and the development impact." (Emphasis added.)

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## CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court Rule 8.204(c)(1), counsel for Appellants and Defendant Intervenors certifies that exclusive of this certification, the Appellant/Defendant Intervenors' Answer Brief on the Merits contains 12,181 words, as determined by the word count of the computer program used to prepare the brief.

Dated: January 31, 2014

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## DECLARATION OF SERVICE BY MAIL

I, Tammy Bell, declare as follows:

I am a resident of the State of California, residing or employed in Palo Alto, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 650 Page Mill Road, Palo Alto, California, 94304.

On January 31, 2014, true copies of **APPELLANT/DEFENDANT INTERVENORS' ANSWER BRIEF ON THE MERITS** 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 Palo Alto, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 31st day of January, 2014, at Palo Alto, California.

Tammy Bell