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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

BUILDING INDUSTRY ASSOCIATION OF CENTRAL CALIFORNIA et al., Plaintiffs and Appellants, v. CITY OF PATTERSON, Defendant and Respondent.	F054785 (Super. Ct. No. 610611) **ORDER MODIFYING OPINION, AND DENYING REHEARING** [NO CHANGE IN JUDGMENT]

THE COURT:

It is ordered that the opinion filed herein on January 30, 2009, and modified on March 2, 2009, be further modified as follows:

1. On page 12 of the opinion filed January 30, 2009, in the second full paragraph beginning "Based on this interpretation" delete the second sentence.

2. Omit item No. 7 of the modification filed March 2, 2009.

3. Beginning on page 12 and continuing to page 14 of the opinion filed January 30, 2009, delete the subheading, paragraphs and footnotes of part III.D. and

insert the following subheading, paragraphs and footnotes, which will require renumbering of subsequent footnotes:

D. Applicable Legal Requirements

In *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 663-664 (*San Remo*), owners of a hotel sued to invalidate a San Francisco ordinance limiting the conversion of residential hotel rooms (usually occupied by low-income tenants) to tourist hotel rooms. The purpose of the ordinance was to preserve the availability of residential hotel rooms for the city's low-income residents who, otherwise, would have had no viable housing options. To achieve that goal, the ordinance required a hotel converting a residential hotel unit into a tourist unit to replace the residential unit elsewhere, pay a fee in-lieu of providing the replacement unit, or take other action that would further replacement. Pursuant to the ordinance, the city issued the hotel owners a conditional use permit authorizing the conversion of hotel rooms only upon compliance with one of those alternatives.

The hotel owners filed suit, alleging the ordinance was unconstitutional because it violated the state takings clause. They argued that *Nollan/Dolan/Erhlich*[12] scrutiny applied to the court's review of the replacement in-lieu fee. The *Nollan/Dolan/Erhlich* heightened level of constitutional scrutiny inquires whether an "essential nexus" and "rough proportionality" are shown between an ad hoc exaction, imposed as a condition of development, and the impact of that development. (*San Remo, supra*, 27 Cal.4th at pp. 665-667, 671.) The *San Remo* court refused to apply this heightened level of scrutiny to the San Francisco ordinance, stating:

> "Nor are plaintiffs correct that, without *Nollan/Dolan/Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. (Gov. Code, § 66001; *Ehrlich, supra*, 12 Cal.4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640.) … While the

[12] *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391; *Nollan v. California Coastal Com.* (1987) 483 U.S. 825, 837; *Erhlich v. City of Culver City* (1996) 12 Cal.4th 854.

> relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees subject to *Ehrlich*, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster." (*San Remo*, *supra*, 27 Cal.4th at p. 671.)[13]

Similarly, the court in *Action Apartment Assn. v. City of Santa Monica* (2008) 166 Cal.App.4th 456, refused to apply the *Nollan/Dolan/Ehrlich* test when analyzing the facial validity of an ordinance of general application that required construction of affordable multifamily housing as a condition to development of multifamily ownership projects. (*Action Apartment Assn. v. City of Santa Monica*, at pp. 469-471.)[14]

Upon examination, it appears that the affordable housing in-lieu fee challenged here is not substantively different from the replacement in-lieu fee considered in *San Remo*. Both are formulaic, legislatively mandated fees imposed as conditions to developing property, not discretionary ad hoc exactions. (*San Remo, supra*, 27 Cal.4th at p. 671.) We conclude, for this reason, that the level of constitutional scrutiny applied by the court in *San Remo* must be applied to City's affordable housing in-lieu fee and is one of the legal requirements incorporated into the Development Agreement.

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[13]The statutory provision referenced in this quote states its test this way: "In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." (Gov. Code, § 66001, subd. (b).) We note that section 66001 expressly applies to fees imposed to mitigate the effects of development on "public facilit[ies]." We express no opinion on the question whether section 66001, or the Mitigation Fee Act in general (see Gov. Code, § 66000.5), applies to affordable housing in-lieu fees.

[14]We note that the court in *Home Builders Association v. City of Napa* (2001) 90 Cal.App.4th 188 (*Home Builders*) considered a takings clause challenge to the facial validity of an inclusionary zoning ordinance and upheld its validity. In this appeal, Developer has attempted to distinguish *Home Builders* by arguing that case did not involve a development agreement, vested rights or judicial review in an "as applied" context. Because Developer has not argued that the affordable housing in-lieu fee is facially invalid, we do not decide the question of facial invalidity here. We also note that *Home Builders* was decided about nine months before the California Supreme Court decided *San Remo*.

Accordingly, we conclude that the increase in the fee is not "reasonably justified" as required by the Development Agreement unless there is a reasonable relationship between the amount of the fee, as increased, and "the deleterious public impact of the development." (*San Remo, supra,* 27 Cal.4th at p. 671.)

City, we note, argues for no different test. Instead, without being more specific or explaining the point in any way, City merely states that the Fee Justification Study "clearly shows the need for affordable housing generated by the new construction." Despite the lack of an argument from City addressed to the reasonable relationship test, we have examined the cited Fee Justification Study in detail, as well as Moran's declaration and other documents, to determine whether the test is satisfied by the information provided. In the process, we have located nothing that demonstrates or implies the increased fee was reasonably related to the need for affordable housing associated with the project.

The record in this matter reveals no reasonable relationship between the extent of City's affordable housing need and development of either (1) the 214 residential lots that constitute the two subdivisions owned by Developer or (2) the 3,507 unentitled lots identified in the Fee Justification Study. Instead, the Fee Justification Study reveals that the in-lieu fee of $20,946 per market rate unit was calculated based on an allocation to City of 642 affordable housing units, out of the total regional need for affordable housing identified in the 2001-2002 Regional Housing Needs Assessment for Stanislaus County. No connection is shown, by the Fee Justification Study or by anything else in the record, between this 642-unit figure and the need for affordable housing associated with new market rate development. Accordingly, the fee calculations described in the Fee Justification Study and Moran's declaration do not support a finding that the fees to be borne by Developer's project bore any reasonable relationship to any deleterious impact associated with the project.

For this reason, we are persuaded that the increased fee of $20,946 violated section 4.5(d)(ii) of the Development Agreement because it was not "reasonably justified" within the meaning of that provision.[15]

[15]The record in this case appears fully developed as to the reasoning process City used when increasing the fee. Thus, this is not a case where the question whether the increase was "reasonably justified" was resolved based on the sufficiency of the proof. In other words, the actual reasoning process City used does not satisfy the contractual standard set by the parties.

There is no change in the judgment.

Respondent's petition for rehearing is denied.

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DAWSON, J.

WE CONCUR:

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VARTABEDIAN, Acting P.J.

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CORNELL, J.