No. _____

In the

Supreme Court of the United States

616 CROFT AVE., LLC, and
JONATHAN & SHELAH LEHRER-GRAIWER,

Petitioners,

v.

CITY OF WEST HOLLYWOOD,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal

PETITION FOR WRIT OF CERTIORARI

BRIAN T. HODGES
Counsel of Record
Pacific Legal Foundation
10940 Northeast 33rd Place,
Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: bth@pacificlegal.org

LAWRENCE G. SALZMAN
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: lgs@pacificlegal.org

Counsel for Petitioner

QUESTION PRESENTED

A City of West Hollywood ordinance requires that builders of a proposed 11-unit condominium pay a $540,393.28 "affordable housing fee" to subsidize the construction of low-cost housing elsewhere in the City. The ordinance imposes the fee automatically as a condition on the approval of a building permit, without any requirement that the City show that the project creates a need for low-cost housing.

The question presented is:

Whether a legislatively mandated permit condition is subject to scrutiny under the unconstitutional conditions doctrine as set out in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987).

LIST OF ALL PARTIES

616 Croft Ave., LLC, and Shelah and Jonathan Lehrer-Graiwer were the appellants in the California state appellate and supreme court proceedings below and are the petitioners herein.

City of West Hollywood, California, is the municipal respondent.

CORPORATE DISCLOSURE STATEMENT

Petitioners have no parent companies, subsidiaries, or affiliates that are publicly owned corporations, and there is no publicly held corporation that owns 10% of its stock.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

California Statute

U.S. Constitution

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

PETITION FOR WRIT OF CERTIORARI

616 Croft Ave., LLC, and Shelah and Jonathan Lehrer-Graiwer respectfully request that this Court issue a writ of certiorari to review the judgment of the California Court of Appeal, Second Appellate District, Division One.

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at *616 Croft Ave., LLC v. City of West Hollywood*, 3 Cal. App. 5th 621 (2016), and is reproduced in Petitioners' Appendix (Pet. App.) at A. The California Supreme Court's order denying review appears at Pet. App. B.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a). Petitioners 616 Croft Ave., LLC, and Shelah and Jonathan Lehrer-Graiwer filed a lawsuit challenging the City of West Hollywood's permit condition as violating the unconstitutional conditions doctrine predicated on the Fifth and Fourteenth Amendments to the United States Constitution. The California Court of Appeal dismissed their federal constitutional claim and upheld the City's exaction in the September 23, 2016, decision of the Second District, Division One, of the California Court of Appeal. The decision became final on December 21, 2016, when review was denied by the California Supreme Court. This petition is timely filed pursuant to Rule 13.

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS AT ISSUE

The Takings Clause of the United States Constitution provides that "private property [shall not] be taken for public use without just compensation." U.S. Const. amend. V.

The Fourteenth Amendment to the United States Constitution provides, in relevant part, that no state shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1.

The relevant regulatory provisions are reproduced in the appendix to this petition. Pet. App. E.

STATEMENT OF THE CASE

In 1975, California's Legislature declared that the lack of affordable low- and moderate-income housing posed a very serious threat to the region's social and economic well-being. *See California Bldg. Indus. Ass'n v. City of San Jose*, 61 Cal. 4th 435, 441 (2015) (*CBIA*). The state's efforts to address the affordable housing problem over the years, however, have been largely unsuccessful. *Id.* Faced with a continuing shortage of affordable housing, many local governments turned to so-called "inclusionary zoning" ordinances, requiring that developers dedicate a certain percentage of the new homes they build as low-income housing, or pay a fee in-lieu of the dedication. *Id.* Since first proposed, the "inclusionary zoning" strategy has been highly

controversial because it relies on a permit condition as a tool to shift the burden of solving a pre-existing public problem onto an individual property owner as the "price" of obtaining an approval.[1]

While the "inclusionary zoning" strategy would appear to directly implicate the doctrine of unconstitutional conditions as set out in *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), a line of California cases has adopted a categorical rule that excludes legislatively imposed permit conditions from heightened scrutiny required by that doctrine. *See*, *e.g.*, *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 868-69, 880-81 (1996) (limiting doctrine to adjudicative decisions); *San Remo Hotel L.P. v. City and Cty. of San Francisco*, 27 Cal. 4th 643, 671 (2002) (recognizing a California rule excluding legislative exactions from the doctrine); *see also CBIA*, 61 Cal. 4th at 461 n.11 (citing *Koontz*, 133 S. Ct. at 2599) (acknowledging the split of authority on the legislative exactions question but declining to address it).

This case arises from the City of West Hollywood's application of its "inclusionary zoning" ordinance to exact a half-million dollar affordable housing fee from a small developer, whose proposed infill project was determined to actually help—not exacerbate—the City's housing shortage.

---

[1] *See*, *e.g.*, Note, *Constitutional Law–Fifth Amendment Takings Clause–California Court of Appeal Finds* Nollan*'s and* Dolan*'s Heightened Scrutiny Inapplicable to Inclusionary Zoning Ordinance.* Home Builders Ass'n of Northern California v. City of Napa, 115 Harv. L. Rev. 2058 (2002).

A. The City of West Hollywood Imposed a Half-Million Dollar Affordable Housing Fee on the Lehrer-Graiwers' Demolition and Building Permits

Shelah and Jonathan Lehrer-Graiwer are the owners and developers of an infill 11-unit condominium project located at 612-616 North Croft Avenue in the City of West Hollywood. Pet. App. A at 1-2. Acting through their company, 616 Croft Ave., LLC, in 2004, the Lehrer-Graiwers applied to the City for permits necessary to redevelop two adjacent single-family homes into a small condominium complex. *Id.* The City Council approved the project in a 2005 resolution, praising the project's "superior architectural design" and noting that the development will provide "11 families with a high quality living environment."[2] The Council also determined that the net gain of nine new residential units "would help the City achieve its share of the regional housing need."[3]

Despite these findings, the City Council demanded that the owners pay a fee in-lieu of its affordable housing requirement as a condition of permit approval.[4] Pet. App. A at 3.

The City imposed the permit condition pursuant to its inclusionary zoning ordinance (reproduced in Pet.

---

[2] Pet. App. D (City of West Hollywood Res. No. 05-3268, § 4(4)).

[3] *Id.* § 8(c).

[4] *Id.* § 11(Conditions 3.1 and 3.6); *see also* City of West Hollywood Dept. Of Community Dev. letters dated July 29, 2004 (AR 16-17) and September 24, 2004 (AR 26-27) asking whether the owners planned to satisfy the City's affordable housing exaction with on-site units or an in-lieu fee.

App. E), which requires developers to sell 20 percent of their newly constructed units at specified below-market rates or, in certain circumstances, to pay an in-lieu fee to fund construction of the equivalent number of units the developer would have otherwise been required to set aside. Pet. App. E at 2-4 (West Hollywood Municipal Code (WHMC) § 19.22.030-19.22.040). If the owner opts to dedicate housing units, he or she must first execute and record a deed restriction granting, among other conditions, a right of first refusal to any eligible households displaced by the development before the City issues the building permit.[5] Pet. App. E at 4-5 (WHMC § 19.22.080(C)). The owner must also grant the City—or any City-designated agency or organization—a purchase option for any inclusionary set-aside units that are not bought by displaced households. Pet. App. E at 8 (WHMC § 19.22.090(C)).

If the owner opts instead to pay an in-lieu fee, the money is placed into the City's "affordable housing trust fund" where it is used to subsidize the provision

---

[5] The ordinance operates as follows: Upon completion of the "inclusionary units," the owner must first offer the homes at a price set by the City Council (currently between $66,413 and $178,804) to any low- or moderate-income households (incomes between $29,193 to $77,068) that were displaced by the project. Next, the owner must offer the units to any displaced households making up to 120 percent of the median income at the same owner-subsidized below-market prices. After that, the City (or a designated organization) may exercise its option to purchase the property at the below-market price. Otherwise, the units must be sold to general low- and moderate-income households at the same owner-subsidized below-market prices. *See* City of West Hollywood, Inclusionary Housing Program – Information for Developers at 6, *available at* http://www.weho.org/home/showdocument?id=25568.

of affordable housing. Pet. App. E at 3-4 (WHMC § 19.22.040(E)). Although the City Code provides that developers pay "an equitable share of the cost of mitigating" for impacts caused by the proposed development,[6] the Council in fact imposed a set fee based on a legislatively enacted "fee schedule" applicable to all new residential development, based solely on the floor area of the units to be constructed. *Id.* at 3 (WHMC § 19.22.040(B)); Pet. App. D (§ 11 (Condition 3.1)); *see also* AR 884 ("Exaction Fees"). The Council's uniform fee schedule permits no variation of the affordable housing fee based on project-specific circumstances.

Shortly after the Council approved the project subject to an affordable housing exaction, the housing market crashed. Pet. App. A at 3. At the Lehrer-Graiwers' requests, the City's Planning Commission extended its permit approvals several times between July 2008 and December 2011. *Id.* During that time, the Council drastically revised its fee schedule, nearly doubling its affordable housing fees. *Id.* Thus, when the Lehrer-Graiwers applied for the necessary permits in December 2011, the City conditioned issuance of the demolition and building permits upon the immediate payment of a $540,393.28 affordable housing in-lieu fee. *Id.*; *see also* AR 884 ("Exaction Fees").

B. The Lehrer-Graiwers Challenge the In-Lieu Fee as Violating *Nollan*, *Dolan*, and *Koontz*

The Lehrer-Graiwers objected and requested that the City Council review both the timing and amount of

---

[6] *See* WHMC § 19.64.020.

its fee. City staff refused to reconsider the fees and refused to defer or extend the time for payment of the exaction fees. Pet. App. A at 3-4. Thus, on December 22, 2012, facing forfeiture or termination of their development approvals, the Lehrer-Graiwers paid the fees under protest. *Id*. The owners also requested that the City Council conduct an administrative review of the disputed exaction fees. *Id*.

When the Council did not respond to the request, the Lehrer-Graiwers filed a lawsuit, seeking in part to invalidate the low-income housing in-lieu fee under the "essential nexus" and "rough proportionality" tests set out by *Nollan*, *Dolan*, and *Koontz*. Pet. App. A at 4-5; Appellants' Opening Br. at 25. Together, the nexus and proportionality tests hold that the government cannot condition approval of a land-use permit on a requirement that the owner dedicate private property to the public, unless the government can show that the dedication is necessary to mitigate adverse public impacts caused by the proposed development. *Koontz*, 133 S. Ct. at 2594-95, 2599.

The Council eventually agreed to hold an administrative hearing on the Lehrer-Graiwers' fee contest. During that proceeding, City staff asserted that, under a California rule that excludes legislatively mandated exactions from the heightened scrutiny required by *Nollan*, *Dolan*, and *Koontz*, the City did not need to provide any evidence establishing a reasonable relationship between the housing fees and the impacts of the project.[7] Accordingly, the City provided no evidence of nexus and proportionality, admitting on the record that the in-lieu fee was not

[7] *See* City of West Hollywood's March 18, 2003, Staff Report on Fee Adjustment Hearing (AR 751-752).

"intended to mitigate impacts caused by development."[8] Instead, the City explained that the fee was designed to meet "needs for affordable housing that exist independently of the Applicants' residential development project[.]"[9]

After holding a hearing on the matter, the City Council adopted the City staff attorney's argument as justification for denying the Lehrer-Graiwers' fee challenge.[10] Despite a complete lack of any connection between the condominium proposal and the City's affordable housing needs, the City Council upheld the $540,393.28 exaction fee. Pet. App. A at 4.

The Lehrer-Graiwers returned to the trial court, which dismissed their unconstitutional conditions claim under a line of California cases holding legislatively imposed exactions categorically exempt from the heightened scrutiny required by *Nollan/Dolan/Koontz*.[11] Pet. App. C at 10. Thus, despite concluding that the ordinance required the owners give the City a well-recognized and constitutionally protected property interest (*i.e.*, a purchase option or a fee in-lieu) as a condition of

---

[8] *Id.* (AR 752).

[9] *Id.* (AR 752).

[10] City of West Hollywood Resolution No. 13-4426, §§ 5-6 (AR 865-866).

[11] AR 326-338. Based on the trial court's decision, the Lehrer-Graiwers voluntarily dismissed their remaining claims in order to immediately appeal the court's judgment. AR 433. Final Judgment was entered on August 12, 2015. AR 440.

permit approval,[12] the trial court held that the affordable housing condition was subject only to California's "reasonable relationship" test. Pet. App. C 14-15.

That test, however, asked only whether "the fees were 'reasonably related' in purpose and amount to the City's need for affordable housing and to the cost of developing affordable units elsewhere in the City." Pet. App. C at 16-17. The court did not require the City to show that the Lehrer-Graiwers' development "caused a need for affordable housing to justify the in-lieu fee." Pet. App. C at 17-18. Even so, the trial court noted that "the City admits" that the need for affordable housing in the City of West Hollywood "predates the project"—a finding that plainly demonstrates a lack of both nexus and proportionality had those constitutional tests been applied. *Id.* Nonetheless, the trial court upheld the $540,393.28 exaction upon the conclusion that the fee was "related to the cost of constructing affordable housing units within the City." *Id.* at 21.

C. The California Court of Appeal Holds That *Nollan*, *Dolan*, and *Koontz* Do Not Apply to Legislatively Mandated Exactions

The court of appeal upheld the trial court's decision under the same line of California Supreme Court cases holding that legislative exactions are categorically exempt from *Nollan/Dolan/Koontz*. Pet. App. A at 9-10 (citing *San Remo Hotel*, 27 Cal. 4th at 668-70, and *Ehrlich*, 12 Cal. 4th at 880-81). Thus, instead of applying the nexus and proportionality tests,

---

[12] Pet. App. C at 14-15.

the court held that the Lehrer-Graiwers bore the burden of proving that the $540,393.28 in-lieu fee bore no reasonable relationship to the public's interest in affordable housing. Pet. App. A at 7, 9, 11, 13. And, like the trial court, the court of appeal had no problem concluding that a fee earmarked for funding the development of new housing elsewhere in the City would advance the public's interest in new affordable housing. Pet. App. A at 14-15.

Like the trial court, the court of appeal readily acknowledged that the in-lieu fee lacked both a nexus and a proportional relationship to the condominium project:

> [T]he in-lieu housing fee here is not to defray the cost of increased demand on public services resulting from Croft's specific development project, but rather to combat the overall lack of affordable housing.

Pet. App. A at 9. But the court explained that, under California's rule, the validity of the affordable housing fee "logically cannot depend on whether the amount of the in lieu fee is reasonably related to the development's impact on the city's affordable housing need."[13] *Id.* (quoting *CBIA*, 61 Cal. 4th at 477). That is because the City's "affordable housing" fee is not intended to mitigate any adverse impacts of new development—instead, the fee is designed to "enhance the public welfare" by demanding that private property

[13] The court treated the Lehrer-Graiwers' claim as raising both a facial challenge to the City Council's adoption of the fee schedule (which the court dismissed as untimely) and an as-applied challenge to the fees actually imposed on the permit condition. Pet. App. A at 6-7 (facial), 7-15 (as-applied). This petition concerns the as-applied challenge.

owners put their land or money toward the development of affordable housing. *Id*. (quoting *CBIA*, 61 Cal. 4th at 454).

The Lehrer-Graiwers filed a petition for review with the California Supreme Court, which was denied (Pet. App. B), and now respectfully ask this Court to issue a writ of certiorari and provide much-needed direction on the important question of federal law decided below.

REASONS FOR GRANTING THE WRIT

This case raises an important issue concerning the limitations that the Takings Clause of the Fifth Amendment of the U.S. Constitution places on a government's authority to use the permit process to force private property owners to dedicate private property to a public use. In the decision below, the California Court of Appeal adopted a rule of federal law that allows the government to circumvent the nexus and proportionality analysis set out by this Court in *Koontz*, 133 S. Ct. 2586, *Dolan*, 512 U.S. 374, and *Nollan*, 483 U.S. 825, whenever the permit condition is required by an act of generally applicable legislation. Not only does the California decision depart from this Court's unconstitutional conditions doctrine precedents, it deepens a long-standing split of authority among the lower courts regarding the scrutiny applied to legislatively mandated exactions. The petition should be granted.

I

THE CALIFORNIA COURT'S REFUSAL TO RECOGNIZE WELL-SETTLED PROPERTY RIGHTS CONFLICTS WITH DECISIONS OF THIS COURT

The California Court of Appeal's decision adopted a rule that categorically excludes well-recognized property rights from the protections guaranteed by the Fifth Amendment and the doctrine of unconstitutional conditions. Because of the per se nature of the California rule, the lower court refused to examine the permit condition to determine if the fee was imposed in lieu of a dedication of a property interest. Pet. App. A at 9-10. The court's refusal to do so directly conflicts with this Court's case law and leaves property owners without any protection against the type of extortion that the doctrine of unconstitutional conditions is supposed to curtail.

The nexus and rough proportionality tests are important safeguards of private property rights subject to land-use permitting. *Koontz*, 133 S. Ct. at 2599; *see also Nollan*, 483 U.S. at 833 ("[T]he right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' "). The tests protect landowners by recognizing the limited circumstances in which the government may lawfully condition permit approval upon the dedication of a property interest to the public: (1) the government may require a landowner to dedicate property to a public use *only* where the dedication is necessary to mitigate for the negative impacts of the proposed development on the public; and (2) the government may not use the permit process to

coerce landowners into giving property to the public that the government would otherwise have to pay for. *Koontz*, 133 S. Ct. at 2594-95; *see also Dolan*, 512 U.S. at 385 ("[G]overnment may not require a person to give up the constitutional right . . . to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit [that] has little or no relationship to the property.").

The heightened scrutiny demanded by *Nollan* and *Dolan* is essential because landowners "are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take." *Koontz*, 133 S. Ct. at 2594; *see also id.* at 2596 ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation.").

In *Nollan*, the California Coastal Commission, acting pursuant to the requirements of a state law, required the Nollans to dedicate an easement over a strip of their private beachfront property as a condition of obtaining a permit to rebuild their home. 483 U.S. at 827-28. The Commission specifically justified the condition on the grounds that "the new house would increase blockage of the view of the ocean, thus contributing to the development of 'a "wall" of residential structures' that would prevent the public 'psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit,'" and would "increase private use of the shorefront." *Id.* at 828-29 (quoting Commission). The Nollans refused to

accept the condition and brought a federal taking claim against the Commission in state court, arguing that the condition constituted a taking because it bore no connection to the impact of their proposed development.

This Court agreed, holding that the easement condition was an unconstitutional taking because it lacked an "essential nexus" to the alleged public impacts that the Nollans' project caused. *Id.* at 837. Because the Nollans' home would have no impact on public beach access, the Commission could not justify a permit condition requiring them to dedicate an easement over their property. *Id.* at 838-39. Without a constitutionally sufficient connection between a permit condition and a project's alleged impact, the easement condition was "not a valid regulation of land use but an 'out-and-out plan of extortion.'" *Id.* at 837 (citations omitted).

In *Dolan*, this Court defined how close a "fit" is required between a permit condition and the alleged impact of a proposed land use. There, the city's development code imposed conditions on Florence Dolan's permit to expand her plumbing and electrical supply store that required her to dedicate some of her land for flood-control improvements and a bicycle path. 512 U.S. at 377. Dolan refused to comply with the conditions and sued the city in state court, alleging that the development conditions effected an unlawful taking and should be enjoined. This Court held that the city established a nexus between both conditions and Dolan's proposed expansion, but nevertheless held that the conditions were unconstitutional. Even when a nexus exists, there still must be a "degree of connection between the exactions and the projected

impact of the proposed development." *Id.* at 386. There must be rough proportionality—*i.e.*, "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. The *Dolan* Court held that the city had not demonstrated that the conditions were roughly proportional to the impact of Dolan's expansion and invalidated the permit conditions. *Id.*

In *Koontz*, this Court held that fees imposed in lieu of dedication of property must also comply with the nexus and proportionality requirements. In that case, a government permitting agency conditioned the approval of Coy Koontz's application to develop 3.9 acres of his 14.9-acre commercial-zoned property. 133 S. Ct. at 2593. Koontz offered to give the agency a conservation easement over the remaining 11 acres, but that was not enough. *Id.* The agency demanded that Koontz either dedicate 13.9 acres of his land or pay a fee in lieu of the additional demanded property. *Id.* Koontz objected to the condition and the agency denied his application. *Id.* Koontz challenged the agency's decision as a violation of the doctrine of unconstitutional conditions. *Id.* On review, this Court confirmed that an in-lieu fee is often the "functional equivalent" of an exaction of land. *Id.* at 2599.

Thus, courts considering a monetary exactions claim must first analyze the entire demand imposed by the government to determine whether "it would transfer an interest in property from the landowner to the government."[14] *Id.* at 2600. If so, then the in-lieu

[14] In other words, the demand must seek an interest in private property, which is defined as the collection of rights inhering in an (continued...)

fee constitutes an exaction subject to the nexus and proportionality tests.

That requirement is met here. Indeed, in an unappealed conclusion of law, the trial court determined that West Hollywood's affordable housing ordinance conditions permit approval upon the transfer of well-recognized property rights to the City. Pet. App. C at 14-16 (the ordinance demands that developers "give[] it a 'right of first refusal' to purchase the affordable units which is, in effect, an option" and is a protected property right). Specifically, the ordinance requires developers to dedicate the following:

> (1) the right of first refusal (WHMC § 19.22.090(c));
>
> (2) the right to freely alienate property (WHMC § 19.22.090(a), (b)); and
>
> (3) the right to sell property at a fair market price (WHMC § 19.22.090(f)); or
>
> (4) a fee in lieu (WHMC § 19.22.040).

---

[14] (...continued)
individual's relationship to his or her land or personal property, including an owner's financial investment in his or her property. *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945) ("property" is comprised of the rights to possess, use, exclude others, and dispose of the property); *see also Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2426 (2015) (crops); *Koontz*, 133 S. Ct. at 2601 (money and real property); *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235 (2003) (interest on legal trust accounts); *Armstrong v. United States*, 364 U.S. 40, 44-49 (1960) (liens); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 601-02 (1935) (mortgages).

California property law recognizes that owners have a right to sell their property to whom they choose, at a price they choose—which includes a right of first refusal. *See Sterling Park, L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1207 (2013) (a purchase option is a protected property right); *Gregory v. City of San Juan Capistrano*, 191 Cal. Rptr. 47, 58 (1983) (A right of first refusal is a property right);[15] *see also Horne*, 135 S. Ct. at 2429 (finding a taking even where the government shares in the sale proceeds of seized raisins because "the growers lose any right to control their disposition"); *Old Dearborn Distrib. Co. v. Seagram Distillers Corp.*, 299 U.S. 183, 191-92 (1936) ("[T]he right of the owner of property to fix the price at which he will sell it is an inherent attribute of the property itself, and as such is within the protection of the Fifth and Fourteenth Amendments."); *Laguna Royale Owners Ass'n. v. Darger*, 174 Cal. Rptr. 136, 144 (1981) (recognizing an owner's right to use and dispose of property as he chooses); *Ex parte Quarg*, 149 Cal. 79, 80 (1906) (An owner of property has a "clear right to dispose of it, to sell it to whom he pleases and at such price as he can obtain."); Cal. Civ. Code § 711 (a property owner has the right to freely alienate property, and to be free from unreasonable restraints on alienation of property).

The decision below, however, explained that under the California rule, it is unnecessary for a court to consider whether the government's underlying demand

---

[15] Disapproved of on other grounds by *Fisher v. City of Berkeley*, 37 Cal. 3d 644 (1984); *see also Manufactured Hous. Cmtys. of Wash. v. Washington*, 142 Wash. 2d 347 (2000) (statute which gave mobile home park tenants a right of first refusal, and took away such right from owner, was a taking even though it would benefit members of the public).

seeks the dedication of a property interest because all legislative exactions are categorically exempt from heightened scrutiny under *Nollan*, *Dolan*, and *Koontz*. Pet. App. A at 10. As a result, the state court failed to protect well-recognized rights from being indirectly appropriated in a permit condition, raising an important question of federal takings law that warrants review.

II

THE CALIFORNIA COURT'S REFUSAL TO APPLY *NOLLAN* AND *DOLAN* SCRUTINY TO LEGISLATIVELY MANDATED EXACTIONS RAISES A QUESTION OF FEDERAL LAW THAT THIS COURT SHOULD SETTLE

A. This Court Has Repeatedly Held Legislatively Mandated Exactions Subject to the Unconstitutional Conditions Doctrine

There is no basis in this Court's case law for the distinction that the California court relies on to afford lesser scrutiny to legislatively mandated exactions. In fact, this Court's exactions decisions belie any distinction whatsoever.

Nollan, *Dolan*, and *Koontz* all involved conditions mandated by general legislation—a fact specifically noted in each of the opinions. The dedication of the Nollans' beachfront, for example, was required by a state law. *Nollan*, 483 U.S. at 828-30 (California Coastal Act and California Public Resources Code imposed public access conditions on all coastal development permits); *see also id.* at 858 (Brennan, J., dissenting) (Pursuant to the California Coastal Act of

1972, a deed restriction granting the public an easement for lateral beach access "had been imposed [by the Commission] since 1979 on all 43 shoreline new development projects in the Faria Family Beach Tract.").

Both the bike path and greenway dedications at issue in *Dolan* were mandated by city land-use planning ordinances. *See Dolan*, 512 U.S. at 377-78 (The city's development code "requires that new development facilitate this plan by dedicating land for pedestrian pathways."); *id.* at 379-80 ("The City Planning Commission . . . granted petitioner's permit application subject to conditions imposed by the city's [Community Development Code].").

And the in-lieu fee at issue in *Koontz* was required by state law. *Koontz*, 133 S. Ct. at 2592 (Florida's Water Resources Act of 1972 and Wetland Protection Act of 1984 require that permitting agencies impose conditions on any development proposal within designated wetlands).

Koontz, which also involved a fee imposed in lieu of a dedication of private property to the public, is directly on point. *Id.* at 2592-93. The permitting authority in that case determined the amount of the fee pursuant to a generally applicable regulation setting the minimum mitigation ratio.[16] *Id.* Florida's Department of Environmental Protection adopted the regulation nearly a decade before Koontz submitted his permit application. *Id.* The fact that the fee was legislatively required did not deter this Court from

---

[16] *See also* Respondent's Brief in Opposition, *Koontz*, 2012 WL 3142655, at *5 n.4 (U.S. Aug. 2012) (citing Fla. Dep't of Env. Reg., Policy for "Wetlands Preservation-as-Mitigation" (June 20, 1988)).

concluding that it was subject to the nexus and proportionality tests (*Koontz*, 133 S. Ct. at 2599-2600)—a fact that compelled Justice Kagan, writing in dissent, to question whether the majority had rejected the legislative-versus-adjudicative distinction. *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting).

Koontz holds that when the government imposes an in-lieu fee on a permit approval, the reviewing court must look at the underlying condition to determine whether it implicates the doctrine of unconstitutional conditions. *See Koontz*, 133 S. Ct. at 2599 (An in-lieu fee is the "functional[] equivalent" of the demand for a dedication of property.). Thus, as a predicate to an as-applied challenge, a court must first determine whether any of the alternative demands (in this case, the dedication of low-income units and a right of first refusal) would violate the Constitution. *Koontz*, 133 S. Ct. at 2598. By adopting a per se rule that excludes all legislatively mandated exactions from inquiry, the court of appeal eliminated this necessary determination, leaving constitutionally guaranteed rights without meaningful protection.

Furthermore, there is no basis in the unconstitutional conditions doctrine for drawing any distinction between legislative and adjudicative exactions. Indeed, since the doctrine's origin in the mid-nineteenth century, this Court has frequently relied on the doctrine to invalidate legislative acts that impose unconstitutional conditions on individuals.[17]

---

[17] *See Lafayette Ins. Co v. French*, 59 U.S. (18 How.) 404, 407 (1855) (Invalidating provisions of state law conditioning permission for a foreign company to do business in Ohio upon the (continued...)

The purpose of the doctrine—to enforce a constitutional limit on government authority—explains why it applies without regard to the type of government entity making the unconstitutional demand:

> [T]he power of the state . . . is not unlimited; and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, compel a surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence.

---

[17] (...continued)
waiver of the right to litigate disputes in the U.S. Federal District Courts because "This consent [to do business as a foreign corporation] may be accompanied by such condition as Ohio may think fit to impose; . . . provided they are not repugnant to the constitution or laws of the United States."); *see also Marshall v. Barlow's Inc.*, 436 U.S. 307, 315 (1978) (invalidating provisions of the Occupational Safety and Health Act, holding that a business owner could not be compelled to choose between a warrantless search of his business by a government agent or shutting down the business); *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 255 (1974) (holding a state statute unconstitutional as an abridgement of freedom of the press because it forced a newspaper to incur additional costs by adding more material to an issue or remove material it desired to print); *Sherbert v. Verner*, 374 U.S. 398, 406 (1963) (provisions of unemployment compensation statute held unconstitutional where government required person to "violate a cardinal principle of her religious faith" in order to receive benefits); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958) (a state constitutional provision authorizing the government to deny a tax exemption for applicants' refusal to take loyalty oath violated unconstitutional conditions doctrine).

Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583, 593-94 (1926) (invalidating state law that required trucking company to dedicate personal property to public uses as a condition for permission to use highways).[18]

Legal scholars also find "little doctrinal basis beyond blind deference to legislative decisions to limit [the] application of [*Nollan* or *Dolan*] only to administrative or quasi-judicial acts of government regulators." David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523, 567-68 (1999). Indeed, where a single government body writes the law, issues permits, and sits in review of its decision as the City did here, it is often difficult to distinguish one branch of the government from the other. Steven A. Haskins, *Closing the* Dolan *Deal—Bridging the Legislative/Adjudicative Divide*, 38 Urb. Law. 487, 514 (2006) (describing the difficulty in drawing a line between legislative and administrative decisionmaking in the land-use context).

---

[18] *See also Doyle v. Continental Ins. Co.*, 94 U.S. 535, 543 (1876) (Bradley, J., dissenting) ("Though a State may have the power, if it sees fit to subject its citizens to the inconvenience, of prohibiting all foreign corporations from transacting business within its jurisdiction, it has no power to impose unconstitutional conditions upon their doing so."); Richard A. Epstein, *Bargaining with the State* 5 (1993) (The doctrine holds that even if the government has absolute discretion to grant or deny any individual a privilege or benefit—such as a land-use permit, "it cannot grant the privilege subject to conditions that improperly 'coerce,' 'pressure,' or 'induce' the waiver of that person's constitutional rights.").

The irrelevance of the "legislative v. administrative" distinction comes as no surprise, because *Nollan* and *Dolan* are rooted in the unconstitutional-conditions doctrine, which "does not distinguish, in theory or in practice, between conditions imposed by different branches of government." James S. Burling & Graham Owen, *The Implications of* Lingle *on Inclusionary Zoning and other Legislative and Monetary Exactions*, 28 Stan. Envtl. L.J. 397, 400 (2009). Moreover, "[g]iving greater leeway to conditions imposed by the legislative branch is inconsistent with the theoretical justifications for the doctrine because those justifications are concerned with questions of the exercise [of] government power and not the specific source of that power." *Id.* at 438. Indeed, from the property owner's perspective, he suffers the same injury whether a legislative or administrative body forces him to bargain away his rights in exchange for a land-use permit.

Two Justices of this Court have expressed marked skepticism at the very idea that the need for heightened scrutiny is obviated when a legislative body—as opposed to some other government entity—decides to exact a property interest from developers. In *Parking Ass'n of Georgia, Inc. v. City of Atlanta, Ga.*, the Atlanta City Council, motivated by a desire to beautify the downtown area, adopted an ordinance that required the owners of parking lots to include landscaped areas equal to at least 10 percent of the paved area at an estimated cost of $12,500 per lot. 515 U.S. 1116, 1116 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). Despite an apparent lack of proportionality, Georgia's Supreme Court upheld the ordinance, concluding that legislatively imposed exactions are not subject to

Nollan and *Dolan*. *Id*. at 1117. The dissenting Justices stated that there appeared to be no meaningful distinction between legislatively imposed conditions and other exactions:

> It is not clear why the existence of a taking should turn on the type of government entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.

Id. at 1117-18 (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari). Both Justices argued that the question presented warrants review because it raises a substantial question of federal constitutional law. *Id*. at 1118.

Justice Thomas reaffirmed that position in his concurring opinion in support of the Court's denial of certiorari in *California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J., concurring in denial of certiorari). There, he wrote that the "lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one" for at least two decades. *Id.* Once again, he expressed "doubt that 'the existence of a taking should turn on the type of

governmental entity responsible for the taking.'" *Id.* (citing *Parking Ass'n of Georgia*, 515 U.S. at 1117-18). Justice Thomas further noted that the Court should resolve this issue as soon as possible:

> Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.

Id.; *see also Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) (The fact that this Court has not yet resolved the split of authority on this question "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money.").

California's adoption of a categorical rule exempting all legislatively mandated exactions from the heightened scrutiny required by *Nollan/Dolan/Koontz* implicates all of the legal and policy concerns identified by members of this Court and warrants review.

B. Holding Legislative Exactions Subject Only to a "Reasonably Related to the Public Welfare" Test Fails To Protect the Rights Guaranteed by the Fifth Amendment

The decision below holds that a challenge to a legislatively imposed condition on a development permit is subject only to a test that asks whether the

condition reasonably relates to the public's general welfare. Pet. App. A at 9-10, 11-15. That standard is meaningless in the context of the Takings Clause because it cannot protect against an uncompensated taking of private property for public use and is thus antithetical to this Court's takings jurisprudence.

In *Lingle*, this Court rejected the "substantially advances a legitimate government interest" test as a takings test, because it "reveal[ed] nothing about the magnitude or character of the burden a particular regulation imposes upon private property rights." 544 U.S. 528, 542 (2005). "A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through payment of compensation." *Id.* at 543. Thus, a determination that a regulation serves a public need, without more, is not sufficient to justify a regulation that appropriates property for a public use. *Id.* at 542-43; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving that desire by a shorter cut than the constitutional way of paying for the change.").

By circumventing the analysis required by *Nollan* and *Dolan*, the California rule shifts the takings inquiry away from the severity of the burden imposed, and focuses instead upon *how* it has been imposed. Under this formulation, the same burdensome exaction may be upheld if imposed legislatively, but struck down as a taking if imposed adjudicatively. This is precisely the result that *Lingle* determined to be incongruent with the Takings Clause. 544 U.S. at 543. *Lingle* provides that, if two landowners are identically

burdened by regulatory acts, "[i]t would make little sense to say that the second owner had suffered a taking while the first had not." *Id.*

Lingle's pronouncement that identical regulatory burdens should be treated equally under the Takings Clause is no less true in the exactions context, and the court below improperly held otherwise. As with the other takings tests, *Nollan* and *Dolan* focus upon the severity of the burden imposed. *Id.* at 547 ("*Nollan* and *Dolan* both involved dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings."). *Lingle* recognized that *Nollan* and *Dolan* amounted to takings because the exactions imposed in those cases were functionally equivalent to physical invasions; however, where government physically invades a property, it effects a taking whether the legislature authorizes the invasion or not.[19] Therefore, because the monetary exaction in this case would also constitute a per se taking if imposed directly (*Koontz*, 133 S. Ct. at 2600), the fact that the legislature authorized the imposed conditions is irrelevant to the analysis.

Moreover, California's "reasonably related" standard directly implicates the fundamental understanding that "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162 (1980). As demonstrated by the decisions below, the "reasonably related" test is predicated on the conclusion that the

---

[19] *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982) (invalidating statute requiring that owners of apartment building allow private companies to install cable boxes on the buildings).

public, by operation of the City's ordinance, had a proprietary interest in the number of affordable housing units it demands from new development. Pet. App. C at 19-21 (concluding that the Lehrer-Graiwers' decision to pay a fee in-lieu "deprived the City of the affordable housing units that would otherwise be required"). Thus, the lower courts upheld the half-million dollar fee simply because it represented the replacement cost of the inclusionary units that the City's ordinance demanded. Only the heightened scrutiny required by *Nollan*, *Dolan*, and *Koontz* will guard against this type of end-run.

C. California's Legislative Exactions Rule Undermines the Takings Clause by Removing Any Limitation on the Amount of Property That Can be Demanded in a Permit Condition

The California courts justify the adoption of a categorical rule by likening legislative exactions to the type of generally applicable land-use regulations that are subject to the normal democratic process, which typically operates as a check on legislative authority. *CBIA*, 61 Cal. 4th at 471 ("While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process.") (quoting *San Remo Hotel*, 27 Cal. 4th at 671). That justification fails because the Takings Clause is founded on the anti-majoritarian principle that "public burdens . . . should be borne by the public as a whole" and cannot be shifted onto individual property owners. *Armstrong*, 364 U.S. at 49.

When the government places public costs on a small number of people, the democratic process, which is majoritarian in nature, works as an endorsement, not a check. *See* James L. Huffman, Dolan v. City of Tigard: *Another Step in the Right Direction*, 25 Envtl. L. 143, 152 (1995) ("The takings clause . . . protects against this majoritarian tyranny . . . by insisting that the costs imposed by government use or regulation of private property are borne by all to whom the benefits inure."). In that circumstance, "it [is] entirely possible that the government could 'gang up' on particular groups to force extractions that a majority of constituents would not only tolerate but applaud, so long as burdens they would otherwise bear were shifted to others." *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004).

That is precisely how West Hollywood's inclusionary zoning ordinance works. The affordable housing exaction does not "defray the cost of increased demand on public services resulting from [any individual developer's] specific development project, but rather . . . combat[s] the overall lack of affordable housing." Pet. App. A at 9. That is a textbook "public burden" which constitutionally must be shouldered by the public at large. But California's legislative exactions rule allows local government to adopt a law shifting that burden onto individual property owners in the form of a permit condition. Thus, the City demanded a half-million dollar fee—earmarked for the City's general housing subsidy program—from an owner whose proposed condominium would help *ameliorate* the City's housing shortage, without public outcry.

When the government is not required to demonstrate a connection between an exaction and the project impacts, and where there is no meaningful democratic check on its actions, there is no limit to the amount of money or property that the government can demand as a permit condition, and there is no end to the types of social problems that individual property owners will not be called upon to solve. The California court's decision, therefore, operates as an exception that swallows the rules and policy this Court set out in *Nollan*, *Dolan*, and *Koontz*. This Court should not allow such a troubling decision to stand unreviewed.

III

THERE IS A SPLIT OF AUTHORITY AMONG THE LOWER COURTS ABOUT WHETHER THE *NOLLAN* AND *DOLAN* STANDARDS APPLY TO EXACTIONS MANDATED BY LEGISLATION

Courts across the country are split over the question of whether legislatively imposed permit conditions are subject to review under *Nollan* and *Dolan*. *See Parking Ass'n of Georgia*, 515 U.S. at 1117 (recognizing a nationwide split of authority); *California Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (division has been deepening for over twenty years). The Texas, Ohio, Maine, Illinois, New York, and Washington Supreme Courts and the First Circuit Court of Appeals do not distinguish between legislatively and administratively imposed exactions, and apply the nexus and proportionality tests to generally applicable permit conditions. *Town of Flower Mound*, 135 S.W.3d at 641; *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660

(Me. 1998); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Northern Illinois Home Builders Association, Inc. v. County of Du Page*, 649 N.E.2d 384, 397 (Ill. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y.), *cert. denied*, 514 U.S. 1109 (1994); *Trimen Development Co. v. King Cty.*, 877 P.2d 187, 194 (Wash. 1994).

On the other hand, the Supreme Courts of Alabama, Alaska, Arizona, California, and Colorado, and the Tenth Circuit Court of Appeals, limit *Nollan* and *Dolan* to administratively imposed conditions. *See*, *e.g.*, *Alto Eldorado Partners v. City of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *San Remo Hotel*, 27 Cal. 4th at 643; *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n of Cent. Arizona v. Scottsdale*, 930 P.2d 993, 996 (Ariz.), *cert. denied*, 521 U.S. 1120 (1997).

Meanwhile, the Ninth Circuit is internally conflicted on this question. *See Mead v. City of Cotati*, 389 Fed. App'x 637, 639 (9th Cir. 2010) (*Nollan* and *Dolan* do not apply to legislative conditions); *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872, 874-76 (9th Cir. 1991) (adjudicating a *Nollan*-based claim against an ordinance requiring developers to provide affordable housing); *Garneau v. City of Seattle*, 147 F.3d 802, 813-15, 819-20 (9th Cir. 1998) (plurality opinion with the court divided equally on whether *Nollan* and *Dolan* apply to legislative exactions); *see also Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1083, n.4 (N.D. Cal. 2014) (*Koontz* undermines the reasoning for holding

legislative exactions exempt from scrutiny under *Nollan* and *Dolan*), *appeal pending*.

This deep and irreconcilable split of authority is firmly entrenched, and it cannot be resolved without this Court's review. This petition provides the Court with a good opportunity to address the split of authority on the scope of *Nollan* and *Dolan* because, due to West Hollywood's factual concessions, it presents the issue as a pure question of law. There is no question that, if *Nollan* and *Dolan* apply to the exaction, a constitutional violation occurred.

CONCLUSION

The petition for writ of certiorari should be granted.

DATED: March, 2017.

Respectfully submitted,

BRIAN T. HODGES
Counsel of Record
Pacific Legal Foundation
10940 Northeast 33rd Place,
Suite 210
Bellevue, Washington 98004
Telephone: (425) 576-0484
Facsimile: (425) 576-9565
E-mail: bth@pacificlegal.org

LAWRENCE G. SALZMAN
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: lgs@pacificlegal.org

Counsel for Petitioners

TABLE OF CONTENTS

Filed 9/23/16

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

616 CROFT AVE., LLC, et al.,

Plaintiffs and Appellants,

v.

CITY OF WEST HOLLYWOOD,

Defendant and Respondent.

B266660

(Los Angeles County Super. Ct. No. BC498004)

APPEAL from a judgment of the Superior Court of Los Angeles County. Luis A. Lavin, Judge. Affirmed.

Rutan & Tucker and David P. Lanferman for Plaintiffs and Appellants.

Jenkins & Hogin, Michael Jenkins, Christi Hogin and Gregg W. Kettles for Defendant and Respondent.

Plaintiffs Shelah and Jonathan Lehrer-Graiwer and 616 Croft Ave., LLC (collectively Croft), appeal from a superior court order denying their petition for a writ of mandamus to compel the City of West Hollywood (the City) to return fees the City collected when Croft applied for building permits. Croft argues the City's collection of the fees was invalid (1) facially under the

due process clause of the United States Constitution and (2) "as applied" because the City did not bear its burden in proving the fees were "reasonably related" to the deleterious public impact caused by Croft's development. We disagree and affirm.

BACKGROUND

Croft is the developer of 612–616 North Croft Avenue, an "in-fill" complex of residential rental units in West Hollywood.[1] In 2004, Croft applied to the City for permits to demolish two single-family homes sitting on adjacent lots and construct in their place an 11-unit condominium complex on the combined lots. In reviewing Croft's permit applications, the City determined Croft's proposed development fell under the City's inclusionary housing ordinance (the Ordinance), West Hollywood Municipal Code (WHMC) section 19.22.010 et seq., which the City enacted to increase the availability of affordable housing in West Hollywood. The Ordinance requires developers to sell or rent a portion of their newly constructed units at specified below-market rates or, if not, to pay an "in-lieu" fee designed to fund construction of the equivalent number of units the developer would have otherwise been required to set aside. (WHMC, §§ 19.22.030-19.22.040.)[2] The City calculates the "in-lieu" fee according to a schedule developed via resolution by the West Hollywood City Council (the City Council).

---

[1] "In-fill" projects refer to developments on unused bits of urban land to maximize the use of urban space and existing infrastructure and reduce urban sprawl.

[2] The in-lieu fee is available only to "[d]evelopers of residential projects with 10 or fewer units." (WHMC, § 19.22.040, subd. A.) Croft qualified, seemingly, because it added only nine net units.

(WHMC, § 19.64.020.) When issuing its approval of Croft's permits, the City inquired how Croft would comply with the Ordinance. Croft responded it would pay the in-lieu fee.

In 2005, the City approved Croft's permits application. The City conditioned the approval on, and would not issue demolition and construction permits until, Croft agreed to a number of conditions, including paying the fees at issue here. The City also specified that if it altered the fee schedule prior to Croft obtaining the building permits, Croft would be subject to the new schedule. The City set the permits' approval to expire in 2007, two years from its issuance of approval. In November 2005, Croft executed an "Acceptance Affidavit," indicating it accepted "all conditions of approval," including paying the fees.

Croft was unable to move forward with its development plans due, in part, to the economic downturn that began in 2007. At Croft's request, the City extended its approval of Croft's permits application several times. During this time, the City revised its fee schedule. Croft agreed again, via at least one additional signed affidavit, to be subject to this new schedule as part of the conditions for renewal.

In 2011, Croft finally requested its building permits. The City supplied Croft with the revised fee schedule, showing the fees the City required as a condition to issue the permits. According to the fee schedule, Croft would owe $581,651.15 in fees for: in-lieu housing ($540,393.28), parks and recreation ($36,551.59), waste water mitigation ($675.00), and traffic mitigation ($4,031.28). The in-lieu housing fee had nearly doubled since 2005. Croft paid the fees in December 2011, but in a letter indicated it did so "under protest"

pursuant to the Mitigation Fee Act (Gov. Code, §§ 66000–66025). According to Croft, the City was unjustified and premature in its collection of fees. Croft also facially challenged the in-lieu fee under the so-called Nollan/Dolan line of Fifth Amendment takings cases (Nollan v. California Coastal Comm'n (1987) 483 U.S. 825 [107 S.Ct. 3141]; Dolan v. City of Tigard (1994) 512 U.S. 374 [114 S.Ct. 2309]) and requested the City to furnish information regarding whether Croft had "any available process for appeal or administrative review." The City did not respond to Croft's inquiry about the possibility of an administrative appeal or review because, according to the City, "[i]t was then, and continues to remain, unclear to the City that Petitioners were entitled to such under the City's code."

On December 21, 2012, Croft sued the City. Croft brought five causes of action:

(1) declaratory relief establishing the in-lieu fees were illegal; (2) declaratory relief establishing the City violated the Mitigation Fee Act; (3) refund of the fees collected from Croft; (4) an injunction to prevent the City from further collecting in-lieu fees; and (5) a writ of mandate to compel the City to return the funds or, alternatively, hold an administrative hearing to determine the validity of the collection. The parties agreed to stay the suit while the City held an administrative hearing before the City Council. On April 15, 2013, the City Council approved Resolution No. 13-4426, which upheld the City's collection of the majority of the fees, save the $675 waste water mitigation fee, which the City conceded it had prematurely collected. Croft then returned to court and added a sixth cause of action for administrative

mandate. Croft agreed to sever the administrative mandate cause of action for an immediate hearing. After a hearing, the court denied the writ. Croft voluntarily dismissed its remaining claims and appealed. During the litigation, Croft completed the condominium complex.

DISCUSSION

On appeal, Croft argues the fees are invalid (1) generally and (2) as applied to it. Croft further argues that the trial court erroneously shifted the burden of proof from the City to Croft and that the City did not carry its burden in showing the fees were reasonably related to public needs caused by the development.

We apply two standards of review. First, we review the facial challenge de novo because it is a pure question of law. (Alviso v. Sonoma County Sheriff's Dept. (2010) 186 Cal.App.4th 198, 204.) Second, we review the as-applied challenge for substantial evidence, but in doing so we determine whether the administrative record supports the City Council's decision, not whether the evidence at trial supported the trial court's decision. (MHC Operating Limited Partnership v. City of San Jose (2003) 106 Cal.App.4th 204, 217–218.)

A. The in-lieu fees were proper

1. Social and legal context

The lack of affordable housing has been a statewide issue of concern for almost 40 years. In 1977, the Legislature codified its finding that "there exists within the urban and rural areas of the state a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income,

including the elderly and handicapped, can afford. This situation creates an absolute present and future shortage of supply in relation to demand, as expressed in terms of housing needs and aspirations, and also creates inflation in the cost of housing, by reason of its scarcity, which tends to decrease the relative affordability of the state's housing supply for all its residents." (Health & Saf. Code, § 50003.3, subd. (a).) By 1982, the Legislature called "[t]he lack of housing . . . a critical problem that threatens the economic, environmental, and social quality of life in California." (Gov. Code, § 65589.5, subd. (a)(1).) Government Code section 65583, subdivision (c)(2) mandated cities like West Hollywood must "[a]ssist in the development of adequate housing to meet the needs of extremely low, very low, low-, and moderate-income households" to help address the housing crisis as part of the statutory obligation to "adopt a comprehensive, long-term general plan for [its] physical development" (Gov. Code, § 65300). This context elucidates both the City's adoption of the Ordinance and our deferential recognition of it as a land use regulation rather than as an exaction or special tax, explained further in part A.3, post.

2. Croft's facial challenge is time barred

As an initial matter, Croft argues the trial court mischaracterized its facial argument as a "'constitutionality'" challenge rather than a "validity" challenge. Croft, however, argued the fees are invalid because they do not satisfy the Fifth Amendment due process requirements of the Nollan/Dolan line of takings cases. This is plainly a constitutional challenge. Even if it were not a constitutional challenge, re-characterizing the argument would not

save the claim from procedural failure because Croft's challenge is untimely.

Government Code section 65009, subdivision (c)(1)(B)-(C) requires that "no action or proceeding shall be maintained . . . by any person unless the action or proceeding is commenced and service is made on the legislative body within 90 days after the legislative body's decision" if the action is to "attack, review, set aside, void, or annul the decision of a legislative body to adopt or amend a zoning ordinance" or "determine the reasonableness, legality, or validity of any decision to adopt or amend any regulation attached to a specific plan." This 90-day limitation applies even if the facial challenge is part of an as-applied challenge. (Travis v. County of Santa Cruz (2004) 33 Cal.4th 757, 776.) Here, Croft challenges the City's enactment of the Ordinance and its attendant fee schedule. Croft's challenge is untimely because Croft brought it more than 90 days after the City enacted the Ordinance and adopted the fee schedule. The City adopted the Ordinance in 2001 and approved the fee schedule, as modified, on June 20, 2011, but Croft did not bring its challenge until, at the earliest, December 22, 2011, if we consider Croft's protest letter a proper facial challenge. Croft's argument that the City waived this defense because the City did not plead it is unavailing. The record contains the City's answer, which clearly pleads "every purported cause of action therein, is barred by any and all applicable statutes of limitation."

3. Croft's as-applied challenge improperly places the burden on the City and incorrectly states how the fee must be reasonable

a. Croft bears the burden, not the City

Croft argues the City bears the burden to prove its fees were reasonable under the Mitigation Fee Act, articles XIII C and XIII D of the California Constitution, and its own municipal code.[3] These provisions do not place the burden on the City either at all or in the way Croft argues.

The Mitigation Fee Act applies when "a monetary exaction other than a tax or special assessment . . . is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project . . . ." (Gov. Code, § 66000, subd. (b).) In California Building Industry Assn. v. City of San Jose (2015) 61 Cal.4th 435, 443-444 (San Jose), the California Supreme Court held that an affordable housing provision similar to the Ordinance here was not an "exaction" which invoked the United States Constitution's Fifth Amendment due process takings protections. (Ibid.; id. at p. 461.) Instead, such a restriction "is an example of a municipality's permissible regulation of the use of land under its broad police power." (Id. at p. 457.) Although the facts here are slightly different than in San Jose because Croft challenges paying an in-lieu fee rather than actually setting aside a number of units, the reasoning in San Jose applies. Croft paid the in-lieu fee

---

[3] Croft references "art. XIII D, § 6 subd. (b)(6)" of the California Constitution several times in its appellate argument, but no such paragraph exists. We construe this incorrect reference as a typographical error and assume Croft intended to reference article XIII D's provisions about special taxes in light of its statement one of its "alternative position[s]" is that the fees "are in reality in the nature of invalid 'special taxes.' (Cal. Const., art. XIII A, XIII C, XIII D.)"

voluntarily as an alternative to setting aside a number of units. If a set-aside requirement is not governed by Nollan or Dolan, then "the validity of the in lieu fee—which is an alternative to the on-site affordable housing requirement—logically cannot depend on whether the amount of the in lieu fee is reasonably related to the development's impact on the city's affordable housing need" under Nollan or Dolan either. (San Jose, at p. 477.)

In addition, and as in San Jose, the purpose of the in-lieu housing fee here is not to defray the cost of increased demand on public services resulting from Croft's specific development project, but rather to combat the overall lack of affordable housing. (San Jose, supra, 61 Cal.4th at p. 444.) This type of fee is not "for the purpose of mitigating the adverse impact of new development but rather to enhance the public welfare by promoting the use of available land for the development of housing that would be available to low- and moderate-income households." (Id. at p. 454.) Assuming the fee is such a land use regulation, "[a]s a general matter, so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property, such a restriction does not violate the takings clause insofar as it governs a property owner's future use of his or her property." (Id. at p. 462.)[4] This is especially true when

---

[4] Croft argues the California Supreme Court held in Sterling Park, L.P. v. City of Palo Alto (2013) 57 Cal.4th 1193 (Sterling Park) that a similar inclusionary ordinance was not a land use regulation, but rather imposed exactions. Sterling Park does not adversely bear on our analysis, however, because, as the San Jose court held, "Sterling Park did not address or intend to express any view whatsoever with regard to the legal test that applies in (continued...)

the regulation, like the one here, broadly applies nondiscretionary fees to a class of owners because the risk of the government extorting benefits as conditions for issuing permits to individuals is unrealized. (San Remo Hotel v. City and County of San Francisco (2002) 27 Cal.4th 643, 668–670; see also Ehrlich v. City of Culver City (1996) 12 Cal.4th 854, 860, 880–881 [applying the Nollan/Dolan requirements to an individual fee charged to a developer, in part, because it was not "a generally applicable development fee or assessment"].)

Croft further argues even if the in-lieu fee is not an exaction, the City's "right of first refusal" to buy the set-aside units, if the targeted renters or buyers do not buy them, is an exaction under Government Code section 66020 and Sterling Park. (See Sterling Park, supra, 57 Cal.4th at pp. 1207–1208 ["Compelling the developer to give the City a purchase option is an exaction under section 66020"].)[5] This argument is unavailing. First, Croft did not set aside units. Croft can therefore challenge this portion of the Ordinance on only a theoretical level. If the challenge is theoretical, it cannot be as-applied and must be facial. As described above, a facial challenge is time barred. Second, and also as described above, the Mitigation

[4] (...continued)
evaluating the substantive validity of the affordable housing requirements imposed by an inclusionary housing ordinance." (San Jose, supra, 61 Cal.4th at p. 482.)

[5] Under the Ordinance, "[a]fter offering the units to eligible households displaced by demolition, the developer of a project shall be required to give right of first refusal to purchase any or all inclusionary units to the city, or a city-designated agency or organization, for at least 60 days from the date of construction completion." (WHMC, § 19.22.090, subd. C.)

Fee Act does not apply to the in-lieu fee. Any language in Government Code section 66020 defining a right of first refusal as an exaction is therefore inapplicable here.

Croft's cited California Constitution articles also do not place the burden on the City to demonstrate individual reasonableness. Croft argues that if the fees are not exactions then they are special taxes masquerading as fees and the City constitutionally bears the burden to prove otherwise under articles XIII C and XIII D. Under article XIII C, section 1, subdivision (e)(7), a "local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." Article XIII D, section 1, subdivision (b), however, establishes that "[n]othing in this article or Article XIII C shall be construed to: [¶] . . . [¶] (b) Affect existing laws relating to the imposition of fees or charges as a condition of property development." Courts have held that fees like the ones here, which are a condition of property development, are not special taxes.

For example, and as the City argues, Terminal Plaza Corp. v. City and County of San Francisco (1986) 177 Cal.App.3d 892 held that fees collected under an ordinance aimed at replacing residential hotel rooms, which had been available to lower income and elderly residents but were lost when developers converted them to tourist hotel rooms or condominiums, were not special taxes. (Id. at pp. 898, 906-907.) The fees were

not special taxes because they were not "earmarked for general revenue purposes or to pay for a variety of public services. Nor [we]re they imposed upon the land, but rather upon the privilege of converting residential hotel units to other uses. Moreover, the ordinance [wa]s not compulsory in nature, since fees are exacted only if the property owner elects to convert his property to another use. And, finally, the regulatory fees imposed by the ordinance have no impact upon general government spending and do not contravene that broad objective of article XIIIA. [Citation.] [¶] Since, simply stated, the ordinance is not a revenue producing measure, we find that neither the costs incurred to provide replacement housing nor the in lieu fees are in the nature of a 'special tax' under section 4." (Id. at pp. 906-907.) That reasoning applies to the in-lieu housing fee here: The fees are not deposited into the general coffers; the fees are not used to offset the increased demand for public services; the fees are not imposed on the land, but rather on building residential developments; the fees are not compulsory because developers could choose the set-aside option or to build a different type of development; and, finally, the fees do not impact government spending. Because the City has shown the fees are not special taxes under Terminal Plaza, articles XIII C and XIII D of the California Constitution do not require the City to demonstrate the reasonableness of Croft's individual fee.

Croft argues that even if the City is not statutorily or constitutionally obligated to demonstrate easonableness, the City took that responsibility upon itself in its municipal code. West Hollywood Municipal Code section 19.64.040, subdivision C.1 states: "Any person subject to a fee required by this chapter may

apply to the Council for an adjustment, reduction, postponement, or waiver of that fee based upon the absence of a reasonable relationship between the impact of that person's commercial or residential development project on the demand for affordable housing." (Italics added.) Croft is incorrect. This provision does not necessarily place the burden on the City to demonstrate reasonableness. Given that ordinarily in "'a challenge to a legislative decision, the petitioner has the burden of proof to show that the decision is unreasonable or invalid as a matter of law' " (Weinstein v. County of Los Angeles (2015) 237 Cal.App.4th 944, 966), we will not shift the burden to the City absent evidence it was the City's intent to do so.

b. The reasonableness test applies to the creation of the fee schedule, not its application

Croft mischaracterizes the nature of the reasonableness inquiry and does not present evidence relating to the correct inquiry; even if it had, the claim related to such an inquiry would be facial and time barred, as described above in part A.2.

Croft characterizes the nature of the reasonableness inquiry as the City proving that, dollar for dollar, the fee it charged Croft was proportional to the negative impact Croft's development had on the demand for affordable housing. This is incorrect. To start, as described above, the burden is on Croft, not the City. Second, although the fee must be reasonable, the inquiry is not about the reasonableness of the individual calculation of fees related to Croft's

development's impact on affordable housing.[6] The inquiry is whether the fee schedule itself is reasonably related to the overall availability of affordable housing in West Hollywood. As the San Jose court held, "when a municipality enacts a broad inclusionary housing ordinance to increase the amount of affordable housing in the community and to disperse new affordable housing in . . . the community, the validity of the ordinance does not depend upon a showing that the restrictions are reasonably related to the impact of a particular development to which the ordinance applies. Rather, the restrictions must be reasonably related to the broad general welfare purposes for which the ordinance was enacted." (San Jose, supra, 61 Cal.4th at p. 474.) Croft does not challenge the City's method in creating the fee schedule.[7]

Because Croft did not dispute the City's creation of the fee schedule, and in light of the statute of limitations, we do not address whether the evidence demonstrates

---

[6] As an as-applied challenge, Croft could, of course, have disputed the City's actual mathematical calculation of its individual fee. For example, Croft could have argued the City exaggerated the number of square feet or made a multiplication error. Croft makes no such arguments here, however; instead, Croft disputes the reasonableness of the overall fee to the deleterious public impact of its individual project on the City. The only viable as-applied argument Croft does make, about the timing of the City's collection, is addressed in part C, post.

[7] Even if it had, "[a]s a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible," and in "'deciding whether a challenged [land use] ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor.'" (San Jose, supra, 61 Cal.4th at p. 455.)

the reasonableness of the fee schedule itself. (See San Jose, supra, 61 Cal.4th at p. 479 [declining to comment on "the validity of the amount of the particular in lieu fee at issue in City of Patterson [(2009) 171 Cal.App.4th 886, disapproved on another point in San Jose] or of the methodology utilized in arriving at that fee" when it was not at issue].)

B. The parks and recreation and traffic mitigation fees were proper

1. The City correctly calculated the parks and recreation fee

Croft argues the City incorrectly calculated the parks and recreation fee because it used the total number of units resulting from Croft's development instead of the net number of units. Croft argues it added only nine new units overall because it tore down two existing dwellings before it built its 11 new units. Government Code section 66477, subdivision (a)(2) states, however, that parks and recreation fees "shall be based upon the residential density, which shall be determined on the basis of the approved or conditionally approved tentative map or parcel map and the average number of persons per household." (Italics added.) Croft cited no law permitting a "net" exception to this rule, and the cases it does cite are inapposite. (E.g., Warmington Old Town Associates v. Tustin Unified School Dist. (2002) 101 Cal.App.4th 840, 845 [considering school-impact fees, not parks and recreation fees]; Cresta Bella, LP v. Poway Unified School Dist. (2013) 218 Cal.App.4th 438, 442–443 [same].) We uphold the City's calculation under the statutory language and in the absence of an exception.

2. Croft abandoned its traffic fees claim on appeal

On Appeal, Croft stated it does "not challenge the City's resolutions setting fees for . . . the purpose of traffic mitigation actually caused by new development in general, and does not now challenge the traffic fees as applied to the net increase of nine (9) units created by" Croft's development. Because Croft abandoned its traffic fees claim, we do not consider it.

C. The City collected the fees at an appropriate time

Croft argues the City collected the fees too early. According to Croft, Government Code section 66007, subdivision (a) mandates that "most fees imposed on residential development projects may not be demanded any earlier than the time of completion [of] either (a) final inspection or (b) certificate of occupancy." Croft argues this limitation applies to both the in-lieu fee and the parks and recreation fee. Section 66007's timing limitation applies to neither.

Government Code section 66007, as part of the Mitigation Fee Act, does not apply to the in-lieu fee, as described above.[8] Croft fails to cite any additional law stating the collection of the in-lieu fee was untimely.

---

[8] Even if it did, Croft omits a critical phrase from its interpretation of the statute's timing limitation. The statute imposes this timing limitation only "on a residential development for the construction of public improvements or facilities." (Gov. Code, § 66007, subd. (a), italics added.) Here, the City collected the fees for nonprofit corporations to develop residential units to be sold to private entities. (WHMC,§ 19.22.040, subd. E.) Although the creation of these units supports a public goal, the units themselves are not public improvements nor are they public facilities. That is, the City does not operate, own, or profit from the finished units.

Absent Croft identifying some other law indicating this timing was unlawful, we will not hold the City collected the fees too soon. As to the parks and recreation fee, under Government Code section 66007, subdivision (b)(1)(B), the City was permitted to collect fees "to reimburse" itself "for expenditures previously made" prior to the final inspection or issuance of the certificate of occupancy. (Gov. Code, § 66007, subd. (b)(1)(B).) In its administrative ruling, the West Hollywood City Council determined that the parks and recreation fees "were used to offset the cost of the recent renovation of nearby West Hollywood Park." This lone statement, although thin, is substantial evidence supporting the City's claim, and Croft presented no evidence this statement was untrue. In light of the absence of evidence of this statement's untruthfulness, we uphold the timing of the City's collection of the parks and recreation fee.

D. We need not reach the City's remaining affirmative defenses

The City alleges Croft was barred from bringing this suit because (1) it waived its right to do so when it agreed to pay the fees and (2) Government Code section 66020, subdivision (d) time bars the claims. We need not address the waiver argument because we are upholding the judgment on different grounds. (Sutter Health Uninsured Pricing Cases (2009) 171 Cal.App.4th 495, 513, quoting Filipino Accountants' Assn. v. State Bd. of Accountancy (1984) 155 Cal.App.3d 1023, 1029 ["Ordinarily, when an appellate court concludes that affirmance of the judgment is proper on certain grounds it will rest its decision on those grounds and not consider alternative grounds which may be available"].) We do not address the

Mitigation Fee Act's statute of limitation because the City argues the Mitigation Fee Act does not apply to the Ordinance, and we agree.

DISPOSITION

The judgment is affirmed. The City of West Hollywood is awarded its costs on appeal under California Rules of Court, rule 8.278.

CERTIFIED FOR PUBLICATION.

LUI, J.

We concur:

CHANEY, Acting P. J.

JOHNSON, J.

Appendix B–1

Court of Appeal, Second Appellate District,
Division One - No. B266660

S238136

IN THE SUPREME COURT OF CALIFORNIA

En Banc

---

616 CROFT AVE., LLC et al.,
Plaintiffs and Appellants,

v.

CITY OF WEST HOLLYWOOD,
Defendant and Respondent

The petition for review denied.

SUPREME COURT
FILED
DEC 21 2016

Jorge Navarrete Clerk

S/ Cantil-Sakauye
Chief Justice

Appendix C–1

SUPERIOR COURT OF THE STATE OF
CALIFORNIA FOR THE
COUNTY OF LOS ANGELES

FILED
June 16 2015
Sherri R. Carter Executive Officer/Clerk
by s/ Nancy DiGiambattista, Deputy

616 Croft Ave., LLC, et al.,

Plaintiffs and Petitioners,

v.

City of West Hollywood, et al.,

Defendants and Respondents.

Case No. BC498004

Interlocutory Decision and Order Denying Petition for Writ of Mandate

Before the Court is the petition by 616 Croft Ave., LLC, Jonathan Lehrer-Graiwer, and Shelah Lehrer-Graiwer (collectively, Petitioners) for a writ of mandate directed at the City of West Hollywood (City) under the sixth cause of action in their First Amended and Supplemental Complaint (FAC). After supplemental briefing was received by the Court, the matter was argued and submitted on June 4, 2015. As set forth below, the writ of mandate is denied.

Request for Judicial Notice and Objections

Petitioners' request for judicial notice is granted.

Petitioners' objection to the "Notice by City of West Hollywood of Recent California Court of Appeal

Decision Pertinent to its Revised Opposition to Petition for Writ of Mandate" filed on May 6, 2015 is overruled. Petitioners were given an opportunity to submit supplemental briefing in connection with the cited decision, City of Berkeley v. 1080 Delaware, LLC, (2015) 234 Cal. App. 4th 1144.

Statement of the Case

The City implemented an "inclusionary housing" ordinance (Ordinance) in 2001[1] in order to "meet[] its commitment to encourage housing affordable to all economic groups . . ." WHMC § 19.22.010; Petitioner's RJN Exhibit A-C. The Ordinance requires the developer of a residential project within the City to sell or rent a defined percentage of the newly constructed housing units at specified below-market prices or, alternatively, to pay an "in lieu" fee that is calculated by the City according to a statutory formula. Id., Exhibit A,§ 19.22.030 (requiring affordable units);§ 19.22.040 (defining the affordable housing "in lieu" fee)). The amount o the affordable housing fee is determined by resolution of the City Council. Id. at exhibit B, § 19.64.020. Funds remitted as "in lieu" fees are placed into the City's Affordable Housing Trust Fund to be used exclusively for development of low and moderate income housing projects. A tax exempt nonprofit corporation can apply to obtain financing for the construction of inclusionary housing in other parts of the City from the Trust Fund. Id. at 19.22.040(E). If the developer wishes to challenge an assessed fee, he

[1] The 2001 Ordinance added two chapters relevant to the current discussion and expands on West Hollywood Ordinance No. 284, adopted in 1991, which established the Affordable Housing Development fees. All three applicable chapters are attached to Petitioners' Request for Judicial Notice as Exhibits A-C.

or she is entitled to do so at a public hearing held by the City Council. Id. at 19.64.040(C)(3).

Petitioners[2] are the owners and developers of 612-616 North Croft Avenue (project or proposed development). The project is located on the corner of Croft Avenue and Rangley Street, near Melrose Avenue, in the City of West Hollywood. (AR 11). In 2004, Petitioners applied to the City for a development and demolition permit application. (AR 2-14). Specifically, they sought permission to demolish two single-family homes on two lots and construct an 11-unit condominium complex on the combined lots.

Because the proposed-project was subject to the City's Ordinance, the City asked Petitioners how they would comply with the City's affordable housing requirements. That is, the City asked them if they would comply with these requirements by providing the required low or moderate income housing units or paying the in-lieu fees. (AR 16, 26). Petitioners responded on November 10, 2004: "Affordable housing: In-lieu fee will be paid by developer." (AR 31).

The City approved Petitioners' application on July 18, 2005 by adopting two resolutions granting the demolition and construction requests. (AR 469-486 [approving demolition and construction permits]; AR 487-495 [approving corresponding changes to City's

---

[2] In the original June 2004 application submitted to the City, only Jonathan Lehrer-Graiwer is listed as the property owner (AR 2, 10). However, the operative pleading states all three Petitioners are the "owners and assignees of all prior development rights and approvals obtained from the City for the subject project." (FAC, ¶ 3). Accordingly, in this decision the Court refers to Petitioners, collectively, when discussing their contentions and the City's opposition.

tract map]). Approval of the project was subject to numerous conditions, including payment of all development fees, including the affordable housing fee, prior to issuance of building permits. (AR 474-475, ¶ ¶ 3.1, 3.6). In addition, if the City adjusted the affordable housing fee prior to Petitioners obtaining the building permits, then the conditions dictated that the revised fee schedule would apply. (AR 474, ¶ 3.1). On November 3, 2005, Petitioners executed an "Affidavit of Acceptance" which stated that they were aware of and accepted "all conditions of approval" in both resolutions, which included payment of the affordable housing fee. (AR 515).

Because Petitioners' project approval was originally set to expire two years from the City's approval, they requested and received numerous extensions of the applicable deadline to begin construction. (AR 561, 605-647, 666, 681-682). At least one of these extensions was granted subject to certain conditions, including that any fees would be recalculated based on the fee schedule in effect at the time the building permits are issued. (AR 661-663). On February 28, 2009, Petitioners again executed, under oath, an affidavit agreeing to those conditions. (AR 660-662).

When construction was finally set to begin in late 2011, Petitioners applied for building permits and received a fee schedule from the City listing each fee that would have to be paid as a condition of issuing the building permits. (AR 683-686). Among the fees were charges for in-lieu housing ($540,393.28), parks and recreation ($36,551.59), waste water mitigation ($675.00) and traffic mitigation ($4,031.28). (AR 684). The fee schedule reflected that the amount of the affordable housing fee had nearly doubled from the time of the

initial project approval. (Compare AR 474 [$13.34/square foot] with AR 685 [$24.68/square foot]).

On December 22, 2011, Petitioners paid the full amount of the fees for a total of $581,651.15. (AR 686). A letter sent by Petitioners' counsel to the City's Planning Manager on that same date explained that the affordable housing, parks and recreation, waste water mitigation, and traffic fees were paid "under protest" pursuant to California's Mitigation Fee Act, Government Code § 66007, and further outlined legal arguments for why the various fees were either not justified or were being demanded before they were due. (AR 689-696).

Petitioners filed this lawsuit on December 21, 2012. Thereafter, the City scheduled a public hearing for March 18, 2013 to determine whether or not the fees should be adjusted, reduced, or waived. (AR 72 -732). Petitioners submitted a letter outlining their position in advance of the hearing (AR 697-726) and City staff prepared a report that recommended denying Petitioners' appeal, except for $675 in wastewater mitigation fees that were collected prematurely. (AR 748-800; recommendation at 751-755). The hearing was conducted on March 18, 2013 before the City Council. (AR 823-850). On April 15, 2013, the City Council voted 5-0 to approve Resolution No. 13-4426, which granted Petitioners' appeal of the waste water mitigation fee, but upheld the remainder of the fees. (AR 856; 864-867).

Standard of Review

Petitioners argue that the Court's review of the challenged actions or Ordinance is governed by Code of

Civil Procedure 1094.5 or Code of Civil Procedure § 1085.

"Ordinary mandate [under CCP section 1085] is used to review adjudicatory actions or decisions when the agency was not required to hold an evidentiary hearing. Judicial review by way of administrative mandate [under CCP section 1094.5] is available only if the decision resulted from a proceedin in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the agency. [Citation.] When review is sought by means of ordinary mandate, generally the court's inquiry is limited to whether the decision was arbitrary, capricious, or entirely lacking in evidentiary support. [Citation.]" DeCuir v. County of Los Angeles, (1998) 64 Cal.App.4th 75, 81. Further, "[i]f the administrative agency provides a hearing but it was not required by law, administrative mandamus does not apply." Sheldon v. Marin County Employees' Ass'n, (2010) 189 Cal.App.4th 458,462; see also Keeler, supra, 46 Cal.2d at p. 599 ("Whether [a hearing was conducted] is not important, as section 1094.5 is applicable only when a hearing and taking of evidence among other things are required"). "[A]s a general rule, when a case involves or affects purely economic interests, courts are far less likely to find a right to be of the fundamental vested character." JKH Enterprises Inc. v. Department of Industrial Relations, (2006) 142 Cal.App.4th 1046, 1060 (impact of the Department of Industrial Relations' decision to issue an administrative stop work order and penalty for violation labor relations was purely economic and the substantial evidence standard was the appropriate standard of reviewing the Department's decision.).

To the extent that the writ proceeding seeks to challenge the City Council's April 15, 2013 decision which granted Petitioners' appeal of the waste water mitigation fee but upheld the remainder of the fees, the parties contend that such review should be conducted under Code of Civil Procedure § 1094.5. The Court disagrees because judicial review by way of administrative mandamus is available only if the decision resulted from a proceeding in which by law a hearing is required to be given, evidence is required to be taken, and discretion in the determination of facts is vested in the agency. DeCuir v. County of Los Angeles,(1998) 64 Cal. App. 4th 75, 81. That is, administrative mandamus does not apply to informal administrative actions. See Wasko v. Dep't of Corr., (1989) 211 Cal. App. 3d 996, 1001 (administrative mandamus is properly directed to formal adjudicatory proceedings and not to informal administrative actions); see also Pacific Lumber Co. v. State Water Resources Control Bd., (2006) 37 Cal. 4th 921, 944 (indicia of proceedings undertaken in a judicial capacity include testimony given under oath or affirmation, a party's ability to subpoena, call, examine, and cross-examine witnesses, to introduce documentary evidence, and the taking of a record of the proceeding). Here, the proceeding before the City Council was not an adjudicatory proceeding because there was no requirement that the panel hear any evidence, let alone testimony under oath. Regardless, under either standard of review, Petitioners have not shown that there is any basis for reversing the City Council's decision.

Petitioners also appear to challenge the constitutionality of the City's Ordinance. A facial challenge to the constitutional validity of a statute or

ordinance considers only the text of the measure itself, not its application to the particular circumstances of an individual. Dillon v. Municipal Court, (1971) 4 Cal.3d 860, 865. "'To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute . . . . Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions.'" Arcadia Unified School Dist v. State Dept. of Education, (1992) 2 Cal.4th 251, 267, quoting Pacific Legal Foundation v. Brown, (1981) 29 Cal.3d 168, 180-181. In contrast, an as applied challenge may seek (1) relief from a specific application of a facially valid statute or ordinance to an individual or class of individuals who are under allegedly impermissible present restraint or disability as a result of the manner or circumstances in which the statute or ordinance has been applied, or (2) an injunction against future application of the statute or ordinance in the allegedly impermissible manner it is shown to have been applied in the past. Tobe v. City of Santa Ana, (1995) 9 Cal. 4th 1069, 1084. If plaintiff seeks to enjoin future, allegedly impermissible, types of applications of a facially valid statute or ordinance, the plaintiff must demonstrate that such application is occurring or has occurred in the past. Id. A plaintiff seeking this relief, either by a petition for writ of mandamus or complaint for declaratory and injunctive relief, must have a sufficient beneficial interest to have standing to prosecute the action, and there must be a present impermissible application of the challenged statute or

ordinance which the court can remedy. Tobe v. City of Santa Ana, 9 Cal. 4th at 1085-1086.

Analysis

Petitioners argue that a writ should issue setting aside the City Council's April 15, 2013 decision and invalidating the challenge Ordinance. Their requests are denied for the reasons that follow.

I. Petitioners have not shown that the City's affordable housing in-lieu fees are not justified, either generally or as applied to them

A. Petitioners' facial challenge

Contrary to Petitioners' assertion that the City has the burden of showing that the Ordinance is legal, it is Petitioners' burden to show that the "mere enactment" of the Ordinance "constitutes a taking and deprives the owner of all viable use of the property at issue." Action Apartment Ass'n v. City of Santa Monica, (2008) 166 Cal.App.4th 456, 468; Tahoe-Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency, (2002) 535 U.S. 302, 318. The cases cited by Petitioners that would place this burden on the City do not deal with a facial challenge to a properly adopted city ordinance and are therefore not applicable.

Here, Petitioners have not carried their burden of showing that the Ordinance is invalid on its face. Indeed, their briefing barely addresses the facial validity of the Ordinance, and even then only makes conclusory statements that are unsupported by an application of the law to the facts of this case. See e.g., Opening Brief, p. 16, lines 14-19. Instead, Petitioners'

arguments appear to be directed at the City's deficiencies in applying the Ordinance to them; namely the City's failure to make findings showing a "reasonable relationship" between the affordable housing fees and the "deleterious impact" of the project.

Further, Petitioners' facial challenge to the Ordinance is untimely. Government Code section 65009(c)(l)(B) provides a 90-day period, starting from the legislative body's decision, to attack the decision of a legislative body. In this case, Petitioners' facial challenge was not brought within 90-days from the City's enactment of the Ordinance. As explained in Travis v. County of Santa Cruz, (2004) 33 Cal. 4th 757, even where an as-applied challenge to an ordinance necessarily involves a facial challenge, the facial challenge must itself be timely. Petitioners' contention that the City waived any statute of limitations defense is without merit. The City pleaded the statute of limitations as an affirmative defense in its answer.

B. Petitioners' as applied challenge

Petitioners argue that the Ordinance is invalid as applied to their project because the City did not show (1) that the in-lieu fees bore an "essential nexus" and "rough proportionality" to the impact of the project, and (2) that the fees bore a "reasonable relationship" between the amount and purpose of the fee and the deleterious impact of Petitioners' development. According to Petitioner, these standards are mandated by the *Nolan/Dolan* line of Supreme Court cases, by

California case law addressing in-lieu fees of the type at issue here, and by the City's own municipal code.[3]

1. The *Nolan / Dolan* level of scrutiny does not apply to the in-lieu fees

Petitioners contend that the City needed to find an "essential nexus" and "rough proportionality" between the purpose and amount of the affordable housing in lieu-fees and the impact of the development for the fees to pass constitutional muster under the Takings Clause of the Fifth Amendment. The City argues that this test is inapplicable because the in-lieu fees were assessed pursuant to a generally applicable ordinance rather than an "ad hoc" discretionary permitting decision. The Court agrees with the City's position.

In Nollan v. California Coastal Comm'n (*Nollan*), (1987) 483 U.S. 825, the Supreme Court held that a condition attached to discretionary government permit

---

[3] After briefing was completed in this case, the California Supreme Court decided Cal. Bldg. Indus. Ass'n v. City of San Jose, 2015 Cal. LEXIS 3905., (C I. June 15, 2015). In that case, the court held that the basic requirement imposed by the challenged ordinance—conditioning the grant of a development permit for new developments of more than 20 units upon a developer's agreement to offer for sale at an affordable housing price at least 15 percent of the on-site for-sale units—does not constitute an exaction for purposes of the takings clause so as to bring into play the unconstitutional conditions doctrine under the *Nollan*, *Dolan*, and *Koontz* decisions. The court also explained that under *Koontz*, so long as a permitting authority offers a property owner at least one alternative means of satisfying a condition that does not violate the takings clause, the property owner has not been subjected to an unconstitutional condition. Because the California Supreme Court's decision was issued after briefing was completed in this case, the Court does not address it other than to note that it would not affect its decision to deny Petitioners' writ of mandate.

needed to bear an "essential nexus" to the legitimate state interest that supported the land use regulations to avoid a violation of the takings clause. Id. at 837. Without such an essential nexus, the Court explained, otherwise valid use restrictions would be converted into an "out-and-out plan of extortion." Id. Later, the Court expanded on this "unconstitutional conditions" doctrine in Dolan v. City of Tigard (*Dolan*), (1994) 512 U.S. 374 when it held that the degree of the exactions must also bear a "rough proportionality" to the projected impact of the proposed development to avoid running afoul of the takings clause. Id. at 388-391. More recently, the Court held in Koontz v. St. Johns River Water Management Dist. (*Koontz*), (2013) 133 S.Ct. 2586, that the unconstitutional conditions doctrine applied not only when the government conditions a discretionary permit approval on the dedication of land, as was the case in *Nollan* and *Dolan*, but also when the condition demanded is a monetary exaction. Id. at 2603.

Petitioners' argument was rejected by the court in a case with similar facts, San Remo Hotel L.P. v. City and County of San Francisco (*San Remo*), (2002) 27 Cal.4th 643. There, the hotel had applied for and received a conditional use permit to convert several residential apartments into temporary hotel rooms, on the condition that they pay the city a "housing replacement" fee to compensate for the lost residential units pursuant to a generally applicable hotel conversion ordinance. Id. at 656. The hotel challenged the city's imposition of the fee on the grounds that the city had failed to establish that the fees bore the "essential nexus" and "rough proportionality" to the development required under the *Nollan/Dolan* line of cases and were therefore unconstitutional. Id. at

663-64. The *San Remo* court found the *Nollan/Dolan* line of cases inapplicable because the fee was imposed on all residential hotels within the city, not just the plaintiff's hotel. Id. at 668-69. It explained that a lower level of scrutiny was justified for generally applicable ordinances because the primary concern justifying the heightened scrutiny of the *Nollan/Dolan* analysis—the risk that the government will extort property from landowners as a condition to granting discretionary land use decisions—was much less compelling for generally applicable ordinances that could be challenged through the democratic process. Id. at 671-72; see also Ehrlich v. City of Culver City, (1996) 12 Cal.4th 854, 881 ("[W]hen a local government imposes special, discretionary permit conditions on development by individual property owners . . ." *Nollan/Dolan* scrutiny applies); Action Apartment Ass'n v. City of Santa Monica, (2008) 166, Cal.App.4th 456, 469-4 70 (*Nollan/Dolan* scrutiny does not apply to generally applicable development fees).

Here, Petitioners are challenging the application of a generally applicable affordable housing law. The City's municipal code provides that all newly constructed residential units must include affordable housing (WHMC § 19.22.020-030) and that an in-lieu fee can be paid instead of providing the units on-site. WHMC § 19.22.040(A). The amount of the in-lieu fee is not determined on an individualized basis, but is instead computed according to a generally applicable formula set by the City Council. Id., subdivision (B). Under the plain terms of the City's code, the imposition of the fee was neither discretionary nor individually applied to Petitioners' project as opposed to any other project. Thus, under *San Remo*, the *Nollan/Dolan* level of scrutiny does not apply to the City's affordable housing

fees because there was no "discretionary deployment of the police power" in connection with the project approvals. *San Remo*, supra, 27 Cal.4th at 670.

The Court also disagrees with Petitioners' contention that *Koontz* is applicable to their challenge. First, *Koontz* dealt with a discretionary, ad hoc permit approval, not a generally applicable ordinance. *Koontz*, supra, 133 S.Ct. at 2593. Second, the holding in that case stands for the proposition that a conditional permit approval based on a monetary exaction was subject to a higher level of scrutiny, not that generally applicable ordinances were also subject to that scrutiny. And this higher level of scrutiny was justified because the central concern of *Nollan* and *Dolan*—that the government might abuse its "substantial power and *discretion* in land-use permitting" to exact money or property without justification—was implicated where the local government had imposed discretionary conditions on Koontz's permit application. Id. at 2600 (emphasis added). Here, the City had no discretion and made no individualized determination on whether or not to impose the affordable housing ordinance because it was bound to impose that fee pursuant to the City's municipal code. Accordingly, the *Nollan/Dolan* level of scrutiny was not triggered by the City's nondiscretionary imposition of the affordable housing fees. Nothing in *Koontz* mandates a different result.

2. The "reasonable relationship" test applies

The Court disagrees with the City's argument that the "reasonable relationship" test does not apply. First, the City Council itself applied the reasonable relationship test to Petitioners' appeal. (AR 864-866). Second, the City's own municipal code allows permit applicants to appeal from a fee (including affordable housing fees)

"based upon the absence of a *reasonable relationship* between the . . . residential development project on the demand for affordable housing . . . and . . . either the amount of the fee charged or the type of facilities to be provided." WHMC § 19.64.040(C) (emphasis added). Third, California law requires legislatively imposed development fees to "bear a *reasonable relationship*, in both intended use and amount, to the deleterious public impact of the development" in order pass constitutional muster under the takings clause. San Remo Hotel L.P. v. City and County of San Francisco, (2002) 27 Cal.4th 643, 667 (emphasis added).

The City argues that these authorities are not applicable because the affordable housing law is akin to a zoning regulation, and thus any monetary fees imposed do not need to bear a "reasonable relationship" to the impacts of the development. However, a similar argument was rejected by the California Supreme Court in Sterling Park, L.P. v. City of Palo Alto (*Sterling Park*), (2013) 57 Cal.4th 1193. In *Sterling Park*, the city argued that its "below market rate" program—which required developers to give the city an option to purchase a percentage of newly developed units and to sell a certain percentage of units at below market rates or to pay an "in-lieu" fee—was merely a land use regulation. Id. at 1207. The court rejected this argument, finding that the "two options" offered to developers (pay the in-lieu fee or sell the units at a below market price and give the city an option to purchase them) constituted fees, not land use regulations. Id.

The City attempts to distinguish *Sterling Park* because the City's affordable housing law does not require a developer to give the City an option to purchase the

property. However, the City's affordable housing ordinance gives it a "right of first refusal" to purchase the affordable units which is, in effect, an option. WHMC § 19.22.090(C). Moreover, the reasoning of *Sterling Park* would apply regardless of whether or not the government demands an option to purchase the units. Under the City's affordable housing law the developer is given the choice of paying money or selling the units at below-market rates; either of these, on their own, could make the Ordinance more than just a zoning regulation. Id. Further, the City's own municipal code also consistently refers to the affordable housing fees as "fees," not regulations, and allows for these fees to be appealed in the same manner as other development fees. See WHMC §§ 19.64.020, 19.64.040(C), 19.124.060(c). Thus, the Court applies the reasonable relationship test to determine whether the challenged fees are legal.

3. The City's finding that in-lieu fees were "reasonably related" to the deleterious impact of projects without affordable housing units is supported by substantial evidence

The City Council's decision denying Petitioners' appeal stated that the fees were "reasonably related" in purpose and amount to the City's need for affordable housing and to the cost of developing affordable housing units elsewhere in the City. (AR 866). Petitioners argue that the City's finding that the fees were reasonably related to the development is not

supported by substantial evidence.[4] The Court disagrees.

> i. The City's finding that the *use* of the affordable housing fees was "reasonably related" to the impact of Petitioners' development is supported by substantial evidence

Having determined that the City's in-lieu fees must "bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development," the Court finds that the City's determination that there is a reasonable relationship between the *use* of the fees and Petitioners' development is supported by substantial evidence in the record. San Remo Hotel L.P. v. City and County of San Francisco, (2002) 27 Cal.4th 643, 667.

Petitioners argue that the affordable housing fees do not bear the requisite "reasonable relationship" between their development and the need for affordable housing in the City. Accordingly, Petitioners' focus is on the relationship between its development and the need for affordable housing, which the City admits predates the project. Essentially, Petitioners contend that the City would need to show that the development

---

[4] Petitioners also argue that the City refused to apply the correct "reasonable relationship" standard to their appeal. Opening Brief, p. 16:20-17:15. However, Petitioners incorrectly cite to the staff report as reflecting the City Council's decision. (See AR 752). The staff report is not the City's decision; rather, the City Council's resolution stating its reasons for denying most of Petitioners' appeal reflects the decision. (See AR 864-867). That opinion expressly applies the reasonable relationship standard to Petitioners' appeal, and finds that the fees bore a reasonable relationship to Petitioners' development. (AR 865-866).

caused a need for affordable housing to justify the in-lieu fee. Because the need for affordable housing exists independently of Petitioners' project, they argue that the requisite "reasonable relationship" is lacking and that the fees are therefore unconstitutional under the takings clause. The City counters that the affordable housing fees are related to the impact of the development because Petitioners chose not to include affordable housing in the development, which would otherwise be included in a new development under the Ordinance. Thus, Petitioners' development did have a deleterious impact on the need for affordable housing: they should have been required to build affordable housing units, but were excused from doing so after paying a fee so that the units could be built elsewhere. The parties rely on *San Remo* and Building Industry Ass'n of Cent. California v. City of Patterson ("*Patterson*"), (2009) 171 Cal.App.4th 886, to support their respective positions.

Here, the City's affordable housing in-lieu fees are related to the impact of the development because Petitioners chose not to include affordable housing units in their project. The City's municipal code requires new developments to include affordable housing units. WHMC § 19.22.010, et. seq. Requiring new developments to include a specified number of affordable housing units is reasonably related to ensuring the future supply of sufficient affordable housing in the same way that preventing the conversion of residential units was reasonably related to maintaining the residential housing stock in *San Remo*. That is, Petitioners' project did affect the need for affordable housing within the City because it deprived the City of the affordable housing units that would otherwise be required under the municipal code

for any new development of this size. Thus, as the City Council stated when it upheld the in-lieu fee, the fee is "reasonably related in its intended use because it is earmarked for development of the affordable units foregone by the developer's election not to include them in the development." (AR 866).

Patterson does not change this analysis. In *Patterson*, the court found that there was no reasonable connection between the affordable housing fees imposed on the development because of the method that the city had used to calculate the fee; the fee was based on the city's share of the regional housing need, not on the impacts of any particular development. Further, the method for reaching the amount of the fee was the basis for the court's decision since the fee was calculated based on the estimated cost of the city's projected affordable housing needs rather on the actual cost of constructing affordable housing units. *Patterson*, supra, at 899. This case presents a different situation since the amount of the fee was related to the cost of constructing affordable housing units within the City.

Based on the foregoing, the Court finds that the use of the affordable housing in-lieu fee is reasonably related to the impact of Petitioners' development.

> ii. The City's finding that the *amount* of the affordable housing fees was "reasonably related" to the impact of Petitioners' development is supported by substantial evidence

The City's in-lieu fee must also be reasonably related in *amount* to the deleterious impact of Petitioners' development. San Remo Hotel L.P. v. City and County

of San Francisco, (2002) 27 Cal.4th 643, 667. The City Council found that the amount of the fee was so related because "it is related to the cost of developing the units elsewhere in the City." (AR 866). Petitioners argue that this finding is not supported by substantial evidence. Again, the Court disagrees.

First, the plain terms of the Ordinance shows that the "amount of required [affordable housing] fees shall be set by Council resolution." WHMC § 19.64.020. However, Petitioners failed to include the City Council resolution setting the disputed fee in the administrative record. Thus, the Court does not have a complete record on which it can find that the City Council did, or did not, set the amount of the affordable housing fee at a level reasonably related to the cost of constructing affordable housing units elsewhere in the City. Petitioners, as the parties seeking a writ, had the burden of introducing all evidence in support of their position. Afford v. Pierno, (1972) 27 Cal. App. 3d 682, 691 ("[T]he burden of proof falls upon the party attacking the administrative decision to demonstrate wherein the proceedings were unfair, in excess of jurisdiction or showed prejudicial abuse of discretion."). They failed to do so by omitting the City's resolution that established the disputed affordable housing fees.

Second, there is substantial evidence in the record that the amount of the affordable housing fee was reasonably related to the impact of Petitioners' development. Both the staff report and the City Council's ultimate decision explain that the amount of the fee is based on the subsidy required to produce the affordable units elsewhere within the City. (AR 752, fn. 5 [staff report]; 866 [City Council resolution]). A method of calculating affordable housing in-lieu fees

based on the cost of building replacement units elsewhere in the City is reasonably related to the impact of Petitioners development, a condominium complex without any affordable housing units. San Remo Hotel L.P. v. City and County of San Francisco, (2002) 27 Cal.4th 643 (upholding the amount of: an in-lieu fee that was calculated based on the cost of constructing replacement housing). The City's statements as to the basis for the affordable housing fees may not be the most detailed evidence that the fees are "reasonably related" to the cost of constructing affordable units elsewhere in the City, but they are substantial evidence of such a relationship. See Evidence Code § 664 (an agency is presumed to have regularly performed its official duty). Thus, the burden was on Petitioners, as the parties challenging the City's decision, to show that the amount of the housing fees was not supported by substantial evidence. They have not done so here.

* * * * *

Disposition

The writ of mandate is denied.

The matter is ordered transferred back to Department 30 to resolve Petitioners' remaining claims. This decision and order will remain interlocutory until a judgment disposing of all causes of action is issued. The administrative record shall be returned to the party who lodged it, to be preserved without alteration until the judgment is final, and to be forwarded to the Court of Appeal in the event of an appeal. The clerk shall provide notice to counsel of record.

IT IS SO ORDERED

June 16, 2015

s/ Luis Lavin
Hon. Luis A. Lavin
Judge of the Superior Court

Appendix D–1

Resolution No. 05-3268

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF WEST HOLLYWOOD, APPROVING THE APPEAL OF JONATHAN LEHRER-GRAIWER AND APPROVING DEMOLITION PERMIT 2004-16 AND DEVELOPMENT PERMIT 2004-18 TO DEMOLISH TWO SINGLE-FAMILY HOMES AND TO CONSTRUCT AN 11-UNIT RESIDENTIAL BUILDING USING THE COURTYARD HOUSING STANDARDS LOCATED AT 612-616 NORTH CROFT AVENUE, WEST HOLLYWOOD, CALIFORNIA

THE CITY COUNCIL OF THE CITY OF WEST HOLLYWOOD DOES HEREBY RESOLVE AS FOLLOWS:

SECTION 1. An application for approval of Demolition Permit 2004-16 Development Permit 2004-18 and Modification Permit 2004-05 was filed on June 29, 2004, by Lehrer representing the property owners Jonathan Lehrer-Graiwer, for the demolition of the two single-family homes on two lots and the construction of 11 residential unites and the on one combined site located at 612-616 Croft. An application for Variance 2004-09 was submitted on September 13, 2004. The application was deemed complete on October 13, 2004. A 90-day waiver of the Permit Streamlining Act was granted on December 06, 2004.

* * * * *

SECTION 4. Based upon the information provided in the appeal at the public hearing, the City Council

hereby makes the following findings with respect to the appeal:

1. The withdrawal of the variance brings the project into conformance with City regulations for this zoning classification.

2. The appeal accurately identifies buildings in the area that are 2, 3, 4, and 5 story buildings. The proposed project would be compatible with this mixture of building heights.

3. The appeal accurately states that project complies with the General Plan because it is designed using the City's courtyard standards and will be a superior architectural design providing 11 families with a high quality living environment.

4. The appeal accurately states that the Senior Planner supported the project.

SECTION 5. Pursuant to the above findings, the City Council hereby approves the appeal by Jonathan Lehrer-Graiwer, approved Demolition Permit 2004-16 Development permit 2004-18. and overturns the Planning Commission's decision.

SECTION 6. The application as proposed will not have a substantial adverse impact on the environment and is categorically exempt from the requirements of the California Environmental quality Act (CEQA) pursuant to Section 15332 (in-fill development projects) of the CEQA Guidelines. The project is consistent with the applicable general plan designation and all applicable general plan policies, as well as with the applicable zoning designation and regulations; the proposed development occurs within city limits on a project site of no more than five acres substantially

surrounded by urban uses; the project site has no value as a habitat for endangered, rare or threatened species because the project is to be built on an already disturbed site in a highly urbanized area; approval of the project would not result in any significant effects relating to traffic, noise, air quality or water quality due to the small scale of the project; and the site can be adequately served by all required utilities and public services.

SECTION 7. In accordance with Section 19.50.050 of the West Hollywood Municipal code, the City Council of the City of West Hollywood hereby makes the following findings with respect to Demolition Permit 2004-16:

a. With approval of this resolution, all other applications for discretionary permits necessary for the new project to be constructed on site have been approved; and

* * * * *

SECTION 8. In accordance with Section 19.48.050 of the West Hollywood Municipal Code, the City Council of the City of West Hollywood hereby makes the following findings regarding Development Permit 2004-18:

* * * * *

c. The proposed use or construction is consistent with the objectives, policies, general land uses, and programs of the General Plan as it meets all requirements of the Zoning Ordinance. This proposed project specifically meets General Plan Objective 1.28 to "provide for the continued development of multi-family units in areas which

are characterized by a significant mix of two-and three-story structures, ensuring that new development is compatible in scale and character with the existing structures." Policy 1.28.22 states "Established base building heights at 45 feet in areas designated R3.3." In addition, the approval of the project continues the implementation process of the General Plan. Specifically, the City's Housing Element of the General Plan indicates that the City's share of the region's housing need is 410 new housing units to be built between 1998 and 2005. From 1998 to 2003, 252 units have been constructed. This project would help the City achieve its share of the regional housing need.

* * * * *

SECTION 11. Pursuant to the above findings, the City Council of the City of West Hollywood hereby approves Demolition Permit 2004-16 and Development 2004-18 subject to the following conditions:

CONTENTS:

9.0 Solid Waste and Recycling

10.0 Transportation, Parking and Circulation

11.0 Seismic

1.0 LEGAL REQUIREMENTS

* * * * *

1.2) If any provision of the permit is held or declared by a court of competent jurisdiction to be invalid and such invalidation would result in a material change to the obligations of or the benefits accruing to either the City of the applicant hereunder, the Director may declare the permit to be void and the privileges granted hereunder to have lapsed. (_____ Planning)

1.3) The failure to comply with any of the conditions of approval shall be grounds for revocation of the permit. (_____ Planning)

* * * * *

2.0 PROJECT DESCRIPTION

2.1) The permit is for demolition of two (2) single-family homes and the construction of an approximately 21,558 square foot, 4-story, 11 unit multi-family residential building using the courtyard standards with 25 subterranean parking space.

* * * * *

3.0 FEES

3.1) West Hollywood Municipal Code, Article 19-1, Chapter 19.64, the applicant shall pay a fee equal to $13.54 per square food of livable area in each

unit being removed or constructed, according to the fee schedule established by the City Council (including all private decks, patios, and balconies). In the event the fee schedule is revised by the City Council prior to obtaining a building permit, the revised fee schedule shall apply. The fee shall be paid prior to the issuance of building permits. (_____ RSHD)

* * * * *

3.6) In the event the fee schedule is revised by the City Council, all development fees and exaction fees shall be recalculated so that they are based on the revised fee schedule in effect at the time building permits are obtained. (_____ Planning)

* * * * *

PASSED, APPROVED AND ADOPTED by the City Council of the City of West Hollywood at a regular meeting held this 18th day of July, 2005 by the following vote:

AYES: Councilmember: Duran, Guarriello, and Mayor Land.

NOES: Councilmember: Prang.

ABSENT: Mayor Pro Tempore: Heilman

ABSTAIN: Councilmember: None.

S/ Abbe Land
ABBELAND, MAYOR

ATTEST:

S/ Thomas R. West
THOMAS R. WEST, CITY CLERK

West Hollywood Municipal Code

Chapter 19.22 Affordable Housing Requirements and Incentives

19.22.010 Purpose.

A. This chapter provides requirements and incentives for the development of affordable housing units in conjunction with other residential projects. These provisions are intended to implement General Plan policies encouraging the production of low and moderate income housing, and housing for disabled and older residents, which is integrated, compatible with and complements adjacent uses, and is located near public and commercial services.

B. The incentives offered in this chapter are used by the city as one means of meeting its commitment to encourage housing affordable to all economic groups, and to meet its regional fair share requirements for the construction and rehabilitation of housing affordable to low and moderate income persons.

(Ord. 07-763 § 7, 2007; Ord. 01-594 § 2 (Exh. A), 2001)

19.22.020 Applicability.

A. This chapter shall apply to the following:

1. The construction of all residential units;

2. Common interest developments created through the conversion of existing residential units that were not subject to the city's affordable housing requirement at the time of construction.

B. Exemptions. The provisions of this chapter shall not be applicable to the following:

1. A new single-family dwelling or the replacement of one single-family dwelling with another single-family dwelling; and

2. A project developed, owned, or operated by a nonprofit housing provider, not including residential care facilities, where all of the units are exclusively for low or low and moderate income persons.

(Ord. 07-763 § 7, 2007; Ord. 02-643 § 19, 2003; Ord. 01-594 § 2 (Exh. A), 2001)

19.22.030 Affordable Units Required.

A. Requirement. Projects subject to this chapter shall include provisions for inclusionary housing in one of the following ways described in Table 3-5:

[table omitted]

* * * * *

B. Number of Units Required. Projects that are required to provide inclusionary units as described in subsection A shall provide the following number of inclusionary units to very low-, low- and moderate-income households as determined by eligibility requirements and a rental and sales price schedule established annually by Council resolution. Unless otherwise noted, inclusionary units provided shall be of comparable size and finish quality to the non-inclusionary units.

1. Projects of Ten or Fewer Units. One unit.

* * * * *

19.22.040 Affordable Housing Fees.

A. In-lieu Fee. Developers of residential projects with 10 or fewer units may choose to pay a fee, in-lieu of providing the required affordable unit on-site.

B. Amount of Fee. The amount of the in-lieu fee shall be calculated in compliance with the Council's Fee Schedule.

C. Timing of Payment. The fee required by this section shall be paid before issuance of a building permit for the approved project.

D. Basis for Fee. Fees paid to fulfill the requirements of this section shall be computed based on the number and size of the units to be constructed. Unit size shall be gross livable floor area, including private balconies, decks and patios.

E. Affordable Housing Trust Fund. Fees paid to fulfill the requirements of this chapter shall be placed in the city's Affordable Housing Trust Fund. The funds shall be used exclusively for projects which have a minimum of 60 percent of the dwelling units affordable to low- and moderate-income households, with at least 20 percent of the units available to low income households. Only tax exempt nonprofit corporations seeking to create or preserve the housing in the city shall be eligible to apply to the Council for funding. The funds may, at the discretion of the Council, be used for predevelopment costs, land or air rights acquisition, administrative costs, gap financing, or to lower the interest rate of construction loans or permanent financing.

In a project that includes market-rate units, trust fund monies shall only be provided to assist in the acquisition and construction of those units affordable to low- and moderate-income households.

(Ord. 07-763 § 7, 2007; Ord. 05-719 § 6, 2006; Ord. 01-594 § 2 (Exh. A), 2001)

* * * * *

19.22.080 Implementation of Inclusionary Unit Provisions.

A. Resolution of Approval. The resolution approving a development permit for any project which provides inclusionary units shall specify the following items:

1. The density bonus being provided;

2. Whether an in-lieu fee is required;

3. The number and square footage of inclusionary units to be provided;

4. The number and square footage of units at each applicable sales price or rent level, and the number of parking spaces provided to each unit; and

5. A list of any other incentives approved by the city.

B. Fee. If an in-lieu fee is required, the fee shall be determined in compliance with Chapter 19.64 (Development Fees).

C. Agreements. Implementation of an approved density bonus or other incentives shall require the following agreements.

1. Within 30 days of the approval of a project with inclusionary units, the applicant shall execute and record the city's Agreement Imposing Restrictions on Real Property. The agreement shall explain the inclusionary requirements in clear and precise terms.

2. Within 30 days of the approval of a project requiring an in-lieu fee, the applicant shall execute and record an Agreement to Pay an Affordable Housing In-Lieu Fee. The Agreement shall specify the amount of the fee and stipulate that the fee shall be paid before issuance of a building permit.

D. Construction Schedule. All inclusionary units in a residential development shall be constructed concurrently with or before the construction of the non-inclusionary units.

E. Phasing. In the event a phased project is approved by the city, required affordable units shall be provided proportionally within each phase.

F. Occupants. New inclusionary units shall be occupied in the following manner:

1. If residential rental units are being demolished and the existing tenants meet the low income or moderate income requirements, the tenants shall be given the right of first refusal to occupy the inclusionary units;

2. If there are no qualified tenants, or if the qualified tenants choose not to exercise the right of first refusal, or if no demolition of residential rental units occurs, then qualified

tenants shall be selected from the city's Inclusionary Housing Waiting List; or

3. If the new inclusionary unit is a sales unit and the existing tenants decline the unit or are not qualified applicants, the city shall conduct a lottery to select qualified prospective buyers.

(Ord. 14-934 § 5, 2014; Ord. 07-763 § 7, 2007; Ord. 07-747 § 3, 2007; Ord. 01-594 § 2 (Exh. A), 2001)

19.22.090 Rental, Sale and Re-Sale of Inclusionary Units.

Newly constructed inclusionary units shall first be offered to eligible households displaced by the demolition necessary to construct the project.

A. Rental of Units.

1. If units are offered for rent, the project owner or developer shall rent the units directly to the required number of very low-, low- and moderate-income households at the rental rate established by Council resolution.

2. The rental rate shall include charges for the unit, parking, pets, water and trash, and all building amenities, unless otherwise specified in the resolution of approval required by Section 19.22.080(A).

B. Limitations on Purchasers and Sales Prices.

1. Newly constructed inclusionary units shall first be offered to eligible low and moderate income households displaced by the demolition necessary to construct the project.

2. Secondly, the offer shall be made to displaced households with 100 to up to 120 percent of the median income of the city, and at a total cost of no more than two and one-half times 120 percent of the median income of the city.

3. The remaining units, and all other newly constructed units and any inclusionary units in a building undergoing conversion to common interest development, shall be offered to low and moderate income households.

4. Lower income inclusionary units shall be sold at a price that is no more than two and one-half times 65 percent of the median income of the city, and adjusted by the "bedroom factor." Qualifying income levels shall be established annually by the Council.

5. Moderate income inclusionary units shall be sold at a price that is no more than two and one-half times the median income of the city, and adjusted by the "bedroom factor." Qualifying income levels shall be established annually by the Council.

6. The sales price of the inclusionary unit is dependent on the unit size and is therefore adjusted by the "bedroom factor" established annually by the Council.

7. Expected homeowners' association fees shall be included in the calculation of total unit costs.

C. Right of First Refusal. After offering the units to eligible households displaced by demolition, the developer of a project shall be required to give right of first refusal to purchase any or all inclusionary units to the city, or a city-designated agency or organization, for at least 60 days from the date of construction completion.

D. Lottery. If the city chooses not to exercise its right of first refusal, it shall conduct a lottery to establish a list of eligible purchasers within that same time period. If the list is not provided, the developer may select the low- or moderate-income purchasers as long as the city verifies income eligibility and the units are sold at a price no more than two and one-half times the median income for the city.

E. Resale of Units. Upon resale, the affordable units shall remain affordable to the targeted income group. The resale price shall be set as follows:

1. The price resulting from the total costs, including homeowners association fees, shall be:

a. Moderate income units: a total cost of no more than two and one-half times the median income for the city, for moderate income households.

b. Low income units: a total cost of no more than two and one-half times 65 percent of the median income for the city for low income households.

c. The sales price of the inclusionary unit is dependent on the unit size and is therefore adjusted by the "bedroom factor."

d. Expected homeowners' association fees shall be included in the calculation of total unit costs.

2. If, during the tenure of the most recent occupant, the homeowners' association fees have risen at a rate faster than the median income for the city, the resale price shall be the higher of:

a. The calculation in subsection (E)(1), above; or

b. The most recent previous sale price increased by the average rise over the last 10 years of the housing component of the Consumer Price Index, multiplied by the number of years of the owner's tenure.

3. Resale of units shall be subject to an agreement in compliance with Section 19.22.080(C) (Agreements).

F. Sales Price Schedule. Sales prices are adjusted annually based on the median income of the city and are subject to Council approval.

(Ord. 14-934 § 6, 2014; Ord. 07-763 § 7, 2007; Ord. 01-594 § 2 (Exh. A), 2001)

To: Cashier From: Planning Division	Adrian Gallo (Staff member's Name)	Date: 12/14/11
Please issue a receipt in the amount of:	$581,651.15	
for application #(s)	DMP 2004-16, DVP 2004-18	Address: 612 Croft Ave

Community Development Department Fees			
CONSTRUCTION DEVELOPMENT PERMITS	CODE	BASIS FOR FEE	FEE AMOUNT

* * * * *

EXACTION FEES (These fees are charged after project approval)			
In-Lieu Housing Fee or Affordable Housing Fees	HOUSE	Based on Code. Determined during project approval.	$540,393.28
In-Lieu Art Fee	ARTB		
In-Lieu Parking Fee	CHDE		
Public Open Space	OSPACE		
Parks & Recreation Fee (Quimby)	QUIMBY		$36,551.59
Child Care Fee	CARE		
Waste Water Mitigation	WATER		$675.00
Traffic Mitigation Fee (Trans Residential, Trans Commercial)	TRAFFIC		$4,031.28
* * * * *			
		APPLICATION SUM TOTAL	$581,651.15