Filed 12/14/18

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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

Court of Appeal, First Appellate District
FILED
DEC 14 2018
Charles D. Johnson, Clerk
By _____ Deputy Clerk

DARTMOND CHERK ET AL.,
Plaintiffs and Appellants,
v.
COUNTY OF MARIN,
Defendant and Respondent.

A153579
(Marin County Super. Ct. No. CIV 1602934)

Dartmond Cherk and the Cherk Family Trust (the Cherks) appeal from the denial of their petition for writ of administrative mandate under Code of Civil Procedure section 1094.5.[1] The Cherks challenge the validity of a $39,960 "in-lieu" fee imposed by the County of Marin (County) under its inclusionary housing program as a condition for subdividing their property.[2] The Cherks contend that the fee is invalid under both the Mitigation Fee Act (the Act) (Gov. Code, § 66000 et seq.) and the "unconstitutional conditions doctrine," established by the United States Supreme Court in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*). We disagree. The fee falls outside the scope of the Act's scrutiny of certain "exactions" because it serves broader purposes than simply mitigating the impact of the Cherks' subdivision. And the unconstitutional conditions doctrine is inapplicable because the Cherks could have avoided the fee by satisfying the inclusionary housing program in an alternative way. Accordingly, we affirm.

I.
FACTUAL AND PROCEDURAL BACKGROUND

For almost two decades, the Cherks have been engaged in an on-again, off-again effort to subdivide a 2.79-acre parcel of land into single-family residential

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

[2] Inclusionary housing programs "'require or encourage developers to set aside a certain percentage of housing units in new or rehabilitated projects for low- and moderate-income residents.'" (*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal. 4th 435, 441 (*San Jose*).)

lots. The effort began in 2000, when they applied to the Planning Division of the Marin County Community Development Agency (Planning Division) to split the parcel into two single family residential lots. The Planning Division deemed the application complete and began its review of the project, but in 2002 the Cherks asked for the review to be put on hold because they saw proposed changes to the Marin County Code as potentially enabling them to subdivide their property into three, rather than two, lots.

A. Ordinance No. 3393 Is Enacted

In October 2003, the County adopted Ordinance No. 3393, amending the "affordable housing regulations" contained in Title 22 (Development Code) of the Marin County Code. In enacting the ordinance, the County Board of Supervisors found that the amendments would implement the policies contained in the County's housing policies encouraging the development of new affordable housing. (Marin County Ord. No. 3393, § V.) In relevant part, the 2003 ordinance "expand[ed] the applicability of the inclusionary housing requirements for all new residential projects resulting in two or more housing units or lots where the [prior] ordinance applie[d] only to new projects resulting in 10 or more residential units or lots" and "[i]ncrease[d] the percentage of required affordable housing units for most new residential projects from 15% to 20%." (*Ibid*.)

As amended, Marin County Code, section 22.22.090 (section 22.22.090) provides that "20 percent of the total number of dwelling units or lots within a subdivision shall be developed as, or dedicated to, affordable housing. Where the

inclusionary housing calculation results in a decimal fraction greater than 0.50, the fraction shall be rounded up to one additional dwelling unit or lot. Where the inclusionary housing calculation results in any decimal fraction less than or equal to 0.50, the project applicant shall pay an in-lieu fee proportional to the decimal fraction." (§ 22.22.090 A.)

B. After Delays and Revisions, a Tentative Subdivision Map Is Approved.

In February 2004, after concluding that the 2003 amendments would not make it any easier to subdivide the property into three lots, the Cherks initially moved forward with their original plan for a two-lot division. But, after meeting with staff in the Planning Division and others, the Cherks decided to apply for a three-lot division after all, with the third lot dedicated to affordable housing. In a December 2004 letter to principal planner Thomas Lai, Dartmond Cherk urged the County to approve the three-lot division, stating, "The Planning department has been charged with finding more affordable housing for Marin County. When asked if we could come up with a plan, we fully cooperated. In our effort to help, we not only came forth with a plan for infill affordable housing, but we built a scale model, met with housing agencies, met with your Housing Strategist, met with the Supervisor, her aide, as well as with the neighborhood representatives. We went to this extraordinary expense not only because we believe in affordable housing, but we also wanted to help the County achieve its goal. With regards to this issue, we need our three lots if only to enable any less ambitious attempt to provide some affordable housing."

A year and a half later, however, the Cherks again changed course and revised the project back to a two-lot division. In a July 2006 internal email, Stacey Laumann of the Marin County Community Development Agency gave instructions to a planner "for [his] communications with the Cherks." Laumann wrote, "In this case, 2 developable parcels are being created. Therefore either 1 of the two lots should be deed restricted for development of low or very low income units, or an in-lieu fee of $39,960 would be required by the County." She further explained that the in-lieu fee was calculated as 40% of the fee for a single affordable housing unit valued at $99,900.

Following a noticed public meeting in December 2007, the Deputy Zoning Administrator approved the Cherks' tentative map. The final project approval was conditioned upon the Cherks' payment of an in-lieu fee of $39,960 in accordance with the formula contained in section 22.22.090 A.

In December 2008, the Planning Division informed the Cherks that the in-lieu fee had increased to $92,808 in light of the County's re-evaluation of the market value of one affordable housing unit. The County reconsidered, however, and ultimately charged the Cherks the original amount of the in-lieu fee based on the prevailing market value when the application was initially deemed complete.

C. The Project Is Finally Approved and the In-lieu Fee Is Paid Under Protest.

The Cherks again suspended their subdivision efforts after determining that the value of their property was impaired by then-existing economic conditions. For several years, they obtained extensions of time to file a parcel map.

In late 2014, the Cherks submitted their parcel map to the Planning Division for final review. The Planning Division informed the Cherks that the parcel map was approved but could not be recorded until the in-lieu fee was paid. The County offered the Cherks the option of paying the in-lieu fee in installments, with half of the fees due at the time of sale for the first lot, and the remaining balance of the fees due within three years of the map's recordation. In a July 2015 email, the Cherks accepted the County's offer to pay the in-lieu fee through an installment plan. But several weeks later, the Cherks paid the fee in full, although they did so under protest. In an accompanying letter that contained a reference line entitled "extortion payment," Dartmond Cherk stated the County was "violating the law that requires in-lieu affordable housing fee when creating two (2) or more new lots. We are creating only one new lot." He also complained that the project was "substantially completed well in advance of the new housing law. It is wrong for you to apply it retroactively."

In February 2016, attorneys for the Cherks wrote to the County asking it to refund the in-lieu fee. The letter claimed the fee was an unconstitutional exaction in violation of the Fifth Amendment takings clause and also violated the Cherks' equal protection rights. The County did not respond to this letter.

D. The Cherks File a Petition for Writ of Administrative Mandate.

In August 2016, the Cherks filed a verified petition for traditional and administrative mandate and complaint for declaratory relief, claiming the County had abused its discretion by imposing the in-lieu fee because it violated the Act and the

unconstitutional conditions doctrine. They later moved for judgment on their petition.

In December 2017, the trial court issued a tentative decision denying the petition. The court found that the in-lieu fee was not a development-impact fee intended to defray the public burden caused by the Cherks' project and was therefore not subject to the Act's "reasonable relationship" test. It also found that the in-lieu fee did not constitute a monetary exaction subject to the unconstitutional conditions doctrine under the California Supreme Court's decision in *San Jose, supra*, 61 Cal. 4th 435, and the Court of Appeal's opinion in *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal. App. 5th 621 (*West Hollywood*).[3] The Cherks voluntarily dismissed their remaining claims, and the court issued a final judgment in January 2018. This appeal followed.

II.
DISCUSSION

A. The Standard of Review.

"In reviewing an agency's decision under Code of Civil Procedure section 1094.5, the trial court determines whether (1) the agency proceeded without, or in excess of, jurisdiction; (2) there was a fair hearing; and (3) the agency abused its discretion." (*McAllister v. California Coastal Com.* (2008) 169 Cal. App. 4th 912, 921.) "On appeal from the denial of a

[3] The trial court also concluded the petition was not untimely and the Cherks were not required to exhaust administrative remedies because the County never provided them with written notice required by Government Code section 66020, subdivision (d), when a local agency imposes fees, dedications, reservations, or other exactions under the Act.

petition, our role is identical to that of the trial court." (*Id.* at p. 922.)

"Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence." (§ 1094.5, subd. (b).) The petitioner has "the burden of proving that the agency's decision was invalid and should be set aside, because it is presumed that the agency regularly performed its official duty. When the standard of review is the substantial evidence test, . . . it is presumed that the findings and actions of the administrative agency were supported by substantial evidence. [Citations.] Thus, since the same standard of review applies now on appeal as did in the trial court, the burden is on [the] appellant to show there is no substantial evidence whatsoever to support the findings of the [agency]." (*Desmond v. County of Contra Costa* (1993) 21 Cal. App. 4th 330, 335-336.)

B. Judicial Review Is Not Barred by the Cherks' Failure to Exhaust Their Administrative Remedies.

The County argues that the judgment should be affirmed because the Cherks failed to exhaust their administrative remedies. According to the County, tentative map decisions are appealable to the Marin County Planning Commission and Board of Supervisors under Marin County Code, section 22.40.020, and the Cherks should have brought an administrative appeal back in December 2007 when the Deputy Zoning Administrator conditioned approval of the tentative map on payment of the in-lieu fee.

We begin by considering, and rejecting, the Cherks' contention that the County forfeited this argument because it did not cross-appeal the portion of the trial court's ruling that the Cherks were not required to exhaust administrative remedies due to the County's failure to provide written notice as required by the Act. It is true that, as a general rule, a respondent who fails to file a cross-appeal cannot claim error in connection with the opposing party's appeal. (*Preserve Poway v. City of Poway* (2016) 245 Cal. App. 4th 560, 585.) But section 906 provides a "limited exception," which "allows a respondent to 'request the reviewing court to . . . review [the judgment] for the purpose of determining whether or not the appellant was prejudiced by the error or errors upon which he relies for reversal or modification of the judgment from which the appeal is taken.'" (*Preserve Poway,* at p. 585.) This exception applies here, as the County raises the administrative-exhaustion issue to show that the judgment against the Cherks can be affirmed on the basis of an alternate legal theory.

We therefore consider the merits of the County's exhaustion argument, but we are not persuaded by them. "The exhaustion of administrative remedies doctrine 'bars the pursuit of a judicial remedy by a person to whom administrative action was available for the purpose of enforcing the right he seeks to assert in court, but who has failed to commence such action and is attempting to obtain judicial redress where no administrative proceeding has occurred at all; it also operates as a defense to litigation commenced by persons who have been aggrieved by action taken in an administrative proceeding which has in fact occurred but who have failed to "exhaust" the remedy available to them in the

course of the proceeding.'" (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal. App. 4th 865, 874.) While the administrative-exhaustion doctrine "remains a 'fundamental rule of procedure' [citation] . . . courts have repeatedly recognized the rule is not inflexible dogma. [Citations.] Exceptions to the rule include situations . . . when resort[ing] to the administrative process would be futile because it is clear what the agency's decision would be [citations]. Before a court can determine whether an exception is applicable the court must analyze and determine whether the benefits served by the administrative hearing outweigh denying a litigant meaningful judicial review." (*Doster v. County of San Diego* (1988) 203 Cal. App. 3d 257, 260-261 (*Doster*).)

Any benefits of insisting on administrative exhaustion here are outweighed by the harm of denying the Cherks meaningful judicial review. This case turns on "a straightforward legal issue that needs little in the way of factual development" and "presents a dispositive question within judicial, not administrative, competence." (*Action Apartment Assn. v. Santa Monica Rent Control Bd.* (2001) 94 Cal. App. 4th 587, 615.) The legal issue is simply whether the in-lieu fee violates the Act or the unconstitutional conditions doctrine. The County's position is clear and based on appellate authority. Given these circumstances, we conclude the Cherks' failure to exhaust administrative remedies was not a jurisdictional bar to seeking judicial relief.

C. The In-lieu Fee Does Not Violate the Act or the Unconstitutional Conditions Doctrine.

1. The governing law.

Turning to the Cherks' main arguments that the in-lieu fee is invalid under the Act and the unconstitutional conditions doctrine, we begin with an overview of the applicable law.

The Act

Under Government Code section 66001, in any action "establishing, increasing, or imposing a fee as a condition of approval of a development project by a local agency," the local agency must, among other things, "[i]dentify the purpose of the fee" and "[d]etermine how there is a reasonable relationship between the fee's use and the type of development project on which the fee is imposed." (Gov. Code, § 66001, subd. (a)(1), (3).) "Fee" under the Act means "a monetary exaction other than a tax or special assessment, whether established for a broad class of projects by legislation of general applicability or imposed on a specific project on an ad hoc basis, that 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." (*Id.,* § 66000, subd. (b).) Any party protesting the imposition of such a fee may do so by tendering the payment under protest and serving the governing body of the entity with written notice of the payment and the factual and legal bases for the protest. (*See id.,* § 66020, subd. (a).)

The unconstitutional conditions doctrine and its application to land-use permits

The unconstitutional conditions doctrine prevents the government in a variety of contexts from denying a benefit to a person because that person exercises a constitutional right. (*Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595, 604 (*Koontz*).) The doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." (*Ibid.*) A series of United States Supreme Court cases have discussed "'a special application' of this doctrine that protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." (*Ibid.*) Particular rules apply in this area because of two competing realities surrounding land-use permits: On one hand, the government can take unreasonable advantage of landowners who seek a permit. "By conditioning a building permit on the owner's deeding over a public right-of-way, for example, the government can pressure an owner into voluntarily giving up property for which the Fifth Amendment would otherwise require just compensation." (*Id.* at p. 605, italics omitted.) But on the other hand, the government often has legitimate interests in controlling or mitigating the effects of a particular development. (*Ibid.*) To address these competing realities, *Nollan* and *Dolan* establish that the "government may not condition the approval of a land-use permit on the owner's relinquishment of a portion of his property unless there is a 'nexus' and 'rough proportionality' between the government's demand and the effects of the proposed land use." (*Id.* at p. 604.)

In *Koontz,* the Court extended the *Nollan/Dolan* test to apply to government demands for money as a condition for a land-use permit. (*Koontz, supra,* 570 U.S. at p. 612.) "[S]o-called 'in lieu of' fees are utterly commonplace . . . and they are functionally equivalent to other types of land use exactions." (*Ibid.*) Accordingly, the Court concluded that they too must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan.* (*Ibid.*) But, pertinent to our purposes here, the Court agreed that "so long as a permitting authority offers the landowner at least one alternative [to the money condition] that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition." (*Id.* at p. 611.)

State authority applying the Act and the unconstitutional conditions doctrine

In *San Jose,* our state Supreme Court considered an inclusionary housing ordinance requiring 15% of all residential developments of 20 or more units to be made available at an affordable cost. (*San Jose, supra,* 61 Cal. 4th at p. 449-450.) The city provided residential developers with "a menu of options from which to select alternatives" to complying with the requirement, including an option of paying an in-lieu fee based on the median sales price of a housing unit affordable to a moderate-income family. (*Ibid.*) A developer sued to invalidate the ordinance, contending that, under the unconstitutional conditions doctrine and *San Remo Hotel v. City & County of San Francisco* (2002) 27 Cal. 4th 643 (*San Remo Hotel*), the city was required to demonstrate a reasonable relationship between any adverse public impacts caused by the new residential

units and the exactions and conditions imposed on developers. (*San Jose,* at pp. 443, 452-453.)

The Court held that the unconstitutional conditions doctrine was inapplicable because the ordinance did not impose an exaction on the developer's property within the meaning of the takings clauses of the federal and California Constitutions. (*San Jose, supra,* 61 Cal. 4th at pp. 443-444.) The Court found that the city's ordinance "does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process." (*Id.* at p. 461.) Rather, the 15% set-aside requirement "simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale. . . . [¶] Rather than being an exaction, the ordinance falls within . . . municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large." (*Ibid.*) Such land use restrictions, enacted under the government's "general police power, to regulate the development and use of real property within its jurisdiction to promote the public welfare" are constitutionally permissible so long as they "bear[] a reasonable relationship to the public welfare." (*Id.* at p. 455.) The Court elaborated that "[n]othing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval." (*Id.* at p. 460.)

The Court therefore held that "it follows that the affordable housing requirement of the San Jose ordinance as a whole—including the voluntary off-site options and in lieu fee that the ordinance makes available to a developer—does not impose an unconstitutional condition in violation of the takings clause." (*San Jose, supra,* 61 Cal. 4th at pp. 468-469.) "No developer is required to pay the in lieu fee and may always opt to satisfy the ordinance by providing on-site affordable housing units." (*Id.* at p. 476.)

The Court rejected the developer's reliance on *San Remo Hotel,* which involved a challenge to a land use restriction requiring property owners seeking to convert long-term rental units to short-term units to provide a comparable number of long-term rental units at another location or pay an in-lieu fee. (*San Remo Hotel, supra,* 27 Cal. 4th at p. 651.) In *San Remo Hotel,* the Court had held that the challenged fee was valid because it was reasonably related to mitigating the impact caused by the proposed conversion of long-term rental housing to short-term rentals. (*Id.* at pp. 672-679.) Seizing on the "reasonably related" language, the developer in *San Jose* argued that the inclusionary housing requirements must also "satisfy something similar to the *Nollan/Dolan* test." (*San Jose, supra,* 61 Cal. 4th at p. 470.) But *San Jose* held that the cited portion of *San Remo Hotel* "applies only to 'development *mitigation* fees' [citation]—that is, to fees whose purpose are to mitigate the effects or impacts of the development on which the fees are imposed—and does not purport to apply to price controls or other land use restrictions that serve a broader constitutionally permissible purpose or purposes unrelated to the impact of the proposed development." (*Id.* at p. 472.) In contrast to the

development-mitigation fee at issue in *San Remo Hotel,* "San Jose's inclusionary housing ordinance is intended to advance purposes beyond mitigating the impacts or effects that are attributable to a particular development or project and instead 'to produce a widespread public benefit' [citation] that inures generally to the municipality as a whole." (*San Jose,* at p. 474.)

Finally, in 2016, the Second District Court of Appeal decided *West Hollywood.* There, a developer applied to the City of West Hollywood for permits to demolish two single-family homes and build an 11-unit condominium complex in their place. (*West Hollywood, supra,* 3 Cal. App. 5th at p. 624.) The city determined that the project fell under the inclusionary housing ordinance, which required developers to sell or rent a portion of newly constructed units at below-market rates or 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." (*Id.* at p. 625.) Although the city approved the application in 2005, by the time the developer sought building permits in 2011, the in-lieu fee had nearly doubled. (*Ibid.)* The developer paid the fee under protest and sued the city, arguing that the in-lieu fee violated the Act and was an unconstitutional condition under the *Nollan/Dolan* test. (*Id.* at pp. 625-626.)

Applying *San Jose,* the Court of Appeal held that *Nollan/Dolan* was not implicated because the developer "paid the in-lieu fee voluntarily as an *alternative* to setting aside a number of units." (*West Hollywood, supra,* 3 Cal. App. 5th at pp. 628-629.) The court further held that the in-lieu fee was not subject to the Act because the fee's purpose was not to

mitigate any adverse impact of the new development, and the fee was part of a land use regulation that broadly applied the nondiscretionary fees to a class of owners. (*Id.* at p. 629.)

2. The Act does not apply to the in-lieu fee.

With this background in mind, we tum to the Cherks' primary arguments. They first argue that the in-lieu fee is "plainly" a development fee or exaction subject to the Act's reasonable-relation standard. In support of their argument, they cite *Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal. App. 4th 554 (*Lemoore*) and various provisions of the Act. We are not convinced. *Lemoore* is not on point because the municipality in that case did not claim that it could impose the fee at issue, a community/recreation facility impact fee, without satisfying the Act. Rather, the issue in *Lemoore* was whether the municipality satisfied the reasonable-relation test by relying on the findings in a development-impact fee report. (*See id.* at pp. 561-566.) Equally unavailing to the Cherks, is their reliance on the Act's language. As we have explained, a "fee" within the meaning of Act is one that is imposed "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).) *West Hollywood* squarely held that an in-lieu housing fee is not an exaction subject to the Act when the fee's purpose is not to mitigate the adverse impact of the particular development but is instead to enhance the public welfare by promoting the use of available land for the development of affordable housing. (*West Hollywood, supra,* 3 Cal. App. 5th at p. 629.)

The Cherks brush aside this holding in *West Hollywood* as dicta because the Court of Appeal "[a]ssum[ed]" the in-lieu fee was a general land use regulation. (*West Hollywood, supra,* 3 Cal. App. 5th at p. 629.) They are mistaken in doing so. The holding was fully consistent with the reasoning of *San Jose,* in which the Supreme Court distinguished the development-mitigation fee in *San Remo Hotel* from a broad inclusionary housing ordinance (including its in-lieu fees) that serves purposes beyond mitigating the impact of a particular development project. (*See San Jose, supra,* 61 Cal. 4th at p. 462.) The validity of the latter "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." (*Id.* at p. 474.) The ordinance here is broadly aimed at increasing the amount of affordable housing in Marin County. The Cherks do not suggest otherwise, nor do they contend that the ordinance is not reasonably related to the general welfare. In short, the in-lieu fee was not a development fee or exaction subject to the Act's reasonable relation standard.

In arguing to the contrary, the Cherks place undue reliance on *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal. 4th 1193 (*Sterling Park*). In that case, the Supreme Court held that the statute of limitations of Government Code section 66020 applied to a challenge to the requirements of Palo Alto's below market rate housing program. Those requirements compelled developers of large-scale housing projects either to set aside a certain number of units for sale at below market value and give the city an option to

purchase them, or to provide offsite units or vacant land. (*Sterling Park, supra,* at p. 1196.) If neither of those alternatives were feasible, the city could accept an in-lieu fee. (*Ibid.*) The court held that "[c]ompelling the developer to give the City a purchase option is an exaction under [Government Code] section 66020" because "a purchase option is a sufficiently strong interest in the property to require compensation if the government takes it in eminent domain." (*Id.* at p. 1207.)

This holding has little relevance here. To begin with, Marin County's inclusionary housing program does not include a provision for a purchase option. More importantly, as *San Jose* made clear, "*Sterling Park* did not address or intend to express any view whatsoever with regard to the legal test that applies in evaluating the substantive validity of the affordable housing requirements imposed by an inclusionary housing ordinance. The opinion in *Sterling Park* focused exclusively on the procedural issue presented in that case and made no mention of the passage in *San Remo Hotel, supra,* 27 Cal. 4th 643, or any other substantive legal test." (*San Jose, supra,* 61 Cal. 4th at p. 482.) Thus, *Sterling Park* expressly did "not decide whether forcing the developer to sell some units below market value, by itself, would constitute an exaction under section 66020." (*Ibid.*)

3. The *Nollan/Dolan* test does not apply to the in-lieu fee.

As we have mentioned, the unconstitutional conditions doctrine is not implicated where the permitting authority offers the applicant at least one constitutionally permissible alternative to paying the in-lieu fee. (*See Koontz, supra,* 570 U.S. at p. 611; *San*

Jose, supra, 61 Cal. 4th at pp. 460-461.) Marin County's inclusionary housing ordinance, like the ordinance in *San Jose,* restricts the use of property by limiting the price for which developers may offer some of its units for sale. (*San Jose,* at pp. 455-457.) *San Jose* concluded that this type of an ordinance is an example of a permissible regulation of the use of land under a county's general police power. (*Ibid*) Because such a restriction is not subject to the *Nollan/Dolan* test, it follows that the County's affordable-housing ordinance as a whole, including the in-lieu fee, does not impose an unconstitutional condition. (*Id.* at pp. 468-469.)

The Cherks argue that *San Jose* and *West Hollywood* are distinguishable because, unlike the developers in those cases, they had no alternative way to comply with the inclusionary housing requirements and "were faced with an exclusive demand for money." Their argument appears to be based on the language of section 22.22.090, which states the applicant "shall" pay an in-lieu fee where the inclusionary housing calculation results in a decimal fraction less than or equal to 0.50. (§ 2.22.090 A.) Because the Cherks' proposed lot division would result in only two lots, the inclusionary housing formula required them to be responsible for providing 40% of an affordable housing unit (0.20 x 2 lots = 0.40). The Cherks assume that because the inclusionary housing calculation resulted in a decimal fraction less than 0.50, they were *required* to pay the in-lieu fee. The County responds that, to the contrary, the Cherks always had the option of "rounding up" from a decimal fraction of less than 0.50 and dedicating the entire second lot to affordable housing.

Putting aside, for a moment, section 22.22.090 A's calculation guideline, other sections of the Development Code make clear that developers have several potential alternatives to the requirement of dedicating onsite units for affordable housing purposes. Under Marin County Code, section 22.22.060, entitled "Waivers," the County may approve one or more of various alternative means of compliance if applicants can demonstrate a better means of serving the County in achieving its affordable housing goals. These alternatives, listed in order of priority, are: the construction of affordable units offsite (Marin County Code, § 22.22.060 A.1); the dedication of other lots of suitable real property to the County or its designee to develop the required inclusionary units (*id.,* A.2); and the "lowest priority" option of paying an in-lieu fee (*id.,* A.3).

Turning back to section 22.22.090, the provision specifies the percentage of affordable housing units that must be set aside and clarifies how to round when the formula yields a fractional unit. While the Cherks' argument that the word "shall" implies that they had no choice but to pay the in-lieu fee is colorable, we must consider the word in context. (*See California Redevelopment Assn. v. Matosantos* (2011) 53 Cal. 4th 231, 257 ["shall" is not necessarily mandatory and depends on context in which it is used].) Clearly, the overarching purpose of the County's inclusionary housing program is to increase the amount of affordable housing, and the primary goal is the dedication of affordable onsite units. We decline to interpret the rounding provision in the manner proposed by the Cherks so as to violate the purposes and goals of the inclusionary housing

program by prohibiting a developer from voluntarily rounding up a fractional unit.

The Cherks contend that however the County might interpret the inclusionary housing provisions in hindsight, in this as-applied challenge, "the actual fact is that the County demanded . . . a lump sum of $39,960." But we find no support in the record that the County made such a demand or interpreted its ordinance in a way that gave the Cherks no choice but to pay the fee. In fact, the record suggests that other choices were available. After the 2003 ordinance was enacted, the Cherks discussed with Planning Division staff their proposal to split the property into three lots, with the third lot dedicated to affordable housing. They eventually abandoned the three-lot plan and returned to the original two-lot plan, but there is no evidence that their decision to pay the in-lieu fee at that time was due to an express demand from the County. The statement in the July 2006 Laumann email that "either *1 of the two lots* should be deed restricted for development of low or very low income units, *or* an in-lieu fee of $39,960 would be required" (italics added) reflects the County's position that the in-lieu fee was an alternative to dedicating one entire lot to affordable housing purposes, and the Cherks cite no contrary evidence to suggest they were not given this choice. Moreover, the Cherks' claim that the County demanded a "lump sum" is belied by the undisputed evidence that the County offered them the option to pay the fee in installments. The record otherwise shows that the Cherks were, at all relevant times, aware of the County's affordable-housing requirements and were engaged in ongoing discussions with the Planning Division on different ways of implementing the County's goals. On this

record, in the absence of evidence that the County demanded payment of the in-lieu fee without alternatives, we conclude the Cherks have failed to distinguish this case from *San Jose* and *West Hollywood*.

Additionally, "legislatively prescribed monetary fees"—as distinguished from ad hoc monetary demands by an administrative agency—"that are imposed as a condition of development are not subject to the *Nollan/Dolan* test." (*San Jose, supra,* 61 Cal. 4th at p. 459, fn. 11, citing *San Remo Hotel, supra,* 27 Cal. 4th at pp. 663-671; *see Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854, 876 [heightened scrutiny appropriate when exactions are imposed on individual and discretionary basis].) Here, as in *San Jose,* the in-lieu fee is a legislatively mandated fee that applies to a broad class of permit applicants. The Cherks argue there is no legitimate basis to provide lesser scrutiny to legislatively mandated in-lieu fees than to those imposed ad hoc by an administrative agency, especially since the County has the discretion to waive the fees from case to case. But this argument ignores *San Remo Hotel's* point that legislatively mandated fees are "subject to the ordinary restraints of the democratic political process" while ad hoc monetary demands "deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systemic assessment, they are more likely to escape such political controls." (*San Remo Hotel,* at p. 671.) In any event, regardless of the County's decision not to waive the in-lieu fee in the Cherks' case, the fee is not subject to the unconstitutional conditions doctrine because there were alternative means of complying with the

inclusionary housing ordinance that did not violate *Nollan/Dolan.* (*See Koontz, supra,* 570 U.S. at p. 611.)

4. The Cherks' regulatory takings claim fails.

In their reply brief, the Cherks argue that for small landowners like themselves, dedicating one of their two newly-created lots to affordable housing imposes a very substantial hardship and may be subject to a regulatory takings challenge under *Penn Central Transp. Co v. New York City* (1978) 438 U.S. 104. We conclude the Cherks doubly waived this argument by not presenting it to the trial court below or in their opening brief. (*Children's Hospital & Medical Center v. Bontá* (2002) 97 Cal. App. 4th 740, 776.) And even if the argument was properly presented, the Cherks have cited no facts or evidence supporting a regulatory taking in this case under the relevant factors set forth in *Penn Central*—the economic impact of regulation on the claimant; the extent to which the regulation interferes with distinct, investment-backed expectations; and the character of the government action (e.g., physical invasion or regulation adjusting societal burdens and benefits to promote the public good). (*Penn Central,* at p. 124.)

For all of these reasons, we conclude the Cherks have not demonstrated that the County failed to proceed in a manner required by law. (§ 1094.5, subd. (b).) As a result, they are not entitled to mandamus relief.

III.
DISPOSITION

The judgment is affirmed. Respondent is awarded its costs on appeal.

_____
Humes, P.J.

We concur:

_____
Margulies, J.

_____
Kelly, J.*

*Judge of the Superior Court of the City and County of San Francisco, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Cherk v. County of Marin A153579

Appendix B-1

ATTORNEY OR PARTY WITHOUT ATTORNEY (*Name, State Bar number, and address*):

Brian E. Washington 146807
David L. Zaltsman 113053
3501 Civic Center Dr. RM 275
San Rafael, CA 94903

TELEPHONE NO.: **415-473-6117**

FAX NO. (*Optional*):

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ATTORNEY FOR (*Name*):

SUPERIOR COURT OF CALIFORNIA, COUNY OF

STREET ADDRESS: **3501 Civic Center Dr.**

MAILING ADDRESS:

CITY AND ZIP CODE: **San Rafael, CA 94903**

BRANCH NAME:

PLAINTIFF/PETITIONER: **Dartmond Cherk and the Cherk Family**

DEFENDANT/RESPONDENT: **County of Marin**

NOTICE OF ENTRY OF JUDGMENT OR ORDER

(*Check one*): [**X**] UNLIMITED CASE (Amount demanded exceeded $25,000)

[ ] LIMITED CASE (Amount demanded was $25,000 or less)

FOR COURT USE ONLY

FILED
JAN 11 2018
JAMES M. KIM, Court Executive Officer
MARIN COUNTY SUPERIOR COURT
By: C. Lucchesi, Deputy

CASE NUMBER:
1602934

TO ALL PARTIES:

1. A judgment, decree, or order was entered in this action on (*date*): **January 5, 2018**

2. A copy of the judgment, decree, or order is attached to this notice.

Date: **January 11, 2018**

David L. Zaltsman
(TYPE OR PRINT NAME OF [**X**] ATTORNEY
[ ] PARTY WITHOUT ATTORNEY)

(SIGNATURE)

Form Approved for Optional Use
Judicial Council of California

CIV-130 (New January 1, 2010)
CEB ceb.com
Essential Forms
NOTICE OF ENTRY OF JUDGMENT OR ORDER

PLAINTIFF/PETITIONER: **Dartmond Cherk; and the Cherk Family Trust**

DEFENDANT/RESPONDENT: **County of Marin**

CASE NUMBER:
1602934

PROOF OF SERVICE BY FIRST-CLASS MAIL
NOTICE OF ENTRY OF JUDGMENT OR ORDER

(*NOTE: You cannot serve the* Notice of Entry of Judgment or Order *if you are a party in the action. The person who served the notice must complete this proof of service.*)

1. I am at least 18 years and not a party to this action. I am a resident of or employed in the county where the mailing took place, and my residence or business address is (*specify*):
Marin County Counsel
3501 Civic Center Dr. RM 275
San Rafael, CA 94903

2. I served a copy of the *Notice of Entry of Judgment or Order* by enclosing it in a sealed envelope with postage fully prepaid and (*check one*):
a. [X] deposited the sealed envelope with the United States Postal Service.

b. [ ] placed the sealed envelope for collection and processing for mailing, following this business's usual practices, with which I am readily familiar. On the same day correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service.

3. The *Notice of Entry of Judgment or Order* was mailed:
a. on (*date*): **January 11, 2018**
b. from (*city and state*): **San Rafael, CA 94903**

4. The envelope was addresses and mailed as follows:
a. Name of person served:
Lawrence G. Salzman
Street address: **930 G Street**
City: **Sacramento**
State and zip code: **CA, 95814**

b. Name of person served:
Street address:
City:
State and zip code:

c. Name of person served:
Street address:
City:
State and zip code:

d. Name of person served:
Street address:
City:
State and zip code:

[ ] Names and addresses of additional persons served are attached. (*You may use form POS-030(P).)*

5. Number of pages attached _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: **January 11, 2018**

Sasha M. Sanderson
(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

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CDA Planning

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County of Marin

Appendix B-6

By: J. Berg, Deputy

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN
DARTMOND CHERK, AND THE CHERK FAMILY TRUST

Petitioners and Plaintiffs,

v.

COUNTY OF MARIN,

Respondent and Defendant.

Case No. CIV 1602934

JUDGMENT DENYING PETITION
FOR WRIT OF ADMINISTRATIVE MANDAMUS
(Code Civ. Proc. Section 1094.5)

Date: December 6, 2017
Time: 1:30 p.m.
Hon. Roy O. Chernus
Department: B

The hearing on the sixth cause of action of this matter for a writ of administrative mandate (Code Civ. Proc. Section 1094.5,) came on for hearing on December 6, 2017 in Department B of the above entitled court, the Honorable Roy O. Chernus presiding. The court had issued its tentative ruling the prior day pursuant to Local Rule of Court 1.10(A). Neither party requested oral argument. Therefore the

tentative ruling was adopted as the final ruling of this court by order filed on December 21, 2017.
In issuing this order, this Court bifurcated the writ petition from the other five (5) causes of action in the complaint.

However, prior to the final issuance of this order, on December 20, 2017, plaintiff's and petitioner's filed a voluntary dismissal of their other five (5) causes of action.

Therefore a final judgment in favor of respondent is now appropriate.

IT IS ORDERED that:

1. Judgment be entered in favor of respondent in this proceeding.

2. Pursuant to the agreement of the parties each party shall bear their own costs and fees.

Dated: JAN 05 2018, 2018

ROY CHERNUS
Honorable Roy O. Chernus
Judge of the Marin County Superior Court

Larry Salzman
Approved as to Form
Lawrence G. Salzman
Attorney for Plaintiffs and Petitioners

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

DATE: 12/06/17 TIME: 1:30 P.M. DEPT: B
CASE NO: CV1602934

PRESIDING: HON. ROY O. CHERNUS

REPORTER:
CLERK: CHRISTINA ASLESON

PETITIONER: DARTMOND CHERK, ET AL
vs.
RESPONDENT: COUNTY OF MARIN

NATURE OF PROCEEDINGS: WRIT – OF MANDATE [PETR] DARTMOND CHERK [PETR] THE CHERK FAMILY TRUST

RULING

As discussed in detail below, the court finds that the mandatory in-lieu affordable housing fee imposed by Respondent County of Marin as a condition for approval of Petitioners' two-lot subdivision (Marin County Code § 22.22.090), is not a development impact fee intended to defray the public burden directly caused by Petitioners' project, and that the imposition of the in-lieu fee is not subject to the heightened "reasonable relationship" test under the Mitigation Fee Act (Govt. Code § 66000 *et seq*.), nor is it reviewed under the unconstitutional conditions/takings analysis under the U.S. and California Constitutions. As such, Petitioners have

not demonstrated that Respondent County failed to proceed in the manner required by law, and the petition for writ of administrative mandate is denied. (Code Civ. Proc. § 1094.5.)

Background

In an effort to satisfy the "Affordable Housing" element of its General Plan which was created to meet the state's mandated affordable housing goals (*See* Govt. Code §§ 65580-65589)[1], in 2003 Marin County adopted Ordinance No. 3393 which amended the Development Code by expanding the existing "inclusionary" affordable housing requirement for very low, low and moderate incomes, and requiring new residential projects resulting in *two or more lots*, with or without dwellings, to set aside 20 percent of the total number of lots within a subdivision to be developed or dedicated to affordable housing. (Marin County Code § 22.22.090 A.) (AR p. 116-118.)

Importantly for our purposes, that ordinance also provides that if that "inclusionary housing" calculation "results in any decimal fraction less than

---

[1] Marin County Code § 22.22.010 states in part:
"Marin County is experiencing a shortage of homes affordable to the workforce of the county, seniors and disabled individuals. The California Legislature has found that the availability of housing is of vital statewide importance and a priority of the highest order, and that local governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community. To help attain local and state housing goals, this Chapter requires new developments to contribute to the County's affordable housing stock through the provision of housing units, land dedication, and/or fees."

or equal to 0.50, the project applicant shall pay an *in-lieu fee* proportional to the decimal fraction" at a rate adequate to construct the affordable units off-site. (Ordinance No. 3392, (F)(e); § 22.22.090 A.) (AR p. 118.) That is what occurred here.

FACTS

Beginning in 2000 Petitioners applied to the Planning Division for tentative map approval to split their undeveloped 2.79 acre parcel into two, single-family residential lots consisting of: 1 – a 1. 79 acres lot to be retained by Petitioners; and 2 – a 1.00 acre lot to be sold. At that time, the County's "inclusionary" affordable housing ordinance applied only to new projects resulting in 10 or more residential units or lots. (AR p. 20-22, 117)

In December 2000, the Planning Division deemed the application to be "complete" (AR p. 21), and the agency began its environmental review and review of the merits of the project prior to reaching a decision on the project. Petitioners were directed to submit various environmental, geotechnical, and utility usage reports as part of that process.

Beginning in 2001 and frequently thereafter, the Planning Division found the application to be "incomplete" due to Petitioners' failure to provide all of the requested reports. (E.g., AR p. 74.)

On September 9, 2002, Petitioners asked the Planning Division to place their application on hold in response to the Planning Staff's suggesting that upcoming changes to the Planning Code would support

Petitioners' new request to subdivide their lot into three parcels. (AR p. 102.)

Further delays for the final approval of the tentative map ensued due to a combination of factors including: Petitioners' failure to file a tentative map with the required conditions and site improvements; their neighbors' lawsuit; ordinary delays inherent in CEQA review and bureaucratic fact-finding and decision-making; and tum-over of Planning Division staff reviewing the application.

In February 2004, Petitioners decided to move forward with their original plan for approval of a two-lot land division after concluding that the 2003 amendment to the Development Code did not result in the anticipated benefits allowing a three-lot subdivision. (AR p. 134-135.) Petitioners changed their minds *again* and on June 14, 2005 Petitioners' consultant wrote to the County stating Petitioners decided to proceed with a three-lot division. (AR p. 136-137.)

In July 2006, Petitioners revised the project back to a two-lot division for the final time. (AR p. 151-153, 162-164.)

Following a noticed public meeting on the project on December 13, 2007, the Deputy Zoning Administrator made findings and approved Petitioners' tentative map. (AR p. 274-285) Final project approval was conditioned, *inter alia,* upon paying an in-lieu fee of $39,960.00 pursuant to the formula contained in the County's affordable housing ordinance. (See Development Code § 22.22.090) (AR p. 281 ¶ 7.) The

amount of the fee was calculated as 40% (.20 x 2 lots) of the market value of a single affordable housing unit. At that time, the County determined the market value of one affordable unit to be $99,900.00. (AR p. 164.)

Petitioners did not administratively appeal the conditions for approval of their tentative map to the Planning Commission or to the Board of Supervisors as allowed by Marin County Code § 22.40.020.

Final project approval was delayed primarily due to Petitioners' failure to file a compliant Parcel Map and to pay the required fees; e.g., the park fee and the "inclusionary" in-lieu fee. (*See e.g.*, AR p. 289-290, 301.)

Later, in a "Project Status" letter dated December 16, 2008 the Planning Division informed Petitioners that the in-lieu fee has increased to $92,808.00 in light of the County's re-evaluation of the market value of one affordable housing unit. (AR p. 289-290, 301-303.) Ultimately, the County reconsidered and charged Petitioners the in-lieu fee in the original amount of $39,960.00, which was the prevailing market value when the application was initially deemed complete. (AR p. 294, 311-312.)

In 2009, purportedly due to the nationwide recession, Petitioners voluntarily suspended their efforts to complete the subdivision process. (¶ 17) For several years thereafter Petitioners obtained extensions of the time to file a Parcel Map that satisfied the conditions imposed by the Planning Division. (AR p. 286-301.)

On December 13, 2013, Petitioners obtained a two-year extension of the agency's tentative map approval, i.e., until December 13, 2015, on which date the two-year period in which to file the Parcel Map commenced. (AR p. 305.)

Petitioners submitted the Parcel Map to the Planning Division for final review on or about October 14, 2014. (AR p. 329-331). On December 18, 2014 the Planning Division informed Petitioners the Parcel Map was approved, but Petitioners could not record the Parcel Map until they paid the in-lieu housing fee of $39,960.00. (AR p. 332.)

On July 29, 2015 Petitioners paid the housing fee under protest. (AR p. 338-339)

Seven months later, on February 19, 2016, Petitioners' original attorneys wrote to the County stating the fee was paid under protest pursuant to the Mitigation Fee Act (Govt. Code § 66000 *et seq*.) and they requested a refund. The letter challenged the fee as an unconstitutional "exaction" in violation of the Fifth Am. "takings clauses", and that the imposition of the fee violated Petitioners' Equal Protection rights. (Pet. Ex. B.) (AR p. 340; § 22.22.090 A.) The letter also asked the County if there were administrative appeal options available. The County never responded to the demand for a refund.

Section 66020 of the Mitigation Fee Act provides in relevant part:

(a) Any party may protest the imposition of any fees, dedications, reservations, or other exactions imposed

on a residential housing development by a local agency by meeting both of the following requirements:

(1) Tendering any required payment in full or providing satisfactory evidence of arrangements to ensure performance of the conditions necessary to meet the requirements of the imposition.

(2) Serving written notice on the governing body of the entity, which notice shall contain all of the following information:

> (A) A statement that the required payment is tendered, or that any conditions which have been imposed are provided for or satisfied, under protest.
>
> (B) A statement informing the governing body of the factual elements of the dispute and the legal theory forming the basis for the protest.

That statute requires the fee "protest" to be filed within 90 days after the government agency delivers a notice at the time of approval of the project or the imposition of the fee, informing the applicant that the 90-day protest period has commenced. (§ 60020(d)(1).) The subdivider then has 180 days from the delivery of the notice by which to file a legal action. (§ 66020(d)(2).) There is no evidence in the administrative record indicating that Respondent sent Petitioners the notice under the Act, triggering the running of the 180-day limitations period.

On August 15, 2016 Petitioners filed this verified petition for traditional and administrative mandate

and for declaratory relief. Petitioners have raised an "as applied" challenge to the fee, alleging the County's imposition of the affordable housing in-lieu fee as a condition for their subdivision approval is an illegal monetary exaction for use of their property. Petitioners contend:

1 – the in-lieu fee violates the Mitigation Fee Law (Govt. Code §§ 66001, 66020), because the fee was imposed without a determination that it was reasonably related to any deleterious public impact caused by their lot-split. (¶ 21);

2 – the fee paid by Petitioners imposes an unconstitutional condition for obtaining the subdivision approval because there is neither an "essential nexus", nor a "rough proportionality" between the basis for imposing the fee and any adverse public impact caused by the lot-split, in violation of the unconstitutional conditions "takings clauses" of the California and U.S. Constitutions. (¶s 22-25); and

3 – the County's rejection of Petitioners' request to waive the fee amounted to a denial of equal protection, since the County waived the fee for other similarly situated property owners. (¶s 26-27.)

The only matter before the court is Petitioners' noticed motion to grant the sixth cause of action for a peremptory writ of mandate. That cause of action alleges Respondent's approval of the two-lot subdivision upon payment of the in-lieu fee violated Respondent's statutory and constitutional duties, and Respondent has a mandatory duty to refund the fee.

For purposes of this hearing, the writ petition is ordered bifurcated from the rest of the complaint. (*See e.g.*, *Ehrlich v. City of Culver City, supra*, 12 Cal. 4th at p. 863.)

DISCUSSION

Respondent's decision to approve Petitioners' subdivision application was a "quasi-adjudicatory" decision. (*See Horn v. County of Ventura* (1979) 24 Cal. 3d 605, 612.) Judicial review of quasi-adjudicatory decisions is through administrative mandamus, and is restricted to the administrative record. (Code Civ. Proc. § 1094.5 (a).) The scope of review is "whether the administrative agency has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc. § 1094.5(b).) Abuse of discretion is established if the administrative agency has not proceeded in the manner required by law, the order is not supported by the findings, or the findings are not supported by the evidence. (§ 1094.5(b); *Lechuza Villas West v. California Coastal Com.* (1997) 60 Cal. App. 4th 218, 233-234.)

At the trial of an administrative mandamus proceeding, the Petitioner has the burden of proof to show the agency's decision is invalid and should be set aside because it is presumed the agency regularly performed its official duty. (Ev. Code § 664; *Desmond v. County of Contra Costa* (1993) 21 Cal. App. 4th 330, 335-336.)

1.

Mitigation Fee Act (Govt. Code§ 66000 *et seq.)*

Petitioners argue the County failed to demonstrate that the in-lieu fee imposed as a condition of

subdivision approval bore a "reasonable relationship" between the government purpose for imposing the fee and the public impact on the availability of affordable housing posed by their project, as required by the Act. (Govt. Code § 60001(b).) (MPA p. 5.)

In pertinent part, Government Code section 66001 requires the local agency to determine "how there is a *reasonable relationship"* between both "the type of development project", and "the need for the public facility and the type of development project on which the fee is imposed." (Gov. Code, § 66001, subd. (a)(3), (4), italics added.) In addition, the local agency must determine how there is *a "reasonable relationship"* between "the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." (*Id.,* § 66001, subd. (b), italics added.)

Based on the authorities discussed below, the court concludes that imposition of the affordable housing in-lieu fee is not "monetary exaction" "imposed for the purposes of defraying all or a portion of the cost of public facilities related to the development project, . . ." as defined by the Act (§ 66000(b).)

Rather it is a permissible land use restriction that does not trigger the County's duty under the Act to demonstrate that the amount of the fee and the need for the public facility bear a "reasonable relationship" to the burden created by the development project. (Govt. Code § 66001(a)(3),(4), (b); generally *Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal. App. 4th 554, 561 ["The local agency must also determine that both 'the

fee's use' and 'the need for the public facility' are reasonably related to the type of development project on which the fee is imposed. [Citation.]"].)

Accordingly, Petitioners' contention that the Act required the County to make that determination before conditioning tentative map approval upon payment of the affordable housing in-lieu fee is rejected.

As succinctly discussed in *Walker v. City of San Clemente* (2015) 239 Cal. App. 4th 1350, the Mitigation Fee Act sets standards and limitations that local agencies must follow before imposing "development fees" on new projects:

The Legislature passed the Act "'in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects.'" (*Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854, 864.) The Act creates uniform procedures for local agencies to follow in establishing, imposing, collecting, accounting for, and using development fees. (*Centex Real Estate Corp. v. City of Vallejo* (1993) 19 Cal. App. 4th 1358, 1361-1362.) In passing the Act, the Legislature found and declared that "untimely or improper allocation of development fees hinders economic growth and is, therefore, a matter of statewide interest and concern." (§ 66006, subd. (e).)

The Act defines a development fee as "a monetary exaction other than a tax or special assessment . . . that 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. . . ." (§ 66000, subd. (b).) "A fee shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan." (§ 66001, subd. (g).) "'Public facilities' includes public improvements, public services, and community amenities." (§ 66000, subd. (d).)

To establish a development fee a local agency must identify "the purpose of the fee" and "the use to which the fee is to be put." (§ 66001, subd. (a).) The agency also must determine that both "the fee's use" and "the need for the public facility" are reasonably related to "the type of development project on which the fee is imposed." (*Ibid.; see Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal. App. 4th 554, 561.) "The Act thus codifies, as the statutory standard applicable by definition to nonpossessory monetary exactions, the 'reasonable relationship' standard employed in California and elsewhere to measure the validity of required dedications of land (or fees in lieu of such dedications) that are challenged under the Fifth and Fourteenth Amendments." (*Ehrlich, supra,* 12 Cal. 4th at p. 865.)

To impose an established development fee as a condition of approval for a specific development project, a local agency must "determine how there is a reasonable relationship between the amount of the fee

and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." (§ 66001, subd. (b).) The agency also must "identify the public improvement that the fee will be used to finance." (§ 66006, subd. (f).) (*Walker, supra,* 239 Cal. App. 4th at pp. 1357-58, *emphasis added.*)

Petitioners assert that the County did not demonstrate the existence of a "reasonable relationship" between the purpose of the in-lieu affordable housing fee imposed under the ordinance, and any adverse impact on the availability of affordable housing in the County that is attributable to Petitioners' land division project. (MPA p. 5-6.) To the contrary, Petitioners argue the undisputed facts show that their "proposal will not result in a decrease in housing – affordable or otherwise." (MPA p. 7.) Additionally, Petitioners contend that any findings made by the County on this matter, *post,* were inadequate.

In the Resolution approving the land division, the Deputy Zoning Administrator found in part:

The project is consistent with the goals and policies of the Countywide Plan because it would create two residential parcels within the City-Centered Corridor consistent with existing low to moderate density residential development in the vicinity . . . . The project would result in a future increase in the availability of housing opportunities in an existing residential community. (AR p. 279 (VI),(A).)

Recent decisions in *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal. 4th 435, and *616 Croft Ave., LLC City of West Hollywood* (*Croft*) (2016) 3 Cal. App. 5th 621 have reviewed similar affordable housing ordinances, and have held that the validity of the "inclusionary" affordable housing conditions like the ones present in the Marin County Code, are not "exactions" intended to mitigate or offset the impact on public facilities caused by the development, but are instead permissible land use regulations enacted under the local government's broad police powers in order to promote the public welfare. (*California Building Industry, supra,* 61 Cal. 4th at p. 457; *Croft, supra,* 3 Cal. App. 5th at pp. 628-629.) These cases held that the validity of these inclusionary conditions are not reviewed under the "reasonable relationship" test.

In *California Building Industry,* our Supreme Court reviewed a similar inclusionary housing ordinance enacted by the City of San Jose, which required all new residential development projects of 20 or more units to sell at least 15 percent of the on-site units at a price that is affordable to low- or moderate-income households. (*Id.* 61 Cal. 4th at p. 442.) Like the Marin County ordinance, the San Jose ordinance also provided alternative compliance options for: 1 – constructing off-site affordable units; and 2 – paying an in lieu-fee based on the median sales prices of a moderate income affordable unit. (*Id.* 61 Cal. 4th at pp. 450-451.)

Before that ordinance went into effect, the Plaintiff building trade group filed a lawsuit challenging the ordinance as unconstitutionally invalid on its face,

and asserting the "exactions" required under the ordinance constituted an unconstitutional taking because at no time before it adopted the ordinance did the City provide substantial evidence to "demonstrate a reasonable relationship" between any adverse impacts on the City's affordable housing problem that was caused or attributable to the new residential developments that are subject to the Ordinance. (*Id.,* 61 Cal.4th at pp. 442-443.)

The Court rejected that argument and held that the affordable housing conditions imposed on future developments do not impose "exactions" on the developer's property which trigger the heightened scrutiny called for in a Fifth Am. "takings" analysis[2], but are proper land use regulations which place limits on the way a developer uses its property; e.g., to promote the public welfare. (*Id.* at pp. 456-457, 461-462.) The Court explained:

[T]here can be no valid unconstitutional-conditions takings claim without a government exaction of property, *and the ordinance in the present case does not effect an exaction*. Rather, the ordinance is an example of a municipality's permissible regulation of the use of land under its broad police power.

---

[2] Under the *Nollan v. California Coastal Comm'n.* (1987) 483 U.S. 825, and *Dolan v. City of Tigard* (1994) 512 U.S. 374 line of Fifth Am. "takings clause" cases, the Supreme Court held that the local permitting authority must show proof of both: an "essential nexus" or relationship between the permit condition and the public impact of the proposed development; and of a "rough proportionality" between the magnitude of the fiscal exaction and the effects of the proposed development. (*See California Building Indust1y, supra,* 61 Cal. 4th at pp. 457-458.)

(*California Bldg. Industry, supra,* 61 Cal. 4th at pp. 456-457, *emphasis added.*)

The Court went on to explain that the basic requirement imposed by San Jose's inclusionary housing ordinance – requiring the developer to sell 15 percent of the units at an affordable price – is not an "exaction" for purposes of the takings clauses because the inclusionary housing ordinance "does not require the developer to dedicate any portion of its property to the public or to pay any money to the public." (*Id.* at p. 461.)

Instead, the Court upheld the affordable housing requirement as a legitimate "price control" regulation on the use of the property for the public benefit, so long as it is not confiscatory under established constitutional analysis. (*Id.* at pp. 464-465.) Under that view, the Court held that "like many other land use regulations, this condition simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale. [Citations.]" (*Id.* at pp. 461, 468.)

Although the question of the validity of the in-lieu fee was not directly before that Court, it distinguished cases which applied the "reasonable relationship" test to "development *mitigation* fees" – i.e., "whose purpose is to mitigate the effects or impacts of the developer on which the fee is imposed" – from the land use restrictions or price controls as mandated in the affordable housing ordinance and which "serve a broader constitutionally permissible purpose or

purposes unrelated to the impact of the proposed development." (*Id.* 61 Cal. 4th at p. 472.)

In making this distinction, the court specifically disapproved of the holding in *Building Industry Ass'n of Cent. California v. City of Patterson* (2009) 171 Cal. App. 4th 886, which case applied the heightened "reasonable relationship" test to determine the validity of the payment of the affordable housing in lieu fee:

For the reasons discussed above, we disapprove the decision in *Building Industry Assn. of Central California v. City of Patterson, supra,* 171 Cal. App. 4th 886, to the extent it indicates that the conditions imposed by an inclusionary zoning ordinance are valid only if they are reasonably related to the need for affordable housing attributable to the projects to which the ordinance applies.
(*California Bldg. Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 479.)

Applying that logic, the Court distinguished San Jose's inclusionary housing ordinance from an "impact" development fee intended to avoid or mitigate the burden on public services that are attributable to a specific development:

Like other zoning or land use regulations that are intended to shape and enhance the character and quality of life of the community as a whole, San Jose's inclusionary housing ordinance is intended to advance purposes beyond mitigating the impacts or effects that are attributable to a particular development or project and instead "to produce a widespread public benefit"

(*Penn Central, supra,* 438 U.S. at p. 134, fn. 30) that inures generally to the municipality as a whole, providing such benefits to residents of new market-rate housing as well as to the other residents of the community.
(*California Bldg. Industry, supra,* 61 Cal. 4th at pp. 474-475.)

The court then concluded that the courts do not review the validity of the affordable housing law based on "a judicial means-end determination that focuses exclusively on the restrictions' relationship to the adverse impact that would result from an alternative use of a particular parcel or a particular proposed project. [Citations.] Similarly, 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 economically diverse projects throughout 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." (*Id.* 61 Cal. 4th at p. 474, *emphasis added.*)

Under that analysis the Court likewise held that the validity of an in-lieu fee does not depend on whether there is a "reasonable relationship" between the fee and the development's impact on the need for affordable housing:

[T]he 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.
(*California Building Industry, supra,* 61 Cal. 4th at p. 477.)

Applying that analysis to the mandatory in-lieu fee imposed by Respondent on Petitioners' lot-split (Marin County Code § 22.22.090 A), this court concludes that the validity of the inclusionary affordable housing conditions contained in Marin County's ordinance are not viewed under the Mitigation Fee Act's "reasonable relationship" test. (Govt. Code § 66001 (a)(3),(4), (b).)

This result is consistent with the holding by the court in *Croft, supra,* 3 Cal. App. 5th 621. That court reviewed the validity of the imposition of an in-lieu fee in an affordable housing ordinance virtually identical to the County's. The West Hollywood 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 have had to set aside. (*Croft, supra,* 3 Cal. App. 5th at p. 625.) In 2005, the developers of an 11-unit condominium complex obtained the City's approval of their demolition and construction permits by agreeing to pay an in-lieu fee instead of selling or renting a portion of their units at specified below market rates, as provided by the City's

affordable housing ordinance. (*Id.*, 3 Cal. App. 5th at pp. 624-625.)

As the Petitioners did here, the *Croft* developers cited the economic crisis and obtained extensions of the permit approvals. But by the time the developers finally requested issuance of the building permit years later in 2011, the City had revised its fee schedule and the amount of the in-lieu fee nearly doubled to $540,393.00. (*Id.* at p. 625.)

Petitioners paid the fees under protest in order to allow the project to go forward, as permitted by the Mitigation Fee Act. (*Id.* 3 Cal. App. 5th at pp. 625-626.) The protest letter challenged the fees as unjustified and also challenged the in-lieu fee as facially invalid under the *Nollan v. California Coastal Comm'n., supra,* 483 U.S. 825, and *Dolan v. City of Tigard, supra,* 512 U.S. 374 line of "unconstitutional conditions" cases. Also, as in our case, the *Croft* developers asked the City to advise them of any available administrative review or appeal options. The City did not respond.

The developers later sued for declaratory and injunction relief alleging, *inter alia,* the in-lieu fees were illegal, the City violated the Mitigation Fee Act, and they also sought a writ of mandate to compel the City to refund the fees. The suit was stayed while the City held an administrative hearing on the request to return the fees. At the hearing, the City upheld the collection of almost all of the fees, and the developers added a cause of action for a writ of administrative mandamus to their complaint. Petitioners severed

that claim, and the trial court denied the writ. (*Id.,* 3 Cal. App. 5th at p. 626.)

The *Croft* court adopted the *California Bldg. Industry's* analysis and held that the inclusionary housing conditions, *specifically the in-lieu fee imposed on the developer,* was not an "exaction" under the Mitigation Fee Act. The *Croft* court rejected the same challenge that Petitioners make here – i.e., the City had the burden to prove its fees were reasonably related to the development's impact on the City's affordable housing need. (3 Cal. App. 5th at pp. 628-629.)

Based on these authorities, the court finds the County did not have to demonstrate a "reasonable relationship" between the in-lieu fee imposed and the deleterious impact caused by Petitioners' project as required by the Mitigation Fee Act, before it imposed the fee. Petitioners' claim that the in lieu fee was invalid under the Mitigation Fee Act is rejected.

In support of their claim that the validity of the in-lieu fee is viewed under the Mitigation Fee Act's reasonable relationship test, Petitioners rely on the Supreme Court's case in *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal. 4th 1193, also an inclusionary housing ordinance case. (MPA p. 9.)

In *Sterling Park* the developer of a planned 96-unit residential condominium development entered into a development agreement with the City which agreement provided that in lieu of building at least 20% of the units as affordable units or pay an in-lieu fee equal to 10% of the sales price of the market rate

units as required by the ordinance, he agreed to build 10 affordable units and pay an in-lieu fee of 5.3488 % of the sales price of the market rate units. After the final subdivision map was approved and nearing the completion of the construction, the development refused to comply with the agreement, and sent the City a notice of protest. (*Id.* 57 Cal. 4th at p. 1197.)

The issue before that court was which of two statutes of limitation applied to the lawsuit. One of the potentially applicable statutes of limitation—Government Code section 66499.37, a part of the Subdivision Map Act—was a general statute of limitations requiring lawsuits challenging the validity of conditions attached to the approval of a tentative or final map to be filed "within 90 days after the date of the decision" attaching the condition. If that statute applied, the developer's lawsuit was time barred.

The other potentially applicable statute of limitations—Government Code section 66020, a part of the Mitigation Fee Act—permitted a developer to protest "the imposition of any fees, dedications, reservations, or other exactions" by "[t]endering any required payment in full" under protest and thereafter to file a lawsuit within 180 days after receiving notice of the required payment. The lawsuit was timely under that statute.

The *Sterling Park* court concluded that the statute of limitations provisions of Government Code section 66020 (part of the Mitigation Fee Act) should properly be interpreted to apply to the requirements imposed by the Palo Alto inclusionary housing ordinance, reasoning that this conclusion would further the

purpose behind the Act – to permit a developer who wished to challenge a fee that was a condition of development to pay the contested fee under protest and to continue with the construction of the development while its legal challenge to the fee went forward. (*Id.* at 57 Cal. 4th pp. 1206-1207.)

In language relied upon by Petitioners, the *Sterling Park* court rejected the developer's argument that the inclusionary housing conditions imposed on his development "are not exactions but merely land use regulations . . . that section 66020 does not govern." (*Id.* at p. 1207.) That court held:

The program offers developers two options, either of which, by itself, would constitute an exaction [under § 66020]. The imposition of the in-lieu fees is certainly similar to a fee. (*Sterling Park,* 57 Cal. 4th at p. 1207.)

In constructing this same language, the *California Building Industry* court explained that its *Sterling Park* decision did *not* hold that affordable housing ordinance conditions are viewed under the heightened "reasonable relationship" test. That Court held:

But whether or not the affordable housing requirements of the San Jose ordinance should be considered "exactions" as that term is used in Government Code section 66020, and thus are subject to the procedural protest and statute of limitations provisions of that statute—an issue we need not and do not decide—it is clear that our decision in *Sterling Park* did not address or intend to express any view whatsoever with regard to the legal test that applies in evaluating the substantive validity of the affordable

housing requirements imposed by an inclusionary housing ordinance. The opinion in *Sterling Park* focused exclusively on the procedural issue presented in that case and made no mention of the passage in *San Remo Hotel, supra,* 27 Cal. 4th 643, 117 Cal. Rptr. 2d 269, 41 P.3d 87, or any other substantive legal test. Nothing in *Sterling Park* supports CBIA's claim that the challenged San Jose ordinance is subject to a judicial standard of review different from that traditionally applied to other legislatively mandated land use development requirements.
(*California Bldg. Industry, supra,* 61 Cal. 4th at p. 482, *emphasis added.*)

While the Act's procedural language in section 66020 may be broad enough to apply the 180-day statute of limitations to monetary protests of in-lieu fees at issue here, despite the fact the fee does do not fall within the narrow statutory definition of "exactions" – i.e., imposed to mitigate the public impact directly caused by Petitioners' development – the holding in *California Building Industry* makes clear that the heightened "reasonable relationship" test does not apply to determine if the imposition of the inclusionary housing conditions are valid. As instructed by the court in *California Building Industry,* the validity of the County's legislatively-mandated, affordable housing ordinance is determined under the simpler, standard test – "As 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. [Citations.]" (*California Bldg. Industry Assn. v. City of San Jose* (2015) 61 Cal. 4th 435, 455; also *Associated Home Builders etc., Inc.*

v. City of Livermore (1976) 18 Cal. 3d 582, 601 ["[T]he land use restriction withstands constitutional attack if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare."].)

2.

Unconstitutional Conditions/Takings Clause

Next, Petitioners contend that under both the Fifth Am. and Cal. Const. art. 1 § 19, the in-lieu fee is a "monetary exaction" upon Petitioners' property subject to the *Nollan/Dolan* (*Nollan v. California Coastal Comm'n., supra,* 483 U.S. 825, *Dolan v. City of Tigard, supra,* 512 U.S. 374), and assert that Respondent has not sustained its burden to demonstrate the existence of an "essential nexus" and a "rough proportionality" between the affordable housing in-lieu fee imposed as a condition for the lot split, and the adverse public impact on affordable housing caused by their project. (MPA p. 8-11.)

Under the federal takings clause made applicable to the states through the Fourteenth Amendment (*Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226, 239) private property cannot be taken for public use without just compensation. Under Cal. Const. art. I, § 19 (a), private property shall not be taken or damaged for public use without just compensation.

In *Nollan v. California Coastal Comm'n., supra,* 483 U.S. 825 and *Dolan v. City of Tigard, supra,* 512 U.S. 374, the local agencies required the landowners to dedicate or transfer a portion of their lands for public use as a condition for granting the respective land use permits. Because these cases involved the actual *conveyance* of a portion of the landowners' properties,

purportedly to ameliorate the public impact of the development, the Supreme Court held that heightened scrutiny of the government action was warranted. (*See California Building Industry, supra,* 61 Cal. 4th at pp. 457-458, discussing the cases.)

The Court in *Nollan/Dolan* held that the government may demand a dedication or conveyance of private lands as a condition for changing the use of their property, only when the government demonstrates that there is an "essential nexus" between the condition imposed and the governmental interest advanced as the justification for the condition (*Nollan, supra,* 483 U.S. at p. 837), and a "rough proportionality" between the extent of the condition demanded and the development's anticipated impacts. (*Dolan, supra,* 512 U.S. at p. 391; *see California Building Industry, supra,* 61 Cal. 4th at pp. 457-458.)

In the more recent case of *Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. __ ; 133 S. Ct. 2586, the Supreme Court held that the *Nollan/Dolan* test also applies when the government conditions approval of a land use permit upon the owner's payment of money as an alternative to dedicating a portion of the owner's land to mitigate the environmental impact caused by the development. The *Koontz* court held that the "nexus" and "rough proportionality" test applied to "monetary exactions" which are a substitute for the property owner's dedication of property to the public and which is intended to mitigate the public impact caused by the project. (*Id.* 133 S. Ct. a p. 2602.)

As discussed above, the *California Building Industry* court concluded that the takings analysis announced in *Nollan/Dolan/Koontz,* *does not* apply to test the validity of the affordable housing conditions' land use restrictions which are similar to the conditions contained in the Marin County ordinance:

Moreover, as we have explained above, the validity of the ordinance's requirement that at least 15 percent of a development's for-sale units be affordable to moderate or low income households does not depend on an assessment of the impact that the development itself will have on the municipality's affordable housing situation. Consequently, *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*.
(*California Bldg. Industry, supra,* 61 Cal.4th at p. 477, *emphasis added.*)

Significantly, that Court further distinguished the alternative fee payment in *Koontz* which was imposed on the developer by the local government on an *"ad hoc basis",* unlike the formulaic, "legislatively prescribed condition applied to a broad class of permit applications" as in our case. (*California Building Industry, supra,* 61 Cal. 4th at p. 460, n. 11.) For such legislatively mandated conditions, our Supreme Court held:

The *Koontz* decision does not purport to decide whether the *Nollan/Dolan* test is applicable to legislatively prescribed monetary permit conditions

that apply to a broad class of proposed developments. (*See Koontz, supra,* 570 U.S. at p. __, 133 S.Ct. at p. 2608, 186 L.Ed.2d at p. 723 (dis. opn. of Kagan, J.).) Our court has held that legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan/Dolan* test. (*San Remo Hotel, supra,* 27 Cal. 4th at pp. 663-671, 117 Cal. Rptr. 2d 269, 41 P.3d 87; *see Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal. 4th 952, 966-967, 81 Cal. Rptr. 2d 93, 968 P.2d 993 *(Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 966-967, 81 Cal. Rptr. 2d 93, 968 P.2d 993 (*Santa Monica Beach*).)
(*California Bldg. Industry, supra,* 61 Cal. 4th at p. 460, n. 11.)

In applying this reasoning to the San Jose ordinance, the *California Building Industry* court held that the "inclusionary housing ordinance does not violate the unconstitutional conditions doctrine because there is no exaction—the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process." (*California Bldg. Industry, supra,* 61 Cal. 4th at p. 461.)

While the Court in *California Building Industry* did not have directly before it the issue of the validity of the legislatively-mandated in-lieu fee, the court in *Croft, supra,* did.

That court applied the *California Building Industry* analysis to the alternative in-lieu fee paid under protest and concluded that the validity of the

imposition of the in-lieu fee is *not* governed by *Nollan/Dolan/Koontz*. (*Id.* 3 Cal. App. 5th at pp. 628-629.)

Under these authorities, the court is compelled to conclude that the affordable housing in-lieu fee imposed as a condition for approval of Petitioners' project does not impose a "monetary exaction" subject to the *Nollan/Dolan/Koontz* test for unconstitutional conditions, and Petitioners' contrary contention must be rejected.

3.

Equal Protection

Petitioners' moving or reply papers do not cite legal authorities nor discuss evidence in the administrative record that would support their claim that imposition of the in-lieu fee violated their Equal Protection rights, as alleged in the verified petition. (¶s 26-27). Petitioners are deemed to have abandoned this claim.

4.

Untimeliness

In light of the holding in *California Building Industry, supra,* that the *procedural portion* of the Mitigation Fee Act controls the protest of an affordable housing in-lieu fee, Respondent's contentions that this action is time-barred and that Petitioners were required to exhaust their administrative remedies (Oppo. p. 8), are rejected. Since Respondent did not provide Petitioners the 180-day notice required by section 60020(d), the limitations period never started to run.

Conclusion

The court finds that the legislatively-mandated affordable housing in-lieu fee is not imposed to defray the public burden caused by Petitioners' project, and therefore Respondent was not required to determine if the fee bore a "reasonable relationship" between the County's purpose in imposing the fee and the public impact on the availability of affordable housing posed by their project, as required by the Mitigation Fee Act (Govt. Code § 60001(b)); nor is the validity of the in-lieu fee reviewed under the unconstitutional takings analysis announced in *Nollan/Dolan/Koontz*. The petition for writ of administrative mandate is denied.

Parties must comply with Marin County Superior Court Local Rules, Rule 1.10(B) to contest the tentative decision. In the event that no party requests oral argument in accordance with Rule 1.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 1.11.

Appendix C-1

SUPREME COURT

F I L E D

MAR 13 2019

Jorge Navarrete Clerk

_____

Deputy

Court of Appeal, First Appellate District,
Division One - No. A153579

S253558

IN THE SUPREME COURT OF CALIFORNIA

En Banc

DARTMOND CHERK et al.,

Plaintiffs and Appellants,

v.

COUNTY OF MARIN,

Defendant and Respondent.

The petition for review is denied.

CANTIL-SAKAUYE

Chief Justice

22.22.060 - Waivers.

The review authority may grant a waiver to the requirements of this Chapter if an alternative affordable housing proposal demonstrates a better means of serving the County in achieving its affordable housing goals than the requirements of Chapter 22.22 (Affordable Housing Regulations).

A. Residential projects. The review authority may approve one or more of the following alternative means of compliance with the requirements of Section 22.22.090 (Inclusionary Housing Standards—Lot Creation) or the mixed use residential inclusionary requirements of Section 22.22.100.B (Mixed use development). Any proposed alternative means of compliance must include an analysis of fair housing implications to insure that any proposed off-site location will promote diversity. Required units or lots must be located in an unincorporated area of the County. Required units or lots may also be within the boundaries of a City or Town provided there is an inter-agency agreement with the County which defines the sharing of affordable housing resources and compliance with fair share housing allocations. The options below are listed in order of priority, with the provision of in-lieu fees being the lowest priority. The applicant must demonstrate that each option is infeasible before the County may consider the next option.

1. **Affordable units off-site.** Inclusionary units may be constructed on one or more sites not contiguous with the proposed development. The off-site property shall be located in an area with appropriate zoning, character and density, location, size, accessibility to public transportation, and other services, consistent with sound community planning principles and shall be devoid of contaminants and other hazardous wastes. The offsite location must include either a greater number of inclusionary units than required on-site or the same number of inclusionary units that are affordable at a lower income level.

2. **Lots.** The applicant may dedicate suitable real property to the County or its designee to develop the required inclusionary units. The property shall be located in an area with appropriate zoning, character and density, location, size, accessibility to public transportation, and other services, consistent with sound community planning principles and shall be devoid of contaminants and other hazardous wastes. The offsite location must include either a greater number of inclusionary units than required on-site or the same number of inclusionary units that are

affordable to a lower income level. Required units may also be constructed within the boundaries of a City or Town provided there is an inter-agency agreement with the County which defines the sharing of affordable housing resources and compliance with fair share housing allocations.

3. **In-lieu fee.** The applicant may pay an in-lieu participation fee based on 125% of the requirement of Section 22.22.090 (Inclusionary Housing Standards—Lot Creation). The review authority shall apply the lowest preference to the payment of an in-lieu fee for compliance with the requirements of this chapter.

B. Non-Residential Development. If the review authority finds that an alternative provides a better means of serving the County in achieving its affordable housing goals, one or more of the following alternative means may be approved for compliance with the requirements of this chapter. Any proposed alternative means of compliance must include an analysis of fair housing implications to insure that any proposed off-site location will promote housing diversity. Required units or lots must be located in an unincorporated area of the County. Required units or lots may also be within the boundaries of a City or

Town provided there is an inter-agency agreement with the County which defines the sharing of affordable housing resources and compliance with fair share housing allocations. A combination of both income-restricted units and affordable housing fees may be allowed. The options below are listed in order of priority, with the provision of in-lieu fees being the lowest priority. The applicant must demonstrate that each option is infeasible before the County may consider the next option.

1. **Affordable units off-site.** Affordable units may be provided off-site on an adjacent property or on one or more sites not contiguous with the proposed development. The off-site property shall be located in an area with appropriate zoning, character and density, location, size, accessibility to public transportation, and other services, consistent with sound community planning principles and shall be devoid of contaminants and other hazardous wastes. The offsite location must include either a greater number of inclusionary units than required on-site or the same number of inclusionary units that are affordable to a lower income level.

2. **Lots.** The applicant may dedicate suitable real property to the County

or its designee to be developed for affordable housing by the County, or a profit or nonprofit, private or public applicant. The off-site property shall be located in the same planning area, and shall be appropriately sized and zoned for development equivalent to or more than the residential units that are not created on-site. The property shall be offered in a condition that is suitable for development, including appropriate access and services, consistent with sound community planning principles and shall be devoid of contaminants and other hazardous wastes.

3. **In-lieu fee.** The applicant may pay an in-lieu participation fee based on 125% of the requirement of Section 22.22.090 (Inclusionary Housing Standards—Lot Creation). The review authority shall apply the lowest preference to the payment of an in-lieu fee for compliance with the requirements of this chapter.

(Ord. No. 3577, 2012; Ord. No. 3602, § II(exh. A), 2013)

22.22.090 - Inclusionary Housing Standards—Lot Creation.

This Section addresses the inclusionary housing standards for lot creation with or without proposed dwellings and the residential portion of mixed use developments. This Section also provides the means to levy in-lieu fees for the construction of affordable housing in cases where the inclusionary requirement includes a decimal fraction of a unit or lot or when a combination of both inclusionary units and an in-lieu fee is required.

A. Number of inclusionary units/lots required. 20 percent of the total number of dwelling units or lots within a subdivision shall be developed as, or dedicated to, affordable housing. Where the inclusionary housing calculation results in a decimal fraction greater than 0.50, the fraction shall be rounded up to one additional dwelling unit or lot. Where the inclusionary housing calculation results in any decimal fraction less than or equal to 0.50, the project applicant shall pay an in-lieu fee proportional to the decimal fraction.

1. Lots developed with a primary residence as of July 13, 2006 shall be deducted from the total number of lots in the proposed subdivision for the purpose of applying the inclusionary requirement.

B. In-lieu fee. A fee may be required in addition to inclusionary units or lots in cases where the inclusionary requirement includes a decimal fraction of a unit or lot or when a combination of both inclusionary units and in-lieu fees is required. The current fee as established by the County shall be multiplied by the fraction of the inclusionary requirement to determine the applicable fee to be paid.

(Ord. No. 3577, 2012)