No. 08-1139

In The
Supreme Court of the United States

ACTION APARTMENT ASSOCIATION,

Petitioner,

v.

CITY OF SANTA MONICA, CITY COUNCIL OF THE CITY OF SANTA MONICA, COUNCIL MEMBERS ROBERT T. HOLBROOK (MAYOR), BOBBY SHRIVER (MAYOR PRO TEMPORE), PAM O'CONNOR, KEVIN McKEOWN, HERB KATZ, RICHARD BLOOM, and KEN GENSER, in their official capacities, and ALL PERSONS INTERESTED IN THE VALIDITY OF ORDINANCE NO. 2191 AMENDING MUNICIPAL CODE SECTIONS 9.56.050 AND 9.56.060,

Respondents.

On Petition For Writ Of Certiorari To The California Court Of Appeal

BRIEF IN OPPOSITION

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April 6, 2009

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QUESTIONS PRESENTED

1. Does Petitioner trade association have a ripe takings claim under the Fifth Amendment of the United States Constitution, when neither it nor its members have requested a waiver or adjustment of the affordable housing requirements of Ordinance 2191 under provisions of the Santa Monica Municipal Code, which allows for the avoidance of the Ordinance's potential unconstitutional application in individual cases?

2. Is a facial Fifth Amendment takings claim against an inclusionary housing ordinance subject to review under the "essential nexus" and "rough proportionality" tests enunciated in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) ("*Nollan*") and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) ("*Dolan*"), when the ordinance does not require a landowner to pay money or convey a possessory interest in real property to the City, but instead requires the developer of a multi-unit residential project to set aside a certain percentage of new units for rent or sale at a reduced price and when there is no claim that the property has lost all economic value?

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions identified by Petitioner, the text of the challenged Santa Monica City Council Ordinance No. 2191, omitted by Petitioner, and Ordinance Nos. 2174 and 2180, adopted in concert therewith. These Ordinances are in the record below; pertinent parts of Ordinance Nos. 2174 and 2180 are reproduced in Appendix A and B, respectively.

STATEMENT OF THE CASE

The City of Santa Monica ("City") presents the following Statement of the Case in response to misstatements of fact and law in the Statement presented by Petitioner.

A. BACKGROUND TO ADOPTION OF ORDINANCE 2191

California imposes on local governments the responsibility to make adequate provision for the housing needs of persons of very low, low and moderate income levels. Cal. Gov. Code §65580, §65580(d), §65583(c), §65584. The state legislature has required numerous incentives to facilitate and expedite the construction of affordable housing, including the state's density bonus law. Cal. Gov. Code §65915; §65582.1. The City meets its responsibility to develop affordable housing in part through

implementation of Santa Monica Municipal Code ("SMMC") Chapter 9.56, the City's Affordable Housing Production Program ("AHPP"). Pet. App. E.

In May 2005, in response to a review of the AHPP, the City commenced proceedings which ultimately led to three separate but related legislative acts. First, in November 2005, the City Council adopted Ordinance 2174. Pet. App. A-13. Pertinent to the petition for certiorari, Ordinance 2174 added the first iteration of SMMC §9.56.170(a), which provided: "A multi-family project applicant may request that the requirement of this Chapter be adjusted or waived based on a showing that applying the requirements of this Chapter would effectuate an unconstitutional taking of property." Resp. App. A; [RA Vol. I:231]. Thus, contrary to Petitioner's representation (Petition at 5), the AHPP waiver and adjustment provision was available before Petitioner filed its complaint and petition on September 11, 2006.[1]

Next, in April 2006, the City Council adopted Ordinance 2180, modifying the City's density bonus

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[1] SMMC §9.56.170(a) was amended October 3, 2006, to broaden the authority to grant adjustments to or waivers of Ordinance 2191 where it would "otherwise have an unconstitutional application to a property." Pet. App. E-20. Petitioner agreed to the dismissal of its fourth cause of action for substantive due process violations below because it failed to exhaust administrative remedies under this amended waiver provision. Pet. App. B-3, ¶2.

law to align it with changes in the state's density bonus law. Resp. App. B; [RA Vol. II:319-346].[2] As discussed further below, the City enhanced the regulatory concessions, incentives, and bonuses accorded projects containing affordable housing in anticipation of the adoption of Ordinance 2191. For example, while state density bonus law applies to development of five or more units, the City provides density bonuses as a matter of right to any multi-family ownership project with four or more units that provides affordable housing on-site in compliance with the AHPP. Pet. App. E-10; SMMC §9.56.050(i). Only after these actions were taken, did the City Council adopt Ordinance 2191.

Finally, all of these legislative enactments were informed by an extensive, updated 2005 "Nexus" Study the City prepared that demonstrates the impact of new market rate multi-family developments on the need for affordable housing. Pet. App. A-13; [RA Vol. I:100-170].

B. ORDINANCE 2191

Petitioner exaggerates the requirements of Ordinance 2191. The Ordinance does not broadly

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[2] Density Bonus laws reward a developer who agrees to build a certain percentage of low- or moderate-income housing with the opportunity to build more residences than would otherwise be permitted by applicable local regulations. *Shea Homes Ltd. Partnership v. County of Alameda*, 2 Cal.Rptr.3d 739, 753 (2003).

mandate on-site or off-site development of affordable housing units in conjunction with "market rate housing unit construction." Petition at 5. It is narrowly tailored. The challenged portions of Ordinance 2191 apply only to multi-family ownership projects of four or more units in multi-family residential zone districts, where the City found affordable ownership housing was not being produced. SMMC §9.56.040(a). For multi-family ownership projects subject to its terms, Ordinance 2191 requires a percentage of affordable housing units on-site (SMMC §9.56.050) or off-site (SMMC §9.56.060) as part of the project as a whole, subject to a waiver and adjustment procedure to avoid unconstitutional application (SMMC §9.56.170(a)), and with substantial incentives available under Ordinance 2180.[3]

Ordinance 2191 does not require developers to transfer ownership of required affordable units to third persons for the benefit of the City's housing policies. Petition at 5. Instead, just like the mobile-home park owner in *Yee v. City of Escondido*, 503 U.S. 519, 531 (1992) ("*Yee*"), developers of multi-family ownership projects subject to Ordinance 2191 already voluntarily open their property to others; they are in the business of selling or renting condominium units. They are not forced to sell or rent to strangers. They

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[3] Although Petitioner attached the entirety of Chapter 9.56 as Appendix E to its Petition, its taking claim challenges Ordinance 2191 and, more particularly, only its amendments to sections 9.56.040, 9.56.050 and 9.56.060.

operate in that precise business by virtue of their own volition. Ordinance 2191 provides that they may select the income-qualified households to whom they sell or rent affordable units. Pet. App. E-17; SMMC §9.56.110(a).

The on-site provisions of §9.56.050(a) for ownership projects between four and fifteen units require a project applicant to construct at least twenty percent (20%) of the total units as *ownership units* for moderate-income households. As an alternative option that twenty percent (20%) of the total units may be provided as *rental units* for low-income households. Pet. App. E-6; SMMC §9.56.050(a). For ownership projects of 16 units or more, this on-site percentage increases to twenty-five (25%) for both options. *Ibid*; §9.56.050(b). The targeted household income (e.g. very-low, low, or moderate) for affordable units is important to the developer as it determines the number of market rate density bonus units to which a project developer is entitled under City and state law.[4]

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[4] In the multi-family residential districts subject to Ordinance 2191, the 20% on-site affordable housing requirement entitles the project applicant to a 15% density bonus if the affordable unit(s) are for moderate income households, and a 35% density bonus if made available to lower-income households. Resp. App. B-3, -5, §2(d). In calculating a density bonus, the law provides " . . . any calculation resulting in a fractional number shall be rounded upwards to the next whole number." Resp. App. B-3, §2(c)(3). Thus, a typical five-unit project with one moderate-income unit is entitled to one market-rate density

(Continued on following page)

Petitioner inflates the requirements that must be met if a developer chooses to satisfy the AHPP through the off-site option of §9.56.060(a). This section requires applicants "to construct twenty-five percent more affordable housing units than number of affordable housing units required by Section 9.56.050(a) and (b)." This calculation is not an aggregate additional 25% which would bring the total to 45% or 50% depending on project size as Petitioner asserts. Petition at 5. Rather, it is a 25% multiplier of the base on-site affordable requirement. Pet. App. E-10; SMMC §9.56.060(a).[5]

Petitioner's statement that developers "must also dedicate off-street, covered parking for the low income units" is false. Petition at 5. As stated above, SMMC §9.56.050(i) entitles affordable housing developers to regulatory concessions (Pet. App. E-10), which include "By-Right Parking Incentives" that allow parking to be "provided through tandem or uncovered parking." Resp. App. B-8, §g. In addition to by-right parking incentives, project applicants subject to Ordinance 2191 are entitled up to three other incentives

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bonus unit, while a five-unit project with one low-income unit is entitled to two additional market-rate units.

[5] For example, if a developer proposed to build five units and satisfy the affordable obligation off-site, the 20% onsite requirement of one unit would be multiplied by 25% (1 x .25) to obtain the sum of .25 additional units. Because this fraction falls below .75, the total number of ownership units affordable to moderate-income households that satisfies the affordable housing obligation entirely off-site would remain one unit.

or regulatory concessions (such as zoning modifications), and may seek a modification of any development standard that could preclude "the construction of a density bonus housing development at the densities or with the concessions permitted by this Section." Resp. App. B-9-11, §h(2); Resp. App. B-11-12, §n. Under Ordinance 2191, project developers also receive priority in having their building plans checked and processed. Pet. App. E-10; SMMC §9.56.050(j).

Petitioner's Statement of the Case ignores these offsetting benefits and incentives available by right to developers who construct affordable housing under Ordinance 2191. Petitioner's omission is understandable. The density bonus, project incentive and waiver provisions of these ordinances belie Petitioner's argument that inclusionary housing ordinances "force developers to swallow the costs of providing below market rates." Petition at 13.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE RIPENESS DOCTRINE PROVIDES AN ALTERNATIVE GROUND FOR DECISION PRESENTED TO THE COURTS BELOW TO AFFIRM THE JUDGMENT

To pursue its facial challenge to Ordinance 2191, Petitioner must first demonstrate that Ordinance 2191 will be invalid "no matter how it is applied." *Yee,*

supra, 503 U.S. at 534; *see also City of Chicago v. Morales*, 527 U.S. 41, 78-79 (1999), Justice Scalia dissenting ("A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the *challenger must establish that no set of circumstances exists under which the Act would be valid.*") (Italics in original). Because Ordinance 2191 allows for waiver of its requirements to avoid unconstitutional application in individual cases, Petitioner cannot satisfy this prerequisite. As the trial court recognized in granting the City's demurrer on this ground, Petitioner cannot show that Ordinance 2191 will result in an uncompensated taking in every situation and no matter how it is applied; for if a waiver of the Ordinance is granted, there cannot be a taking. Pet. App. B-3, ¶3. Thus, the petition should be denied solely because this case is unripe for judicial review.

II. THIS CASE DOES NOT SQUARELY RAISE THE QUESTION PRESENTED BY PETITIONER

A. THERE IS NO "EXACTION" WITHIN THE PURVIEW OF *NOLLAN* AND *DOLAN* PRESENT IN THIS CASE

Because Ordinance 2191 does not exact an interest in real property comparable to a *per se* taking, this case presents only an advisory question whether such an exaction can be imposed legislatively and be subject to a Fifth Amendment takings claim reviewed under *Nollan* and *Dolan*. Indeed, the absence of a *per*

se taking stands in the way of this Court ever reaching the question presented by Petitioner.

In *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 538 (2005) ("*Lingle*"), this Court clarified that "outside two relatively narrow categories of regulatory action generally deemed *per se* takings" – permanent physical invasion (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) ("*Loretto*")) and denial of all economically beneficial use of property (*Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) ("*Lucas*")) – "and the special context of land-use exactions," regulatory takings challenges are governed by the multi-pronged standards set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978) ("*Penn Central*"). In doing so, the Court made clear that *Nollan* and *Dolan* retain validity under the Takings Clause as a special type of *per se* physical taking. *Lingle, supra*, at 546-547.[6]

Ordinance 2191 does not result in the permanent physical occupation of land as required by *Loretto* to constitute a *per se* physical taking. In a condominium project subject to Ordinance 2191, housing units

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[6] The Court explained that the rule established by *Nollan* and *Dolan* in "the special context of land-use exactions" (*id.* at 538) was "entirely distinct from the 'substantially advances' test" (*id.* at 547) by describing the dedications of real property required in these cases as being so onerous that, outside the adjudicatory exactions context, they would have been deemed a *per se* physical taking. *Id.* at 546-547.

are sold or rented as part of a development project voluntarily undertaken by the property owner, the same as in any other development. While the sale or rental price may be lowered to make some units affordable to lower income potential buyers or renters, such market regulation does not violate the Fifth Amendment. Transfers of wealth from one private party to another are not *per se* takings. "Traditional zoning regulations can transfer wealth . . . but the existence of the transfer in itself does not convert regulation into physical invasion." *Yee*, *supra*, 503 U.S. at 529-530; *see also Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211, 223 (1986). Thus, Petitioner's formulation that Ordinance 2191 requires "owners to transfer ownership of required affordable units to third persons for the benefit of the City's housing policies" fails as a *per se* exaction. As in *Yee* "[b]ecause they voluntarily open their property to occupation by others, petitioners cannot assert a *per se* right to compensation based on their inability to exclude particular individuals." *Yee*, *supra,* 503 U.S. at 531.[7]

Nor do the challenged sections of Ordinance 2191 amount to an economic *per se* taking required by

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[7] "When a landowner decides to rent his land to tenants, the government may place ceilings on the rents the landowner can charge, *or require the landowner to accept tenants he does not like*, without automatically having to pay compensation." *Yee, supra*, 503 U.S. at 529 (citations omitted; emphasis added).

Lucas. While the transfer of affordable units to qualified purchasers or renters may reduce sales income from those units as opposed to market rate units, even such a potential diminution of income from individual affordable units does not wipe out all economic gain. Takings jurisprudence looks at the parcel-as-a-whole in evaluating the economic impact of a regulation on a property owner. Petitioner cannot divide a parcel into discrete segments and then attempt to argue that the splintered rights in a particular segment have been entirely abrogated. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning*, 535 U.S. 302, 327 (2002) ("*Tahoe-Sierra*"); *Penn Central*, *supra*, 438 U.S. at 130-131.

Thus, Petitioner's mischaracterization of Ordinance 2191's affordable housing requirement as an exaction of individual affordable units is flawed because, when viewed as a whole, any affected property includes market-rate, density bonus market-rate and, as a smaller subset, affordable units. At most, depending on the application of Ordinances 2191 and 2180, the AHPP may have some hypothetical potential to reduce sales or rental income from a condominium project subject to its terms, but that does not amount to a *per se* taking. As noted in *Lucas*, *supra*, 505 U.S. at 1020, the *per se* "total taking" rule is inapplicable where land retains some value, even where the challenged regulation prohibits all development. *See also Tahoe-Sierra*, *supra*, 535 U.S. at

330, 332 (anything less than a "complete elimination of value," or a "total loss," requires the kind of analysis applied in *Penn Central*).

As *Lingle* and *Tahoe-Sierra* instruct, if Petitioner wanted to challenge Ordinance 2191 on Fifth Amendment grounds, it should have done so under *Penn Central*. Petitioner failed to bring such a regulatory takings challenge and, therefore, has waived any claim for review by this Court on those grounds.

B. THE DECISION BELOW IS NOT SUITABLE TO REVIEW THE CONFLICT AMONG THE CASES CITED BY PETITIONER

This case is a particularly poor vehicle to resolve the question Petitioner urges – whether heightened scrutiny under *Nollan* and *Dolan* applies to "legislative exactions." Not one of the cases cited by Petitioner as examples of the conflict in how courts treat legislative and adjudicative exactions involved an inclusionary housing ordinance. None of Petitioner's cases addressed an ordinance that provided for waiver or adjustment of its requirements; much less the offsetting significant benefits provided by Ordinances 2191 and 2180. Furthermore, in all of the cases Petitioner cites the "exaction" or property interest at issue involved either some form of monetary

exaction,[8] or the dedication of an interest in real property to a governmental agency.[9]

In contrast, there is no monetary exaction at issue in this case. There are no property dedication requirements that result in the transfer of a property interest tantamount to the physical occupation of land as in the cases Petitioner presents as examples of "legislative exactions." Ordinance 2191 does not authorize the physical invasion of property identified in *Amoco Oil Company*, *supra*, in which dedication of twenty percent of the owner's property for public highway expansion was required as a condition of a special use permit, or in *Curtis*, *supra*, where the Town's ordinance required conveyance to it of a right of way or easement to a fire pond and access road

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[8] *Waters Landing Ltd. Partnership v. Montgomery County*, 650 A.2d 712 (Md. 1994); *National Ass'n of Home Builders of the United States v. Chesterfield County*, 907 F.Supp. 166 (E.D. Va. 1995); *Southeast Cass Water Resource Dist. v. Burlington Northern Railroad Co.*, 527 N.W.2d 884 (N.D. 1995); *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997); *Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek*, 729 N.E.2d 349 (Ohio 2000); *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87 (Cal. 2002); *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620 (Tex. 2004).

[9] *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Iowa Ct. App. 1995) ("*Amoco Oil Company*"); *Art Piculell Group v. Clackamas County*, 922 P.2d 1227 (Or. Ct. App. 1996); *Curtis v. Town of South Thomaston*, 708 A.2d 657 (Me. 1998) ("*Curtis*"); *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008), *cert. pending* (08-1102).

as a condition of subdivision approval. Indeed, in *Amoco Oil Company*, the court distinguished regulations like Ordinance 2191 from dedications of real property subject to analysis under *Nollan* and *Dolan*: "The exaction of property in this case is the quintessential physical invasion of private property. It is not simply a reduction in, or limitation upon Amoco's use of its property, but it is a permanent loss of the property itself." *Amoco Oil Company*, *supra*, 661 N.E.2d at 389 (footnote omitted).

Amoco Oil Company and *Curtis* reveal that those courts would not have considered Ordinance 2191 as imposing property exactions triggering the application of *Nollan* and *Dolan*. Because the affordable housing requirements of Ordinance 2191 are readily distinguishable from each of the monetary exactions and property dedications reviewed in the other decisions Petitioner relies upon to claim a conflict, it is far from apparent how those courts that found exactions in the facts before them would treat inclusionary housing ordinances, and whether they would have reached different conclusions as to the appropriate doctrinal formula to analyze Petitioner's facial taking claim.

III. CONSTITUTIONAL ADJUDICATION OF INCLUSIONARY HOUSING ORDINANCES WOULD BENEFIT FROM FURTHER DEVELOPMENT IN THE LOWER COURTS

There are few judicial decisions involving inclusionary housing ordinances. Courts have not, therefore, significantly analyzed the threshold question of whether to characterize these ordinances as regulations governing land use, price controls or exactions.

The City is unaware of any lower court opinion that treats an inclusionary housing ordinance as imposing an impermissible *per se* exaction. The Court of Appeal below considered Ordinance 2191 a traditional land use or zoning legislation. This is consistent with the two New Jersey Supreme Court decisions, which also considered such ordinances as traditional land use regulations rather than as exactions. *Southern Burlington County NAACP v. Township of Mount Laurel*, 456 A.2d 390, 448-450 (N.J. 1983); *Holmdel Builders Ass'n v. Township of Holmdel*, 583 A.2d 277, 288 (N.J. 1990). Similarly, in *Home Builders Ass'n of Northern California v. City of Napa,* 108 Cal.Rptr.2d 60, 66 (Ct. App. 2001), *review denied*, (Sept. 12, 2001), *cert. denied,* 535 U.S. 954 (2002), the California Court of Appeal treated the inclusionary housing ordinance before it as generally applicable economic legislation. This approach comports with this Court's treatment of Escondido's rent control ordinance as a regulation of petitioners' *use* of their property in *Yee. See, Yee, supra,* 503 U.S. at 532.

Notably, some in Petitioner's shoes have argued that an inclusionary housing ordinance constituted an improper price control regulation. *See, Home Builders Ass'n of Northern California v. City of Napa, supra,* 108 Cal.Rptr.2d at 66-67. If Ordinance 2191 were considered a price or rent control regulation, *Nollan* and *Dolan* would not apply, and analysis under such a claim would determine whether the limitations are confiscatory and fail to permit a fair return.

All of this leads to the conclusion that this Court should await further lower court developments. Until the lower courts have crystallized real differences on the threshold questions of how to characterize inclusionary housing ordinances (e.g., general land use regulations, price control regulations, exactions), and have provided insight into the appropriate legal framework to analyze Fifth Amendment claims against them, this Court should defer review of attempts like Petitioner's to leap frog these threshold questions in seeking review of the discrete question whether legislation is subject to heightened scrutiny review under *Nollan* and *Dolan*.

CONCLUSION

Based on the foregoing, this Court should deny the Petition for Writ of Certiorari.

Dated: April 6, 2009

Respectfully submitted,

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