IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S212072

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE,

Respondent.

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

Intervenors.

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

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

PETITIONER'S OPENING BRIEF

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QUESTION PRESENTED FOR REVIEW

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

INTRODUCTION

The answer to the question presented is yes; the court below erred in holding otherwise. This Court should reverse the court below and affirm the judgment of the trial court.

The City of San Jose (City or San Jose) faces a significant shortage of housing that is affordable to moderate and low-income households. The City has identified a range of potential funding sources to increase its existing stock of affordable housing, most of which involve generally applicable taxes. Appellants' Appendix (AA) 1214-1217 (Attachment C, listing "Potential Revenue Sources," to November 19, 2008 Memorandum from San Jose Director of Housing Leslye Krutko to San Jose Community and Economic Development Committee).

Rather than pursuing these sources of funding to increase its stock of affordable housing, the City shifted the responsibility for meeting that public need to a limited subgroup of property owners. The City did so by enacting

its Inclusionary Housing Ordinance, No. 28689, San Jose Municipal Code Chapter 5.08 (Ordinance), in violation of the Fifth Amendment to the United States Constitution and Article One, Section Nineteen of the California Constitution. One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960); *see San Remo Hotel*, 27 Cal. 4th at 664 (claims under California Constitution's takings clause analyzed under relevant decisions of this Court and those of United States Supreme Court applying United States Constitution's Takings Clause). At times when limited general tax revenues compete for important public purposes, local governments face the temptation to shift those public burdens onto individual property owners who can be leveraged through permitting processes to meet the public need, even when the property owners' projects do not proximately cause such existing needs. It is most urgent in just these situations that the courts enforce the constitutional ban on development exactions that do not cure impacts proximately caused by the projects on which they are imposed.

The Ordinance is an inclusionary housing law, a type of development exaction in which local governments require new home builders, as a condition

of development permit approval, to set aside a specified percentage[1] of the homes they build from the general market, and instead sell or rent those homes at defined prices to renters or buyers whose eligibility is based on their income relative to an index, usually Area Median Income (AMI). Typically, buyers and renters with incomes at or below specified percentages of AMI are eligible to buy or rent the set-aside homes. *See generally* Adam F. Cray, *The Use of Residential Nexus Analysis in Support of California's Inclusionary Housing Ordinances: A Critical Evaluation*, Goldman School of Public Policy, University of California, Berkeley, Nov. 2011, at 4.[2] While many different local government policies encourage or assist the development of affordable housing, the specific purpose of inclusionary housing laws is to increase the supply of affordable housing *without public subsidies*. *See* Daniel R. Mandelker, *The Effects of Inclusionary Zoning on Local Housing Markets: Lessons from the San Francisco, Washington D.C. and Suburban Boston Areas*, A.L.I.-A.B.A. Land Use Inst., Mar. 2008, at 2 (inclusionary housing

[1] The set-aside percentage varies among different local governments who impose these exactions. In the San Francisco Bay Area, where these exactions are fairly common, the set asides range from 10% to as high as 50% in Cupertino. AA 1223 (Attachment D1-B, "Survey of Inclusionary Housing Ordinances in Santa Clara County" to November 19, 2008 Memorandum from Leslye Krutko to San Jose Community and Economic Development Committee).

[2] *Available at* http://urbanpolicy.berkeley.edu/pdf/Cray.Nov11.pdf (last visited Dec. 4, 2013).

"requires less direct public subsidy than traditional affordable housing programs").[3] Inclusionary housing laws accomplish this purpose by shifting the burden of providing affordable housing from the public generally to specific property owners who seek development permits to build new homes.

In order to retain the resulting supply of privately subsidized affordable housing, inclusionary housing laws generally impose long-term limitations on the re-sale and re-rental of the affordable homes. *See generally* Rick Jacobus & Jeffrey Lubell, *Preservation of Affordable Homeownership: A Continuum of Strategies*, Center for Housing Policy, Apr. 2007, at 5-7.[4] These restrictions typically remain in effect for decades. *See, e.g.*, *Affordable by Choice*, Non-Profit Housing Association of Northern California, 2007, at 27, Table 6 (listing length of continuing affordability requirements for various California jurisdictions).[5]

Inclusionary housing laws frequently require developers to choose among a menu of alternative exactions. These can include providing the affordable homes outside of the development (by building them elsewhere,

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[3] *Available at* http://www.nhc.org/media/documents/IZ_in_SF,_DC,_Boston.pdf ?phpMyAdmin=d3a4afe4e37aae985c684e22d8f65929 (last visited Dec. 4, 2013).

[4] *Available at* http://www.nhc.org/media/documents/Preservation_of_Affordable_Homeownership2.pdf?phpMyAdmin=d3a4afe4e37aae985c684e22d8f65929 (last visited Dec. 4, 2013).

[5] *Available at* http://www.nonprofithousing.org/pdf_attachments/IHIReport.pdf (last visited Dec. 4, 2013).

buying existing homes and providing them as affordable homes, partnering with nonprofit developers of affordable housing, etc), dedicating land of equal value, and paying an in-lieu fee. Cray, *supra*, at 4; *Affordable By Choice*, *supra*, at 9. These alternatives are properly viewed as an integrated program of exactions, the constitutionality of which should be considered as a whole, rather than as separate impositions that may be considered in isolation from each other. *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396, 1411 (2009) ("affordable housing requirements and in lieu fee option are inextricably linked"), *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013) (In-lieu fees "utterly commonplace, and they are functionally equivalent to other types of land use exactions.").

FACTUAL SUMMARY

This case is a facial challenge to the constitutional validity of the Ordinance under the Takings Clauses of the United States and California Constitutions. As such, the relevant facts are the provisions of the Ordinance itself, and the City's record of adoption of the Ordinance. *Tobe v. City of Santa Ana*, 9 Cal. 4th 1069, 1084 (1995) (citing *Dillon v. Mun. Court*, 4 Cal. 3d 860, 865 (1971)); *Shappell Indus., Inc. v. Governing Bd. of Milpitas Unified Sch. Dist.*, 1 Cal. App. 4th 218, 233-34 (1991).

San Jose's Ordinance applies to all new, nonexempt residential housing developments of more than 20 units in San Jose. San Jose Municipal Code

(SJMC) § 5.08.310; AA 0673.[6] The Ordinance defines "inclusionary units" as residential units affordable to buyers and renters earning from extremely low up to moderate incomes, SJMC § 5.08.205, AA 0667, and requires that new for-sale developments set aside 15% of their units as inclusionary units, *id.* § 5.08.400(A)(a), AA 0676. The Ordinance also exacts a 15% affordable set-aside from rental developments, SJMC § 5.08.400(A)(b), AA 0676-77, but the Ordinance suspends these provisions in recognition of the decision in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal. App. 4th 1396 (2009) (Los Angeles affordable housing ordinance pre-empted by vacancy decontrol provisions of Costa-Hawkins Rental Housing Act, Civ. Code § 1954.50, *et seq.*). The rental provisions of the Ordinance will remain suspended unless the *Palmer/Sixth Street Properties* decision is overturned or abrogated by statutory amendments.[7]

In the alternative to setting aside homes in the permitted development, builders may substitute one or more of the following exactions in combination:

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[6] The Ordinance is codified in the San Jose Municipal Code (SJMC), Title 5, Chapter 5.08. Future section references are to the SJMC, *available at* http://sanjose.amlegal.com/nxt/gateway.dll/California/sanjose_ca/sanjosemunicipalcode?f=templates$fn=default.htm$3.0$vid=amlegal:sanjose_ca). *See also* AA 651-709 (copy of the Ordinance submitted to the trial court below).

[7] Assembly Bill 1229 (Atkins) of 2013 would have abrogated *Palmer/Sixth Street Properties*, but was vetoed by Governor Brown on October 13, 2013. *Available at* http://gov.ca.gov/docs/AB_1229_2013_Veto_Message.pdf (last visited Dec. 4, 2013).

(1) Build inclusionary units offsite equal to 20% of the number of market rate units in the development, SJMC § 5.08.510, AA 0687-89.

(2) Pay an in-lieu fee,[8] *id.* § 5.08.520(A), AA 0689-92, which City staff calculated would be approximately $122,000 per inclusionary unit. AA 0944 (Attachment D to October 26, 2009 memorandum from Leslye Krutko to Mayor and City Council, AA 0921-0944.).

(3) Dedicate land suitable for construction of inclusionary units and whose value is at least that of the applicable in-lieu fee. SJMC § 5.08.530(A), AA 0692-93.

(4) Purchase credits from another builder. *Id*. § 5.08.540, AA 0694-95.

(5) Acquire and/or rehabilitate existing units for use as inclusionary units. *Id.* § 5.08.550, AA 0695-97.

[8] The amount of the in-lieu fee is the difference between the median sales price of an attached market rate unit in the prior 36 months and the affordable housing cost for a household of 2½ persons earning no more than 110% of the area median income. SJMC § 5.08.520(B)(1), AA 00689-90.

Inclusionary units are subject to long-term recorded encumbrances that ensure that the homes themselves, or the value of the subsidy provided to the City by way of the exaction, remain part of the City's stock of affordable housing. SJMC § 5.08.600(A), AA 0700-01.

> Affordability documents for for-sale owner-occupied inclusionary units shall also include subordinate shared appreciation documents permitting the city to capture at resale the difference between the market rate value of the inclusionary unit and the affordable housing cost, plus a share of appreciation realized from an unrestricted sale in such amounts as deemed necessary by the city to replace the inclusionary unit.

Id., *see* AA 1250, 1253-55 (November 19, 2008, City staff presentation to San Jose Planning Commission, explaining how shared appreciation mechanism works, and resulting lien on affordable home in favor of City). The long-term affordability restrictions remain in effect for 45 years for for-sale homes and 55 years for rental homes. SJMC § 5.08.600(B), AA 0701; *see* Health & Safety Code § 33413(c)(1)-(2).

The Ordinance also requires the recordation of an Affordable Housing Plan and Agreement against the entire new home development prior to approval of any final or parcel map or issuance of any building permit. SJMC § 5.08.610, AA 0702-05. The Plan and Agreement must identify the manner in which the home builder will comply with the Ordinance, the details of inclusionary units to be provided (including construction and completion schedule), the marketing of inclusionary units and verification of tenant

incomes for rental units, and long-term capital and maintenance funding plans for rental inclusionary units. SJMC § 5.08.610(B), AA 0703-04.

The trial court found no evidence in the record that any of these exactions are reasonably related to any deleterious public impacts of new home building. Order at 6, AA 3353.

PROCEDURAL HISTORY

Plaintiff and Petitioner California Building Industry Association (CBIA) commenced this action by filing its timely Complaint and Petition for Writ of Mandate on March 24, 2010, AA 0001-0074, as a facial challenge to the Ordinance, adopted January 26, 2010, and effective February 26, 2010. AA 0017. The Complaint alleges that the Ordinance violates the standard established in this Court's decision in *San Remo Hotel L.P. v. City & County of San Francisco*, by failing to reasonably relate, in either purpose or amount, to any deleterious impact of new residential development. AA 0010 (Complaint ¶ 27). The Complaint alleges that the City adopted the Ordinance without any evidence in the record of any relationship, reasonable or otherwise, between the exactions imposed by the Ordinance and any adverse impacts of new home building. AA 0007-08 (Complaint ¶¶ 18-19).

On May 9, 2011, the trial court granted leave to intervene to Affordable Housing Network of Santa Clara County, Housing California, California Coalition of Rural Housing, Law Foundation of Silicon Valley, Non-Profit Housing Association of Northern California, The Public Interest Law Project, Southern California Association of Non-Profit Housing, San Diego Housing Federation, and Janel Martinez (Intervenors). AA 0457-58.

The case was tried to the court initially on July 11 and 13, 2013. Reporter's Transcript (RT) 1-98. The evidence at trial consisted of the administrative record of the City's adoption of the Ordinance in four volumes, referred to by the parties as the Stipulated Documents. AA 0740-3110; RT 3-4, 89 (Stipulated Documents offered in evidence).[9] No witnesses testified. CBIA's Opening Trial Brief, filed May 6, 2011 (AA 0306-33), surveys relevant portions of the Stipulated Documents and argues that they contain no evidence of a reasonable relationship between the exactions in the Ordinance and any negative impact of building new homes in San Jose. AA 0316-19 (CBIA's Opening Trial Brief, pp. 6-9). CBIA argued similarly at trial. RT 9-10 (San Jose did not prepare a nexus study to support the Ordinance), 11

[9] The Stipulated Documents appear in Volumes III through XII of the Appellants' Appendix, AA 0740-3110. An index to the Stipulated Documents appears at AA 0743-53. The Stipulated Documents were identified and page numbered for the trial court from SDI000041through SDI 002473, and the four volumes of the Stipulated Documents correspond to AA 0740-1272 (SDI000041-000549), AA 1273-1899 (SDI000550 - 001157), AA 1900-2469 (SDI001158 - 001845), and AA 2470-3110 (SDI001846-002473).

(feasibility study prepared by San Jose is not a nexus study and does not identify impacts of new residential development on need for or availability of affordable housing), 44 (no evidence in the record to support a finding that exactions are related to impact of new residential development), 80 (other cities have prepared nexus studies to support inclusionary housing ordinances, but San Jose did not).

For their part, the City and Intervenors argued consistently in their trial briefs that the Ordinance does not impose exactions, is not subject to *San Remo Hotel*, and is a valid exercise of the police power so long as it is reasonably related to the valid public purpose of increasing the supply of affordable housing. AA 0511, 0514-0517, 0521-22 (City's Trial Brief, pp. 17, 20-23, 27-28), AA 0728 - 0737 (Intervenors' Trial Brief, pp. 12-21). The City and Intervenors stayed with this theory of the case throughout trial, specifically and repeatedly arguing that the Ordinance was not intended to mitigate any negative impacts of new home building. RT 19:17-20 (City), 20:2 (counsel for City: "This is not a mitigation fee case."), 24:22-26 (Intervenors), 25:4-7 (Counsel for Intervenors: "[W]hat we're looking at is not whether market rate housing has some sort of deleterious impact on the community but instead whether what the City has proposed is a valid exercise of its police power."), 26:15-19 (Intervenors), 28:27 - 29:3 (Intervenors), 93:15-20 (Intervenors). The City at trial disclaimed any legal obligation to support the Ordinance with

a nexus study. RT 53:10-14, 87:28-88:8 ("Those are required if the requirement is to mitigate an impact on the project. But this ordinance and the one in *Napa* . . . are not mitigation cases.").

During trial the parties disputed the significance of a consulting report prepared for the City by Rosen and Associates (Rosen Report). CBIA pointed out that the Rosen Study does not establish any negative impacts of new home building on either the need for or supply of affordable housing. Instead, the Rosen Report simply surveys various levels of affordable set-asides in neighboring cities' inclusionary housing ordinances, and assesses the economic impact of various set-aside levels on development projects. RT 11:7-13. The City contended that the Rosen Report provided support for its decision to choose 15% as the set aside level in the Ordinance, while similarly characterizing the Rosen Report as a survey of the economic impact of various set aside levels on new home builders. RT 54:14-25.

The case was submitted at the conclusion of the July 13, 2011, hearing, RT 97, but on October 19, 2011, the trial court set the matter for a further hearing on November 7, 2011, in order to take oral argument on six questions, one of which was whether the City could identify any evidence in the record to establish a reasonable relationship between the requirements of the Ordinance and "any deleterious impacts caused by a new residential

development?" AA 3297 (Trial Court's Order Noticing Vacation of Submission and Order for Further Briefing, p. 3).

In response, CBIA restated its argument that there was not such evidence, because the City had not done a nexus study. AA 3326, Plaintiff's Post-Trial Brief, p. 7 (referring to citations to the record included in prior briefs). *See also* RT 102-105 (including citations to the record), RT 116:20-27 (citation to record showing City's decision not to prepare nexus study), 137 (Rosen report not a nexus study; it analyzes impact of exactions on home builders, not impact of homebuilding on affordable housing).

The City and Intervenors for their part doubled down on the position that San Jose did not need to show such a connection. RT 124:12-16 (City), 110:10-12 (City: "But that's not—we didn't have to do that. The City does not have to do that because this is not an impact fee. It's not a mitigation fee."), 131:2-4 (Intervenors: "[T]he purpose of the ordinance is not to address impacts of redevelopment."). The City and Intervenors pointed to two findings in the Ordinance itself, and Intervenors asserted without further evidence that the findings were based on data from the Environmental Impact Report for the San Jose 2020 General Plan.[10] RT 110:5-10, AA 3337 (City's Brief Pursuant to Court's October 19, 2011 Order, p. 5), AA 3310-11 (Intervenors'

[10] The referenced EIR and supporting documents are not part of the Stipulated Documents and was not in evidence before the trial court.

Supplemental Brief in Response to the Court's October 19, 2011 Order, pp. 7-8).

Following trial, the court issued its Order Granting Plaintiff's Request for Temporary, Preliminary, and Permanent Injunctive Relief (Order) on May 25, 2012. AA 3348-3354. In the Order, the trial court applied *San Remo Hotel*, found that the City had not identified any evidence that the Ordinance was reasonably related to any impact of new market rate housing development in the city, and permanently enjoined San Jose from enforcing the Ordinance absent such an evidentiary showing in the future. AA 3353. The Court entered Judgment After Trial on July 11, 2012, AA 3355-68, and the City appealed on July 18, 2012. AA 3391-3395.

On appeal, the City argued that the trial court had erred in applying *San Remo Hotel* to the case, but did not challenge the trial court's factual finding that no evidence in the record established a relationship between the exactions in the Ordinance and any impact of new home building on affordable housing. Appellants' Opening Brief, Oct. 16, 2012. To the contrary, the City argued on appeal that "the pertinent facts are undisputed." Appellants' Opening Brief at 21. The City did not raise on appeal any question of whether the trial court had improperly shifted the burden of proof from CBIA. Intervenors raised the issue of shifting the burden of proof on appeal in their Opening Brief, but framed that issue in terms of the standard of review that they were arguing for. Intervenors/Appellants' Opening Brief, November 2, 2012, at 19 n.6 ("It is the

Plaintiff's burden to demonstrate there is insufficient evidence to establish a reasonable relationship between a development condition *and the legitimate purpose of the regulation establishing the condition*.") (citation omitted, emphasis added), *see also id.* at 34.

The Court of Appeal, Sixth Division, filed its opinion, *CBIA v. City of San Jose*, 157 Cal. Rptr. 3d 813 (2013) (review granted) (Opinion), on June 6, 2013. The court below reversed the trial court's Order and held that *San Remo Hotel* is not applicable to the Ordinance, which is instead reviewable only as an exercise of the City's police power. *Id*. at 824. The court of appeal remanded the case to the trial court for further proceedings subject to the police power standard of review. *Id*. at 825.

Both Plaintiff and Defendants filed timely petitions for rehearing in the court of appeal on June 21, 2013, which petitions were denied on July 1, 2013. The Opinion was final in the court of appeal as of July 6, 2013. Cal. R. Ct. 8.264(b)(1). CBIA timely petitioned for review, which this Court granted on September 11, 2013.

STANDARD OF REVIEW

This Court independently reviews legal issues decided by the lower appellate courts, and has noted that "we have need *not* to defer, in order to be free to further the uniform articulation and application of the law within our jurisdiction." *Smiley v. Citibank*, 11 Cal. 4th 138, 146 (1995). The constitutionality of a local ordinance is subject to de novo review. *Zubarau v.*

City of Palmdale, 192 Cal. App. 4th 289, 307-08 (2011). Whether the Ordinance is subject to elevated scrutiny under *San Remo Hotel*, or mere rational basis review as an exercise of the police power, is a question of law which this Court decides de novo. *See Aryeh v. Canon Business Solutions, Inc.*, 55 Cal. 4th 1185, 1191 (2013).

A facial constitutional challenge to a local ordinance succeeds where the ordinance is shown to be unconstitutional "in the *generality or great majority* of cases." *San Remo Hotel, L.P. v. City & County of San Francisco*, 27 Cal. 4th at 673. In *San Remo Hotel*, this Court declined to address which party had the burden of proof. *Id.* at 670 n.13 (appeal from ruling on demurrer rendered burden of proof moot). However, in exactions cases, the burden of producing evidence is on the government to justify the necessary relationship between the exaction and the impacts of the proposed development. *Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore*, 185 Cal. App. 4th 554, 561 (2010) (local agency has burden of producing evidence of reasonable relationship in challenge to fee under Mitigation Fee Act); *see also Bixel Assocs. v. City of Los Angeles*, 216 Cal. App. 3d 1208, 1216 (1989) (burden of proof on city in challenge to fire hydrant fee under Proposition 13 prohibition on local special taxes); *cf. Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) ("[T]he city must make some sort of individualized determination

that the required dedication is related both in nature and extent to the impact of the proposed development.") (footnote omitted).

ARGUMENT

Under *San Remo Hotel, L.P. v. City & County of San Francisco,* legislatively imposed development exactions must, as "a matter of both statutory and constitutional law, . . . bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development." 27 Cal. 4th at 671 (citations omitted). The Ordinance is a legislatively imposed development exaction and therefore 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.

I

THE ORDINANCE IS NOT SUBSTANTIVELY DIFFERENT FROM THE HOUSING CONVERSION ORDINANCE CONSIDERED IN *SAN REMO HOTEL,* AND SHOULD BE HELD TO THE SAME STANDARD

A. *San Remo Hotel* Established the Standard of Review for All Legislatively Adopted Development Exactions

In *San Remo Hotel*, the Court considered the constitutionality of San Francisco's Hotel Conversion Ordinance (HCO) under the takings clause of the California Constitution. 27 Cal. 4th at 649. The ordinance regulated the conversion of long-term residential hotel rooms to tourist rooms by requiring

one-to-one replacement of converted rooms. *Id*. at 651. The purpose of the ordinance was to maintain an existing supply of affordable low-income housing in San Francisco. *Id*. at 650. It functioned by requiring a permit in order to change the use of hotel rooms from residential to tourist use, and requiring hotel owners to mitigate the conversion of residential rooms through one of the following exactions: (1) building or otherwise providing new units comparable to those converted, (2) building or rehabilitating other types of housing for low-income, disabled, or elderly persons, or (3) paying an in-lieu fee either to (a) the City or (b) a public or nonprofit housing developer. *Id*. at 651. The in-lieu fee included the cost of a replacement housing site, plus a portion of the replacement construction costs. *Id*.

The owners of the San Remo Hotel brought both facial and as-applied challenges to the ordinance on the grounds that it violated the takings clause of Article I, Section 19, of the California Constitution. 27 Cal. 4th at 649, 655, 672. The relevant issue in the case was what level of judicial scrutiny applied to the room conversion ordinance. *Id*. at 658, 663-72. After extensive discussion of the issue, this Court held that as "a matter of both statutory and constitutional law," legislatively adopted development conditions like the room conversion ordinance are only constitutional if they "bear a reasonable relationship, in both intended use and amount, to the deleterious public impact

of the development."[11] *Id*. at 671 (citations omitted). The Court then applied this standard to the hotel owners' facial and as-applied challenges, and concluded that the ordinance did have the necessary reasonable relationship, because the hotel room conversions actually caused the loss of affordable housing that the conversion ordinance sought to mitigate, and the mitigation requirements were limited to the number of residential rooms converted to tourist use. *Id*. at 673, 677-78.

B. *City of Patterson* Properly Applied *San Remo Hotel* to Affordable Housing Fees

In a closely analogous case, the court of appeal ruled that the City of Patterson's affordable housing requirement was subject to the *San Remo Hotel* standard. *Bldg. Indus. Ass'n of Cent. Cal. v. City of Patterson*, 171 Cal. App. 4th 886 (2009). The exaction in *City of Patterson* was an affordable housing fee which new home builders were obliged to provide to the city as a condition of development permit approval. *Id*. at 888. Unlike San Francisco's HCO, Patterson's exaction was not based on replacing affordable homes that were lost when new homes were built. Instead, Patterson was seeking to add to its existing stock of affordable housing. *Id*. at 891-92. To achieve this purpose,

[11] In adopting this standard, the Court declined to apply the more rigorous standard of review set forth in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, and also refused to apply the more lenient standard applicable to exercises of the police power. 27 Cal. 4th at 670-71.

the city set the in-lieu fee in question at $20,946 per new single-family home. *Id*. at 893.

The city required home builders to comply with the affordable housing requirements using the following options: "(1) build affordable housing units; (2) develop senior housing within the project; (3) obtain a sufficient number of affordable residential unit credits from other residential developments within City; or (4) pay an in-lieu fee at the time the building permit is issued for a market rate housing unit." *Id.* at 890.

The court of appeal held in *City of Patterson* that "the affordable housing in-lieu fee challenged here is not substantively different from the replacement in-lieu fee considered in *San Remo*." 171 Cal. App. 4th at 898. The court of appeal then ruled, based on the record before it, that Patterson's fee did not bear any reasonable relationship to any public impact of new home building. *Id*. at 899. The court of appeal focused on the fact that Patterson's affordable housing exaction was based on the city's objective to build a larger supply of new affordable housing units. *Id*. (in-lieu fee based on the cost of 642 affordable housing units assigned to city by regional housing needs assessment, divided by the number of unentitled residential building lots in the city).

The San Francisco and Patterson ordinances function very similarly, but they have a crucial distinction which explains why the plaintiffs in *City of Patterson* prevailed where those in *San Remo Hotel* did not. This Court, in

San Remo Hotel, held that San Francisco's hotel conversion exaction actually mitigated for the loss of existing affordable housing which the plaintiffs were causing by converting those rooms to tourist use. 27 Cal. 4th at 673, 677-78. By contrast, in *City of Patterson*, the court of appeal held that Patterson's ordinance had no relationship to any deleterious impact (*i.e.*, did not mitigate any proximately caused harm) of new home construction on the supply of affordable housing in Patterson. 171 Cal. App. 4th at 899.

C. The Court below Erroneously Distinguished *City of Patterson*

The Opinion attempts to distinguish *City of Patterson*, Opinion, 157 Cal. Rptr. 3d at 821, but fails to do so on any principled basis that would legitimately divide the two cases. San Jose's Ordinance and Patterson's affordable housing fee are the same in all material respects, and the pertinent legal question is the same in both cases.

The Ordinance is structured analogously to the Patterson exaction. Each has an onsite compliance alternative, various offsite compliance alternatives, and an in-lieu fee alternative. *City of Patterson*, 171 Cal. App. 4th at 890 (listing alternatives); SJMC §§ 5.08.400(A)(a), 5.08.510-.550, AA 0676, 0687-97 (same). Both are imposed as a condition of development permit approval. *City of Patterson*, 171 Cal. App. 4th at 889-90 (affordable housing fee included among more than 20 fees required in development agreement); SJMC § 5.08.400 ("All new residential developments . . . shall include

inclusionary units."). Both divest the owner/builder of property, in the form of money, or affordable homes of one description or another.

In arguing for a distinction, the court below notes that *City of Patterson* did not involve a facial challenge, and hence the plaintiff in that case was not required to meet the burden of showing the ordinance to be unconstitutional in the "generality or great majority of cases," the test *San Remo Hotel* applies for facial challenges. Opinion, 157 Cal. Rptr. 3d at 821; *San Remo Hotel*, 27 Cal. 4th at 673. But that confuses the legal standard this Court established for legislative development fees in *San Remo Hotel* with the burden a plaintiff must meet when applying that test in a facial challenge. *San Remo Hotel* ruled on both a facial and an as-applied challenge to the San Francisco Housing Conversion Ordinance. *See San Remo Hotel*, 27 Cal. 4th at 672 ("Plaintiffs attack the housing replacement provisions of the HCO both on their face and as applied to the San Remo Hotel."). *San Remo Hotel* applied the same rule in resolving both the facial and as-applied challenges, by examining whether the in-lieu fees in question were reasonably related to loss of residential hotel units in general, and whether the San Remo Hotel's calculated fee was reasonably related to the specific loss of its residential units. *Id.* at 672-74, 677-79. There is no basis for the Opinion to distinguish *City of Patterson*'s application of the *San Remo Hotel* rule on the basis that *City of Patterson* was an as-applied challenge.

The Opinion also appears to find significant that Patterson did not argue for a different standard of review. 157 Cal. Rptr. 3d at 821. *City of Patterson* says that Patterson "argue[d] for no different test." 171 Cal. App. 4th at 898. In its proper context, this statement follows *City of Patterson*'s detailed examination of *San Remo Hotel*, its discussion of whether *San Remo Hotel* or the higher standard of *Nollan/Dolan/Ehrlich* should apply, and its ultimate conclusion that San Francisco's hotel conversion ordinance was "not substantively different" from Patterson's affordable housing fee. *Id.* at 897-98. This context does not support the Opinion's inference that *City of Patterson* did not meaningfully consider the applicability of *San Remo Hotel*. The court in *City of Patterson* considered competing standards of review at some length, held that *San Remo Hotel* applied, and only *then* observed that the city offered no alternative. *Id.*

D. The Ordinance Is Not Substantively Different from the Exactions in *San Remo Hotel* and *City of Patterson*

In this case, San Jose's Ordinance is also a legislatively adopted development permit condition, and hence falls under the same level of scrutiny as San Francisco's HCO in *San Remo Hotel*, and the affordable housing exaction in *City of Patterson*. The Ordinance is structured analogously to both the San Francisco and Patterson exactions. Each of the three ordinances have an onsite compliance alternative, various offsite compliance alternatives, and an in-lieu fee alternative. *San Remo Hotel*, 27 Cal. 4th at 651 (listing

alternatives); *City of Patterson*, 171 Cal. App. 4th at 890 (same); SJMC §§ 5.08.400(A)(a), 5.08.510-.550, AA 0676, 0687-97 (same). Each of the three ordinances is imposed as a condition of development permit approval. SJMC § 5.08.400 ("All new residential developments . . . shall include inclusionary units."); *San Remo Hotel*, 27 Cal. 4th at 651 ("unlawful to eliminate a residential hotel unit without obtaining a conversion permit"); *City of Patterson*, 171 Cal. App. 4th at 889-90 (affordable housing fee included among more than 20 fees required in development agreement). All three divest the owner of money or property of one description or another.[12]

There is no meaningful distinction between the affordable housing fee in *City of Patterson* and San Jose's Ordinance. Neither is "substantively different from the replacement in-lieu fee considered in *San Remo*." *City of Patterson*, 171 Cal. App. 4th at 898. The Court should reverse the Opinion of the court below, approve *City of Patterson*, and hold that *San Remo Hotel* applies to the Ordinance.

[12] The Ordinance and the Patterson fee also both differ in the same way from the San Francisco HCO, in that they seek to create a new supply of affordable housing rather than to mitigate for the loss of existing affordable housing directly caused by the tourist hotel conversions in *San Remo Hotel*.

II

THE COURT BELOW ERRED IN HOLDING THAT THE ORDINANCE IS SUBJECT TO POLICE POWER REVIEW, BECAUSE THE ORDINANCE IS AN EXACTION, NOT A LAND USE REGULATION

The Opinion is also in error when it concludes that the Ordinance should be reviewed as an exercise of the police power. Opinion, 157 Cal. Rptr. 3d at 824. Subsequent to the issuance of the Opinion, this Court held in *Sterling Park, L.P. v. City of Palo Alto*, 57 Cal. 4th 1193 (2013), that affordable housing set-asides similar to the Ordinance are exactions under the Mitigation Fee Act, Gov't Code § 66020, and not "merely land use regulations." 57 Cal. 4th at 1207.

Palo Alto's below market rate housing program requires that new home projects "must provide at least 20 percent of all units as below market rate units." *Id*. at 1196. Palo Alto enforces a priority of compliance methods, starting with building affordable homes within the project itself, providing "off site units or vacant land if providing on site units is not feasible[,]" or a cash in-lieu payment if no other option is feasible. *Id*. The below market rate homes must be sold to qualified buyers selected by Palo Alto based on income. *Id*. Palo Alto implements this program by taking an option to purchase the below market rate homes at the defined below market price, which the city then assigns to the buyer it selects. *Id*.

In deciding whether these requirements are an "exaction" within the meaning of the Mitigation Fee Act, this Court extensively discussed the court of appeal's decision in *Trinity Park, L.P. v. City of Sunnyvale*, 193 Cal. App. 4th 1014 (2011), which had held that similar affordable housing set-asides were not exactions under the Mitigation Fee Act, based on a narrow reading of the term "exaction." *Sterling Park*, 57 Cal. 4th at 1200-03. *Sterling Park* disapproved *Trinity Park*'s interpretation of "exaction," 57 Cal. 4th at 1202-03, and instead adopted the interpretation of the court of appeal in *Fogarty v. City of Chico*, 148 Cal. App. 4th 537 (2007) (exactions divest the property owner of money or interests in property, while land use regulations limit the use of property without transferring it). The Court approved *Fogarty* for starting with "the usual and ordinary meaning of the word 'exaction'" and then determining that this was the meaning to use in interpreting the Mitigation Fee Act. 57 Cal. 4th at 1204 (citing *Fogarty*, 148 Cal. App. 4th at 543-44). *Sterling Park* also held that Palo Alto's in-lieu fee was obviously an exaction, and that forcing the builder to give the city an option to purchase the below market homes was also an exaction. *Id.* at 1208 (declining to address whether the requirement to set aside below market homes, absent more, was itself an exaction).[13]

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[13] The Court has recognized that the right to freely alienate property, through sale or lease, is an essential incident of property ownership. *Apartment Ass'n of Los Angeles County, Inc. v. City of Los Angeles*, 24 Cal. 4th 830, 840-41 (continued...)

Under *Sterling Park*, the Ordinance is clearly an exaction, and not a land use regulation as the court below held. Given *Sterling Park*'s analysis of the distinction between exactions and land use regulations, and approval of *Fogarty*'s analysis of the same, it is clear that if a condition of permit approval is an exaction for purposes of the Mitigation Fee Act, then it is one for general purposes, and it is therefore not a land use regulation. *Sterling Park*, 57 Cal. 4th at 1207 ("The [MFA] governs conditions on development a local agency imposes that divest the developer of money or a possessory interest in property, but not restrictions on the manner in which a developer may use its property."); *id*. ("The City argues that the requirements it imposed under its below market rate program are not exactions but merely land use regulations . . . . We disagree.") (citation omitted).

San Jose's Ordinance meets the Court's description of an exaction as described in *Sterling Park*: it divests home builders of money and interests in property. Each of the options divests builders of one or both types of interests. This is self-evident as to the in-lieu fee alternative. *San Remo Hotel*, 27 Cal. 4th at 671 ("[S]uch fees must bear a reasonable relationship . . . to the deleterious public impact of the development."); *see also Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. at 2599 ("[S]uch so-called 'in lieu of' fees

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[13] (...continued)
(2001). The Ordinance transfers this incident in property from the owner to the City by defining those to whom the owner may sell or rent the inclusionary units.

. . . are functionally equivalent to other types of land use exactions.") (internal citation omitted). The second alternative, land dedication, also clearly transfers an interest in property to the City, resulting in the City acquiring fee title to the dedicated land.

The remaining alternatives involve either on or off site construction of inclusionary units, or the acquisition and/or rehabilitation of inclusionary units. Under each of these remaining alternatives, at the end of the day the builder sets aside property that it owns and could otherwise sell or rent in the market (thereby realizing the market value of the property), as an inclusionary unit (thereby realizing significantly less than the market value of the property). The Ordinance divests the owner of the difference, in money, between the market value of the property and the affordable price of the property. The value of this money is transferred to the City, which then transfers the value of it to eligible purchasers or renters of the inclusionary units.[14] Alternatively, one can consider the home itself as dedicated or transferred to the City to become part of its stock of affordable housing. The City gains the benefit of this increase in the affordable housing stock without paying just compensation

[14] However one chooses to look at the question of whether this value is transferred to the City first, or directly to the eligible purchaser/renter, or whether it is significant or not that cash does not change hands in the initial purchase or rental, one thing is certain. This value, which could easily be converted into cash upon sale or rental of the home, has unquestionably been taken away from the builder.

to the owner/builder for the difference between the market and affordable prices.[15]

As to for-sale homes, the Ordinance also results in the City acquiring a recorded lien on the property, to secure what the City characterizes as a second mortgage between it and the eligible buyer, in the amount of the difference between the affordable and market prices. SJMC § 5.08.600(A), AA 0700-01. The purpose of the recorded lien against the for-sale inclusionary units is to ensure that the City is able to recapture both the difference between the market and affordable prices upon initial sale, and an amount of any increase in market price that is necessary, as determined by the City, to allow the City to "recycle" the subsidy to a new eligible buyer. *See* AA 1250, 1253-55. This recorded restriction remains in effect for 45 years, SJMC § 5.08.600(B), AA 0701, ensuring for that period of time that the City (rather than the builder) can convert into cash the spread between the affordable and market prices of the homes that it adds to its inventory of affordable housing. A deed-of-trust against real property is an interest which allows the lien holder to participate in a condemnation award when the underlying property is taken through eminent domain. Code Civ. Proc.

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[15] San Jose would without doubt be required to use eminent domain and pay just compensation if it sought to convert existing homes within the City from "market price" to "affordable" homes, rather then using its development permitting authority to obtain the same end. *See Dolan*, 512 U.S. at 384 (citing *Nollan*, 483 U.S. at 831).

§ 1265.225; *see People ex rel. Dep't of Transp. v. Redwood Baseline, Ltd.*, 84 Cal. App. 3d 662, 670-71 (1978).[16] In this regard, the set-aside of for-sale inclusionary units under the Ordinance cannot be distinguished from Palo Alto's below market price program which *Sterling Park* holds is an exaction, and not a land use regulation, in part because of Palo Alto's taking of an option to purchase from the builder. 57 Cal. 4th at 1207 (citing *County of San Diego v. Miller*, 13 Cal. 3d 684, 691-93 (1975)).

As to rental inclusionary units under the Ordinance, builders are required to make several commitments to the City as part of the Affordable Housing Plan and Agreement. *See* SJMC § 5.08.610, AA 0702-05. These requirements include "a capital reserve for repair, replacement and maintenance [which] shall be maintained for the term of the affordability restriction, with provision for sufficient initial capitalization and periodic contributions to the capital reserve." SJMC § 5.08.610(B)(8), AA 0703. Under this requirement, the builder is obligated to make ongoing expenditures and capital contributions for fifty-five years for the benefit of the stock of affordable apartments which the City exacted from the builder in the first place. The obvious reasons for the City to include such a requirement are (a) to protect the affordable housing stock that the Ordinance has exacted from

[16] The United States Supreme Court has held that the government must pay just compensation when it takes a lien. *Koontz*, 133 S. Ct. at 2599 (citing *Armstrong*, 364 U.S. at 44-49, and other cases).

the builder, and (b) ensure that the builder or some successor finances that protection, against the likelihood that the affordable rent will be inadequate to provide such a maintenance and capital fund. Similar to the shared equity liens imposed against for-sale homes, the ongoing maintenance and capital financing obligations allow the City to retain the value of the subsidy that it has exacted from the original owner/builder, and clearly establish that the Ordinance transfers money and property from the home builder.

The foregoing discussion demonstrates that the Ordinance is an exaction and not a land use regulation, under *Sterling Park*. Since the Ordinance is an exaction, it is subject to the *San Remo Hotel* standard, rather than the Police Power standard that would be applicable to a land use regulation. The Court should hold that the Ordinance is subject to judicial scrutiny under *San Remo Hotel*, and reverse the Opinion of the court below.

III

THE COURT BELOW ERRED BY HOLDING THAT THE ORDINANCE IS NOT SUBJECT TO *SAN REMO HOTEL* BECAUSE THE ORDINANCE IS NOT A MITIGATION FEE

The court below considered whether *San Remo Hotel* applies to the Ordinance, and erroneously held that it does not. Opinion, 157 Cal. Rptr. 3d at 824. The Opinion first notes that the plaintiffs in *San Remo Hotel* were challenging a development fee whose purpose was to mitigate the loss of residential housing caused by the conversion of residential hotels to tourist use.

Id. at 820 (citing *San Remo Hotel*, 27 Cal. 4th at 671, 673). The Opinion proceeds to observe that it was reasonable for this Court to require a reasonable relationship between the housing replacement fee and the hotel conversions in question because the fee was a mitigation fee for the hotel conversions. *Id*. The Opinion next concedes that the Ordinance is not intended to mitigate any loss of affordable housing caused by new residential development, but then remarkably concludes that "whether the Ordinance was reasonably related to the deleterious impact of market-rate residential development in San Jose *is the wrong question to ask in this case*." *Id*. at 820-21 (emphasis added).

By analyzing *San Remo Hotel* in this way, the court below vitiated this Court's holding in *San Remo Hotel*. The Opinion reads *San Remo Hotel* as only requiring a reasonable relationship between a development fee and negative public impacts proximately caused by the development in those (soon to be rare) cases where a local government is foolish enough to claim that the fee is to mitigate harm caused by the development. Under the Opinion, local governments are free of the *San Remo Hotel* standard if they are savvy enough to deny that a legislative development fee has any relationship to any negative impacts caused by the development. This contradicts *San Remo Hotel*, which requires that *all* legislative monetary exactions bear a reasonable relationship,

in amount and purpose, to the deleterious impacts of the development. 27 Cal. 4th at 670.

The court below would have it that this Court only required San Francisco's HCO to be reasonably related to the loss of affordable housing directly caused by residential hotel conversions because the express purpose of the HCO was to mitigate for residential hotel conversions, and that *San Remo Hotel* has no application beyond exactions whose express purpose is to mitigate negative impacts of development. This "is to use words in a manner that deprives them of all their ordinary meaning." *Nollan*, 483 U.S. at 831. *San Remo Hotel* naturally described the HCO as a mitigation fee, because that is what it was. 27 Cal. 4th at 671. But there is nothing in *San Remo Hotel*'s discussion of the standard of judicial review that even remotely suggests that legislative development exactions are subject to a *lower* standard of review if they *don't* mitigate any impacts proximately caused by the project. Rather, *San Remo Hotel* makes clear that the only way a legislatively adopted development exaction will pass muster is if it is a *valid mitigation fee, i.e.*, it mitigates a public harm proximately caused by the project, in a manner that is reasonable in both purpose and amount. This Court stated in *San Remo Hotel*:

> Plaintiffs' hypothetical city could only "put [its] zoning up for sale" in the manner imagined if the "prices" charged, and the intended use of the proceeds, bore a reasonable relationship to the impacts of the various development intensity levels on public resources and interests. While the 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.

Id. (responding to claim that without scrutiny under *Nollan*, *Dolan*, and *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996), cities could convert their zoning laws into revenue generation by only zoning for one type of structure, but then permitting different projects upon the payment of substantial fees). It makes no sense to read this passage as saying that "purported mitigation fees" require a reasonable relationship in purpose and scope to the impacts caused by the project, while fees that admittedly bear no relationship to the project at all do not have to make any such showing.

The Opinion's holding also cannot be squared with this Court's analysis in *Sterling Park*. In that case, the Court rejected *Trinity Park*'s narrow reading of the term "exaction" in the Mitigation Fee Act, because the result of such a narrow reading was that builders could pay an arguably excessive mitigation fee under protest and challenge it under the Act, but could not use the Act to challenge a fee "imposed for purposes entirely unrelated to the project." 57 Cal. 4th at 1205. "In other words, the more unreasonable the fee or exaction, the less recourse the developer would have." *Id*. The Court rejected such a "perverse interpretation" for the same reasons that it should reject the Opinion of the court below: it leaves property owners with fewer legal protections when the permitting authority is admittedly taking something unrelated to the project than when the exactions are at least intended to mitigate the project's

impacts. The Opinion also holds conscientious local governments, who make a good-faith effort to show the required causal relationship, to a higher standard than it does those cities that do not even try to legally justify their development exactions. This Court should reverse the Opinion of the court below and hold that the Ordinance is subject to the rule in *San Remo Hotel*.

IV

THE OPINION BELOW IS INCONSISTENT WITH *EHRLICH* AND WITH THE UNITED STATES SUPREME COURT'S RECENT DECISION IN *KOONTZ*

The only authority of this Court under which the Opinion could have applied the police power standard to a development in-lieu fee is the approval of the "art in public places" fee in *Ehrlich*, 12 Cal. 4th at 886, although the Opinion does not cite this case. *Ehrlich* held that a legislative development fee to fund public art was similar to conventional zoning ordinances that govern color schemes, landscaping, and architectural features. As such, the Court held that the in-lieu public art fee was equivalent to an ordinary aesthetic or landscaping requirement enacted under the police power and hence not subject to any heightened scrutiny. *Id.* This Court has never extended this holding of *Ehrlich* beyond the context of aesthetic zoning regulations.

But the Opinion provides no analysis at all of whether the Ordinance has anything to do with aesthetic elements of residential developments, and makes no conclusions on that subject. The Ordinance is not in any sense an

aesthetic zoning ordinance. It requires that the exterior aesthetics of inclusionary units be the same as market rate units within a development, *i.e.*, to the extent the Ordinance deals at all with design, it expressly imposes no different exterior aesthetic requirements. SJMC § 5.08.470(B). In any event, the in-lieu fee in the Ordinance has nothing to do with what the inclusionary units look like, only what they cost and who may purchase or rent them. Absent a finding to support a conclusion that *Ehrlich* applies, the remaining option is that the Ordinance is a legislative monetary exaction, subject to *San Remo Hotel*.

Subsequent to the filing of the Opinion, the United States Supreme Court issued its decision in *Koontz v. St. Johns River Water Management District*, which holds in relevant part that a government's demand for property from a land use applicant must satisfy the requirements of *Nollan* and *Dolan*, even when the demand is for money. *Koontz*, 133 S. Ct. at 2599, 2603. *Koontz* discusses the relationship between exactions of interests in real property and in-lieu fees, finding in-lieu fees to be commonplace and "functionally equivalent to other types of land use exactions." *Id*. at 2599.

Koontz's statement that all development in-lieu fees are simply a type of land use exaction undermines the Opinion's premise that development in-lieu fees such as those in the Ordinance can be reviewed under the deferential police power standard. This Court has applied higher standards of review to adjudicatory development fees, in *Ehrlich*, 12 Cal. 4th at 859 (*Nollan* and

Dolan scrutiny apply to adjudicatory development fees imposed to replace recreational land rezoned for development), and an intermediate standard of review to legislative development fees in *San Remo Hotel*. By broadly stating that all development in-lieu fees are exactions, *Koontz* indicates at the least that these are the only two options for California courts to apply, and that in-lieu fees in California are always subject to the standards of either *Nollan/Dolan/Ehrlich*, or *San Remo Hotel*.

Koontz thus casts doubt on the continuing validity of this Court's ruling in *Ehrlich* that Culver City's "art in public places" fee was an ordinary aesthetic zoning requirement under the police power and not subject to heightened scrutiny. *Ehrlich*, 12 Cal. 4th at 886. Read in combination with this Court's opinion in *Sterling Park*, even Culver City's "art in public places" fee would more properly be viewed as an exaction subject to at least the *San Remo Hotel* standard. As with the affordable housing exactions in this case and in *Sterling Park*, the art in public places fee could have been paid under protest and the project could have gone forward, indicating that the art in public places fee was an exaction rather than a land use regulation. *Ehrlich*, 12 Cal. 4th at 885-86; *see Sterling Park*, 57 Cal. 4th at 1206-07. Similarly, the art in public places fee transferred money or property to the City, either in the form of a $32,000 fee or the contribution of artwork of equal value (or displaying it in an area of the project reasonably accessible to the public),

while not restricting the manner in which the property could be developed. *Ehrlich*, 12 Cal. 4th at 885-86; *Sterling Park*, 57 Cal. 4th at 1207.

On this basis, the Court should hold that all in-lieu development fees are subject to either the heightened standard of review of *Nollan/Dolan/Ehrlich*, or the intermediate standard of *San Remo Hotel*.

V

THE COURT BELOW ERRED IN SUGGESTING THAT THE TRIAL COURT IMPROPERLY SHIFTED THE BURDEN OF PROOF TO THE CITY

The court below remanded the case to the trial court for further proceedings under the police power standard rather than under *San Remo Hotel*. Opinion, 157 Cal. Rptr. 3d at 825. In so doing, the court below took pains to "again emphasize, however, that it is *CBIA*'s burden to establish the facial invalidity of the IHO, not the City's to prove that it survives the challenge." *Id*. (emphasis in original, citations omitted). In so doing, the court below did not expressly hold that the trial court had shifted the burden of proof, or whether it had done so improperly. The Opinion suggests rather clearly, however, that something is amiss in the Judgment's statement that the trial court had

> previously asked the City of San Jose to demonstrate where in the record was there evidence demonstrating the constitutionally required reasonable relationships between deleterious public impacts of new residential development and the new requirements to build and to dedicate the affordable housing or

> pay the fees in lieu of such property conveyances. The City of San Jose has appeared to be unable to do so.

AA 3367 (Judgment); *see* Opinion, 157 Cal. Rptr. 3d at 818 (citing same).

The above recitation of the trial proceedings of this case in the Procedural History, *supra*, pp. 9-12, makes clear that CBIA met its initial burden of producing evidence by introducing the entire record of the City's adoption of the Ordinance (RT 3-4, 89, AA 0740-3110), and demonstrating that it lacked any evidence to establish the necessary causal connection between new home building and the exactions in the Ordinance. AA 0316-19 (CBIA's Opening Trial Brief, at 6-9); RT 9-10, 11, 44, 80. It was only after this extensive showing at trial that the trial court asked the City to identify any evidence that would support the required causal relationship. AA 3297 (Trial Court's October 19, 2011 Order Noticing Vacation of Submission and Order for Further Briefing, at 3).

The authorities cited above in the Standard of Review, *supra*, pp. 14-15, support the proposition that the City had the initial burden of producing evidence in any event. *See, e.g., Homebuilders Association of Tulare/Kings Counties, Inc.*, 185 Cal. App. 4th at 561 (local agency has burden of producing evidence of reasonable relationship in challenge to fee under Mitigation Fee Act). But even if that burden was on Petitioner, it clearly met that burden and shifted it to the City. *See, e.g., California Farm Bureau Fed'n v. State Water*

Res. Control Bd., 51 Cal. 4th 421, 436-37 (2011) (discussing shifting burden of producing evidence upon establishing prima facie case).

The court below erred in suggesting that a remand was necessary to apply the proper burden of proof. Petitioner met its burden of proof at trial under the proper legal standard of *San Remo Hotel*; no remand is necessary. This Court should reverse the court below and affirm the Judgment of the trial court.

CONCLUSION

Based upon the foregoing, the Court should hold that the Ordinance is subject to the standard of review set forth in *San Remo Hotel*, reverse the Opinion of the court below, and affirm the Judgment of the trial court.

DATED: December 9, 2013.

Respectfully submitted,

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By _____
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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing PETITIONER'S OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 9,530 words.

DATED: December 9, 2013.

_____

ANTHONY L. FRANÇOIS

DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

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

On December 9, 2013, true copies of PETITIONER'S OPENING BRIEF were placed in envelopes addressed to:

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

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 9th day of December, 2013, at Sacramento, California.

_____
TAWNDA ELLING