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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

DANIEL LEVIN; MARIA LEVIN; PARK LANE ASSOCIATES, L.P.; THE SAN FRANCISCO APARTMENT ASSOCIATION; and THE COALITION FOR BETTER HOUSING,

Plaintiffs,

vs.

CITY AND COUNTY OF SAN FRANCISCO,

Defendant.

DAVID GREENE AND ALL OTHERS SIMILARLY SITUATED,

Intervenors.

Case No. 14-cv-03352-CRB (JSC)

DEFENDANT CITY AND COUNTY OF SAN FRANCISCO'S SUPPLEMENTAL TRIAL BRIEF RE *NOLLAN/DOLAN* ISSUES

Judge: Hon. Charles R. Breyer

Trial Date: October 6, 2014

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There is a crisis of housing affordability in San Francisco, as the Court has acknowledged and Plaintiffs do not contest. When landlords exercise their state statutory rights under the Ellis Act to exit the rental market, they curtail the protections of rent control for people who rely on that protection to afford housing in the city—including San Francisco's musicians, teachers, artists, and nonprofit workers.

Under the Ellis Act, San Francisco has the police-power authority to require landlords to mitigate the adverse impacts that they cause with evictions. Cal. Gov. Code § 7060.1(c). California cases acknowledge that a payment to an evicted tenant is one mitigation method that is within a city's police power to require, *Pieri v. City & Cnty. of San Francisco*, 137 Cal.App.4th 886, 893 n.4 (2006), and that private landlords may lawfully be required to replace the affordable housing units that they remove from the market, *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal.4th 643, 651 (2002).

Of course, such requirements must also comport with federal takings law. But it is not a taking to require a property owner to mitigate the harms that he causes by changing the use of a property. As long as the mitigation condition serves the same legitimate purpose as would a refusal to allow the change in use, and as long as the mitigation condition does not require the property owner to remedy more than the impact he causes, the Takings Clause is satisfied.

The Takings Clause is satisfied here. The purpose of rent control is to protect tenants from rent increases. Requiring a landlord to make a mitigation payment to an evicted tenant to compensate for the loss of rent control serves the same police-power purpose as rent control. And because the duration of rent control is indefinite, requiring the landlord to compensate the tenant for two years of lost rent control does not overcompensate the tenant. The Court should reject Plaintiffs' *Nollan*/*Dolan* challenge to the 2014 Mitigation Ordinance for the reasons discussed in Sections I and II, below.

Nor does San Francisco stand alone in requiring this kind of mitigation for evictions. Price controls on housing are relatively rare in this country, although there is no doubt they are constitutional. But in the few markets where housing price controls exist, it is common for private landlords to be required to compensate tenants for the loss of price-control protections, as San Francisco shows in Section III, below. And what San Francisco requires of landlords by the

Mitigation Ordinance is no more than what the federal government and the State of California require of themselves when they take apartment buildings by eminent domain. The Mitigation Ordinance is valid and this Court should uphold it.

ARGUMENT

I. THE 2014 MITIGATION ORDINANCE SATISFIES THE *NOLLAN/DOLAN* TEST

A. The Mitigation Payment Compensates The Tenant For The Loss Of Rent Control's Price Protection

Rent control in San Francisco provides two kinds of protections for renters: 1) tenure protection, *i.e*. stringent limits on the reasons for which tenants can be evicted, S.F. Admin. Code §§ 37.2(r)(5), 37.3(a); and 2) price protection, by limiting annual rent increases to 60% of inflation, *id.* § 37.3(a)(1). Thus, most rent-controlled tenants in San Francisco can expect to receive the benefits of below-market rents well into the future.

A landlord evicting a tenant under the Ellis Act causes an adverse impact on the tenant by abruptly terminating that guarantee of below-market rents. The tenant must now obtain replacement housing in the market, at the market rate.[1] The adverse financial impact on the tenant from eviction is very straightforward. As a consequence of her eviction, the tenant must now pay the difference between her former regulated rent and her new market rent:

New market rent – old regulated rent = rent payment differential (RPD)

Thus, after eviction, the tenant is adversely financially impacted by the amount of the RPD each and every month. To figure out precisely the total amount of the adverse financial impact on the tenant, one would have to know how long the tenant would have remained in the rent-controlled apartment. In light of the long tenure of many rent-controlled tenants, it is probably a very long time, and compensating the tenant for only 24 months of RPDs almost certainly does not fully compensate

[1] That is true even if the tenant is lucky enough to find a new rent-controlled unit. When a new tenancy starts, the landlord is not restricted in setting the initial rent pursuant to California law. Cal. Civ. Code § 1954.52. Only future increases are regulated by rent control in San Francisco, not the initial rent.

most tenants.[2] In addition, that amount of mitigation does not compensate the tenant for moving expenses, the time it takes her to find a new apartment, the stress of moving, etc.

Does it matter if the tenant switches from a one-bedroom apartment to a studio after being evicted, or moves to a cheaper apartment outside of San Francisco? Is the tenant getting a windfall in that case by getting a mitigation payment based on the market cost of a comparable unit in San Francisco? The answer is no if one believes that markets are efficient, *i.e.* that prices reflect the value of goods. In that case, if the tenant substitutes to a less valuable apartment, she incurs an adverse impact by consuming less valuable housing. The mitigation payment in that case still compensates her for the adverse impact the landlord has caused by evicting her. But she simply chooses to stretch her cash mitigation payment out longer by belt-tightening, *i.e.* by consuming less valuable housing, and is no better or worse off than if she had remained in the city.[3]

B. Application Of *Nollan* And *Dolan* To The Mitigation Payment Requirement

Because the amount of the mitigation payment is directly correlated to the new market rent the tenant faces as a result of the landlord's decision to evict her, it satisfies the standards of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

Where the government demands property in exchange for providing some benefit, it does not have to pay just compensation for that taking unless the property demanded does not have an "essential nexus" to the social harms caused by granting the benefit, *Nollan*, 483 U.S. at 837, or unless the demand is not roughly proportional to those harms, *Dolan*, 512 U.S. at 391. The government bears

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[2] The evidence from trial shows that the tenure of rent-controlled tenants is typically much longer than two years. *See, e.g.*, Trial Ex. 28 at 28-124 – 28-125. And the longer a rent-controlled tenancy has lasted, the more valuable it is to the tenant since market rent increases have been suppressed for a longer period of time.

[3] Nor does the ordinance become invalid if the tenant decides to move out of San Francisco and thus one of the legislative goals San Francisco stated at its hearing, preventing tenants from having to leave San Francisco, is not met. "[T]here is no constitutional requirement that the inquiry into whether the legislation substantially serves legitimate goals must be limited to stated goals . . . " *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal.4th 952, 970 (1999).

the burden under this test. But the showing it must make is not demanding. As San Francisco demonstrates here, the 2014 Mitigation Ordinance easily meets these standards.

1. There Is A Nexus Between The Loss Of Rent Control And A Mitigation Payment To Help Tenants Afford Market Rent.

With respect to *Nollan*, there must be an "essential nexus" between the condition and the impact of the benefit. 483 U.S. at 837. Or to put it another way, the permit condition must "serve[] the same legitimate police-power purpose as a refusal to issue the permit." *Id.* at 836.

That test is met here. Rent control serves the legitimate police-power purpose of promoting consumer welfare for tenants by regulating prices and protecting tenants from sharp rent increases. *Pennell v. City of San Jose*, 485 U.S. 1, 13 (1988). Conditioning a landlord's right to terminate a tenant's rent-controlled tenancy on a mitigation payment to make up for the loss of rent control also protects tenants from sharp rent increases. Thus, the nexus test of *Nollan* is met because the mitigation payment "serves the same governmental purpose" as rent control. Indeed, it is hard to imagine a closer nexus than the one between a price control and a payment to compensate someone for the loss of a price control.

This is not a case like *Nollan* itself, where the mitigation condition was unrelated to the problem caused by development. In that case, the Nollans' desire to build a bigger beach house meant that the public would lose visual access to the ocean from public property. The Coastal Commission's requested mitigation—giving up a lateral easement across the beach—had no effect on the loss of visual access the proposed development caused. 483 U.S. at 839-41. Here, the mitigation San Francisco requires, making up the loss of rent-controlled rent, is directly related to the impact the landlord's choice has on the tenant.

Case law does not demand a tighter fit than this, or more elaborate analysis to demonstrate it. In *Dolan*, for instance, the Supreme Court held without further analysis that there was an "obvious" nexus between increased traffic congestion resulting from a business owner's expansion of an existing retail store and a city's decision to provide a pedestrian/bicycle pathway to ease traffic congestion. 512 U.S. at 387-88.

Plaintiffs argue that there is no nexus here between an Ellis eviction and the required mitigation because "the withdrawal of rental property does not cause the rental affordability problem addressed by the Payment." Dkt. 51 at 18:25-26. Plaintiffs contend that it is larger market forces, not the withdrawal of any particular unit from the market, that causes tenants to experience high rents when they seek new housing. *Id.* at 19. But that argument—the *only* argument that Plaintiffs make to rebut San Francisco's nexus showing—is wrong. A tenant who is evicted because of the Ellis Act and eligible for mitigation payments previously enjoyed a below-market rent and now faces market rents as a *direct* result of the landlord's decision to evict her. Had the landlord not evicted her, she would not face a new higher rent.

Nor is San Francisco prevented from requiring mitigation simply because there are many forces that create high housing prices in San Francisco. One problem in *Dolan* that the government lawfully sought to mitigate was traffic congestion, notwithstanding the fact that the single property owner plaintiff in that case could hardly have been the only source of traffic congestion. 512 U.S. at 387-88; *see also State Route 4 Bypass Auth. v. Superior Court*, 153 Cal. App. 4th 1546, 1562 (2007) (*Dolan* does not require the government to choose equitable means of apportioning responsibility for harms among contributors to harm); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 287 (Minn. Ct. App. 1996). The same is true here: San Francisco is not forbidden from requiring landlords to mitigate the harms they have caused tenants simply because many forces have created high market prices.

2. The Mitigation Payment Is Roughly Proportional To The Financial Impacts The Tenant Incurs From The Loss of Rent Control.

In *Dolan*, the Supreme Court attempted to describe what its "rough proportionality" standard required of the fit between the proposed development and the required mitigation. It said that the Constitution requires something more than "very generalized statements" about the connection, but something less than "a very exacting correspondence." 512 U.S. at 389-90. Instead, it held that state courts taking "an intermediate position, requiring the municipality to show a 'reasonable relationship' between the required dedication and the impact of the proposed development," were correct. Thus, it

adopted a "reasonable relationship" standard, but it dubbed that standard "rough proportionality" to avoid any confusion with the term "rational basis." *Id.* at 390-91. Under that standard, "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id.* at 391. A mathematical formula applied to individual cases satisfies the "individualized determination" standard. *Horne v. U.S. Dep't of Agriculture*, 750 F.3d 1128, 1144 (9th Cir. 2014).

As the term "rough proportionality" indicates, the government's effort to quantify the impact of a development need not be exact. *Dolan* itself stated that the City of Tigard merely had to make at least "some effort to quantify its findings." 512 U.S. at 395. *Dolan* cited with approval cases that required nothing more than "reasonableness" to support a required exaction. *See, e.g., Jordan v. Village of Menomonee Falls*, 28 Wis.2d 608, 619 (1965); *Collis v. City of Bloomington*, 310 Minn. 5, 18 (1976). Other courts have applied similarly relaxed tests, or approved rough proportionality without an elaborate factual showing of proportionality. *See, e.g., Ocean Harbor House Homeowners Ass'n v. California Coastal Comm'n*, 163 Cal. App. 4th 215, 236 (2008) (finding rough proportionality where expert opined that government's method was "defensible"); *Twin Lakes Dev. Corp. v. Town of Monroe*, 1 N.Y.3d 98, 105-06 (2003) (approving fee exaction to provide new parks based on assertion of relationship between new development and need for new parks); *Kottschade v. City of Rochester*, 537 N.W.2d 301, 308 (Minn. Ct. App. 1995) (approving dedication of land for highway interchange where new store would increase traffic and "provide a further need" for construction of interchange)

The Ninth Circuit, too, has approved an exaction under *Nollan*/*Dolan* without any lengthy inquiry into rough proportionality. In *Horne v. Department of Agriculture*, 750 F.3d 1128, the court examined a federal marketing order requiring raisin producers to contribute a certain number of raisins every year to a raisin reserve in order to smooth out peaks and valleys in the raisin market and stabilize prices. The Hornes refused to comply with the marketing order and were fined as a result. They argued that both the fine and the raisin reserve requirement were per se takings of their property. *Id.* at 1137, 1143. The Ninth Circuit rejected this claim and applied *Nollan*/*Dolan* instead. Without any elaborate inquiry into the mechanics of the marketing order, the Circuit approved the marketing order

requirement, stating that, "[a]t bottom, *Dolan*'s individualized review ensures the government's implementation of the regulations is tailored to the interest the government seeks to protect." *Id.* at 1144.

The "rough proportionality" test applied in these cases is readily met here. There is a rough proportionality or reasonable relationship between the loss of rent control and a payment that compensates a tenant for the increased rent payment she will incur by virtue of the loss of rent control. The payment that each tenant receives is calculated based on the difference between her regulated rent and her market-rate rent for 24 months. There is a very close relationship, in both nature and kind, between the financial harm the landlord causes her (abruptly facing market rents) and the required mitigation (a subsidy to meet those market rents for two years). In fact, unless the tenant would not have remained in her rent-controlled unit for at least two more years absent eviction, then the landlord is undercompensating her for the adverse effects he has caused by paying only two years' of mitigation. But the landlord certainly cannot complain that he is paying more than the harm he has caused.[4] Thus, because the City's method of calculating compensation "is tailored to the interest the government seeks to protect," *Horne*, 750 F.3d at 1144; because the City has made "some effort" to quantify the relationship between the tenant's harm and the mitigation, *Dolan*, 512 U.S. at 395; and because this effort is "reasonable," *id.* at 390-91, the City has met its burden.

Plaintiffs argue that the "rough proportionality" test is not satisfied here because tenants need not use their mitigation payments for rent, and thus the mitigation bears no relationship to the harm the landlord causes. Dkt. 51 at 19:19-21. This argument is specious because money is fungible. Unless the tenant has a free source of housing, or unless one makes the ridiculous assumption that the tenant will forego housing, the tenant will use money for replacement housing in the future after being evicted, and will have to pay market rent instead of regulated rent for that housing.

Plaintiffs also argue that the mitigation payment is disproportionate in "extent," *i.e.* in requiring two years' worth of mitigation payments, because the landlord's decision to withdraw a unit

[4] In the event that the Controller's formula does not accurately measure the difference between the tenant's regulated rent and market rent for a comparable unit, a landlord is entitled to seek relief from the Rent Board to ensure that the tenant is not overcompensated. S.F. Admin. Code § 37.9A(e)(3)(H).

from the rental causes the tenant to need to rent another unit for two years. "The tenant's need to rent for any amount of time is independent of the withdrawal event and arises from a personal choice to rent and to live in San Francisco, while the high prices the tenant faces flow from macro-economic forces." Dkt. 51 at 20:7-9. That argument, too, is specious because it waves away the protections of rent control. Tenants who are protected by rent control receive protection from market increases in rents for a lifetime, not just for two years. Providing two years' worth of subsidy is proportionate to at least some of the adverse impacts that landlords cause with evictions. That is all that is required.

C. Application of *Nollan*/*Dolan* Offers No Occasion To Apply Heightened Scrutiny To San Francisco's Policy Goals

San Francisco has a policy of protecting tenants in rent-controlled units from paying market price rent increases for their units for as long as tenants choose to remain in their homes. That policy is implemented without regard to tenants' wealth or poverty; there is no means test for rent control. Every tenant who loses rent control and is subject to higher market rents must pay more for housing or consume less housing, regardless of wealth or poverty. The 2014 Mitigation Ordinance thus requires landlords to compensate all tenants for that adverse impact.

Plaintiffs and the Court have questioned whether it is appropriate for wealthy tenants to receive mitigation payments. That question is irrelevant to the outcome of this facial trial, for two principal reasons.

First, it is irrelevant because this trial concerns a facial challenge. Plaintiffs cannot prevail unless they can show that "no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The fact that some small proportion of San Francisco's tenant class might be affluent and eligible to receive mitigation payments does not negate the fact that most tenants in San Francisco are not similarly situated to Warren Buffett. Indeed, Plaintiffs do not even contend that all or most tenants in San Francisco are affluent, and the Board of Supervisors received a great deal of evidence to the contrary in the proceedings that led up to their adoption of the ordinance. *See, e.g.*, Trial Ex. 13 at 4, 26-27; Trial Ex. 16 at 52, 56, 66, 71-73, 77.

There should be no doubt that in the great run of cases where the ordinance is applied, it will assist people of low or ordinary means in obtaining a basic necessity of life.

Second, questions about the affluence of tenants are not relevant to whether the *Nollan*/*Dolan* test is met. A wealthy tenant as well as a poor one will pay more in rent if her price-control right is extinguished, and mitigation ordinance on its face compensates both for the adverse impact of paying more in rent. The nexus and rough proportionality between the adverse impact and the amount of payment are the same for wealthy and poor tenants alike.

It may be, of course, that the prospect of landlords paying wealthy tenants mitigation payments raises other concerns for the Court, such as basic fairness concerns. Those concerns can certainly be raised in as-applied proceedings challenging a particular payment to a particular tenant. But they should not impact the *Nollan*/*Dolan* inquiry. The *Nollan*/*Dolan* test requires heightened scrutiny only for the nexus and rough proportionality between the harm imposed by a development and the mitigation the government requires. It provides no warrant for the Court to apply searching scrutiny to San Francisco's policy goals, or to apply anything other than a rational basis test to the question of whether San Francisco's 2014 Mitigation Ordinance is related to a legitimate public purpose. Thus, for example, in *Dolan*, when the Supreme Court required the City of Tigard to make some showing that a bicycle path "will or is likely to" offset some traffic demand generated by the plaintiff's new retail development, 512 U.S. at 395, it did not second-guess whether bicycle paths are desirable, or whether it was innately fair for the developer to have to offset traffic congestion that other developments had created. If San Francisco's system of rent control without regard to tenant income is rationally related to a legitimate public purpose—and Ninth Circuit case law says that it does, *see Action Apartment Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1023 (9th Cir. 2007); *Schnuck v. City of Santa Monica*, 935 F.2d 171, 174 (9th Cir. 1991)—then so too does its mitigation requirement even if it does not exclude affluent tenants.

II. THE *NOLLAN*/*DOLAN* TEST IS NOT APPLICABLE IN THIS CASE

At the trial, the Court characterized many of San Francisco's objections to applying *Nollan*/*Dolan* as procedural. These objections may be procedural, but they are substantial and precedential.

A. *Nollan* and *Dolan* Do Not Apply To Legislative Conditions Under Ninth Circuit Precedent—And This Rule Serves Important Federal Interests

First and most importantly, the Ninth Circuit has held that the *Nollan*/*Dolan* test applies only to adjudicative conditions imposed on a case-by-case basis to individual developments, and not to conditions imposed by legislation. *McClung v. City of Sumner*, 548 F.3d 1219, 1222 (9th Cir. 2008), abrogated in part on other grounds by *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). For legislatively imposed conditions, the traditional *Penn Central* test for regulatory takings applies, not the heightened scrutiny of *Nollan* and *Dolan*. *Id.* at 1222. The mitigation ordinance is a legislative condition and thus cannot be scrutinized under *Nollan* and *Dolan*.

The Ninth Circuit is not alone in eschewing the *Nollan*/*Dolan* test for legislative conditions. That is the approach taken by the majority of jurisdictions to consider the issue. *See St. Clair Cnty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Wolf Ranch, LLC v. City of Colorado Springs*, 220 P.3d 559, 564 (Colo. 2009); *Greater Atlanta Homebuilders Ass'n v. DeKalb Cnty.*, 277 Ga. 295, 298 (2003); *Rogers Mach., Inc. v. Washington Cnty.*, 181 Or. App. 369, 395 (2002); *Home Builders Ass'n of N. California v. City of Napa*, 90 Cal. App. 4th 188, 194 (2001), as modified (July 2, 2001); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 187 Ariz. 479, 486 (1997); *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 287 (Minn. Ct. App. 1996); *Clajon Prod. Corp. v. Petera*, 70 F.3d 1566, 1578 (10th Cir. 1995); *Southeast Cass Water Res. Dist. v. Burlington N. R. Co.*, 527 N.W.2d 884, 896 (N.D. 1995); *Harris v. City of Wichita, Sedgwick Cnty., Kan.*, 862 F. Supp. 287, 294 (D. Kan. 1994) *aff'd*, 74 F.3d 1249 (10th Cir. 1996); *Waters Landing Ltd. P'ship v. Montgomery Cnty.*, 337 Md. 15, 40 (1994). By contrast, a small minority of jurisdictions have held that legislatively imposed conditions are analyzed with the same heightened scrutiny that applies under *Nollan*/*Dolan* to adjudicative conditions. *See Town of Flower Mound v. Stafford Estates*

Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004); *Amoco Oil Co. v. Vill. of Schaumburg*, 277 Ill. App. 3d 926, 940 (1995); *Trimen Dev. Co. v. King County*, 877 P.2d 187, 194 (Wash. 1994).[5]

The Ninth Circuit's decision in *McClung* is binding on this Court. Plaintiffs argue that it is not binding because another of *McClung*'s holdings—that a fee condition is not analyzed under *Nollan* and *Dolan*—was subsequently abrogated by the Supreme Court in *Koontz*, 133 S. Ct. 2586. But as the City explained in its trial brief, *McClung*'s holding about the analysis of legislative conditions was independent of its analysis about fees. *McClung*, 548 F.3d at 1222. Plaintiffs also argue that *McClung* does not apply because *McClung* itself acknowledged that a legislative mitigation condition might be subject to heightened scrutiny if it were "wholly unrelated" to the harms caused by a particular development. *Id.* at 1225. That caveat does not apply to this case because a mitigation payment to compensate tenants for the loss of rent control is related to an eviction that causes the tenant to lose rent control. Finally, Plaintiffs argue that the Court should not follow *McClung* but instead the prior Ninth Circuit case of *Commercial Builders of N. California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), which was decided before *Dolan* but applied *Nollan*'s nexus requirement to a city ordinance that conditioned new development on a fee payment. *Commercial Builders* does not create precedent on this issue because it does not discuss or mention whether a legislatively imposed condition is different than an adjudicative condition. There is no indication in the case that any party raised the issue or that the Ninth Circuit even considered it. Thus, it cannot overcome the precedential force of *McClung*'s express holding.

This is an important issue for the federal courts. There are hundreds of impact fees that are passed legislatively by local jurisdictions and apply across the board to new developments. *See, e.g.*, Duncan Assocs., *National Impact Fee Survey: 2012*, available at http://www.impactfees.com/publications%20pdf/2012_survey.pdf. If legislation passing an impact fee

[5] Plaintiffs cite a couple of other examples in their opposition trial brief of federal courts applying *Nollan* and *Dolan* to legislation. Dkt. 69 at 8. But these are all cases where a court applied that test without discussing whether it applied to legislation or only to adjudicative conditions. *See ABN 51st St. Partners v. City of New York*, 724 F. Supp. 1142, 1153 (S.D.N.Y. 1989); *Crow-New Jersey 32 Ltd. P'ship v. Twp. of Clinton*, 718 F. Supp. 378, 384 (D.N.J. 1989); *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 607 (M.D. Fla. 1989). There is no indication in these cases that the court even considered the question. A case is not authority for a proposition that it does not even discuss. *See Supreme Lodge K. P. v. Withers*, 177 U.S. 260, 276 (1900).

draws *Nollan*/*Dolan* takings analysis, then each of these fees is subject to heightened judicial review in the federal courts. There is no indication that the Supreme Court intended to federalize local building codes or land use law in *Nollan* or *Dolan*, especially where the Court has repeatedly emphasized that its exactions cases occur in the context of case-by-case adjudicative conditions as contrasted to legislative conditions. *See Dolan*, 512 U.S. at 385 (noting difference between ad hoc permit conditions and "essentially legislative determinations"); *id.* at 391 n.8 ("in evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. Here, *by contrast*, the city made an *adjudicative decision* to condition petitioner's application for a building permit on an individual parcel.") (emphasis added; citation omitted); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546 (2005) (characterizing *Nollan* and *Dolan* as "takings challenges to adjudicative land-use exactions").

B. *Nollan* and *Dolan* Do Not Apply To Facial Challenges Or To Adjustments To Existing Landlord-Tenant Regulatory Regimes

As San Francisco noted in its opening brief, the Ninth Circuit has already considered and rejected a claim that a relocation fee to displaced tenants can be challenged facially under *Nollan* and *Dolan*. *See Garneau v. City of Seattle*, 147 F.3d 802, 807 (9th Cir. 1998) (Brunetti, J.); *id.* at 813 (Williams, J.); *see also McClung*, 548 F.3d at 1228 n.4 ("In the end, two of the three *Garneau* judges agreed that *Nollan/Dolan* did not apply to the permit requirement."). That holding should control the outcome here.

Finally, the Court need not engage in a *Nollan*/*Dolan* inquiry at all because such an inquiry is only necessary where the government compels a dedication or payment as a condition that it could not directly compel. In this case, requiring landlords to provide two years' worth of controlled rents to tenants in the form of a cash payment is the equivalent of requiring landlords to provide two years' worth of rent control to tenants. It is clear that rent control is not a taking—even if federal constitutional law does not allow governments to impose it permanently, two years is not a long time, and rent control of that duration is permissible. *Yee v. City of Escondido*, 503 U.S. 519, 528 (1992);

Guggenheim v. City of Goleta, 638 F.3d 1111, 1121-22 (9th Cir. 2010) (en banc). Thus, requiring a chase payment of equal value to two years of rent control cannot be a taking either.

III. LAWS REQUIRING PROPERTY OWNERS TO PROVIDE REPLACEMENT HOUSING OR OTHER ACCOMMODATIONS TO DISPLACED TENANTS ARE NOT UNCOMMON

As Plaintiffs would have it, San Francisco stands alone in requiring landlords who withdraw rent-regulated units from the rental housing market to provide new housing, or a payment to be used for new housing, to their tenants. But this type of mitigation, or cash payments equivalent to it, is not unusual in markets or submarkets where price controls on housing exist, as the following examples show:

1. New York State requires private landlords to pay 72 months of rent differential payments when demolishing units and to provide permanent comparable housing when displacing elderly or disabled tenants to take over apartments for personal use. New York State has a form of rent control known as rent stabilization and no equivalent of the Ellis Act to permit landlords of rent-stabilized buildings to exit the rental business as of right. *See* 9 N.Y.C.R.R. §§ 2524.4, 2524.5. Landlords who wish to exit the rental business may do so only with permission of a state agency and only where they can show they need to use the apartment building in connection with a different business they own or operate. *Id.* § 2524.5(a)(1). Landlords who wish to demolish their buildings can only do so with the approval of a state agency, and must either "relocate the tenant to a suitable housing accommodation . . . at the same or lower legal regulated rent in a closely proximate area," or, if an equivalent unit cannot be found, must "pay the tenant a stipend equal to the difference in rent [between the old and new units] *multiplied by 72 months*." *Id.* § 2524.5(a)(2)(b)(2) (emphasis added). There is no requirement that the tenant be unable to afford new housing without assistance.

Landlords who seek to recover a single unit for their own personal use may do so as of right for rent-stabilized apartments, *id.* § 2524.4(a), but only on a showing of compelling personal need for rent-controlled apartments, *id.* § 2104.5(a)(1). But they are not permitted to displace a tenant who is aged 62 or older or disabled unless they provide the tenant with "*an equivalent or superior housing*

accommodation at the same or lower regulated rent in a closely proximate area." *Id.* § 2524.4(a)(2) (emphasis added); *see also id.* § 2104.5(a)(2). There is no requirement that the tenant be low-income.

To San Francisco's knowledge, no landlord has challenged these requirements on *Nollan*/*Dolan* grounds. The Second Circuit recently held that New York City's rent-stabilization laws did not effect a per se taking. *Harmon v. Markus*, 412 F. App'x 420, 422 (2d Cir. 2011), cert. denied sub nom., *Harmon v. Kimmel*, 132 S. Ct. 1991 (2012). Older versions of these laws have also been upheld against constitutional challenge. *Loab Estates v. Druhe*, 300 N.Y. 176, 179 (1949) (no due process violation where landlord was required to relocate his tenant prior to demolishing apartment building).

2. San Francisco requires private landlords seeking to convert residential hotels to tourist use to provide one-for-one replacement of converted units. *San Remo Hotel*, 27 Cal.4th at 651. Landlords may do so either by constructing or rehabilitating new units to replace the old ones or by paying "an in lieu fee equal to the replacement site acquisition costs plus a set portion of the replacement construction costs." *Id.* The California Supreme Court has not evaluated this requirement under the *Nollan*/*Dolan* test because it held that while *Nollan*/*Dolan* applies to monetary fee exactions, it does not apply to legislatively enacted exactions. *Id.* at 667-68. But that court did determine that "the housing replacement fees bear a reasonable relationship to loss of housing" caused by an owner's decision to convert residential units to tourist use. *Id.* at 673. The Ninth Circuit later held that the California Supreme Court's determination was entitled to preclusive effect in the federal courts because it was "equivalent to the approach taken in this circuit" in light of the fact that Circuit precedent at the time did not extend *Nollan*/*Dolan* to monetary exactions. *San Remo Hotel, L.P. v. San Francisco City & County*, 364 F.3d 1088, 1098 (9th Cir. 2004), aff'd, 545 U.S. 323 (2005).

3. Private landlords in California must provide replacement dwelling units for residential units they convert or demolish within coastal zones that are occupied by low- and moderate-income people under state law. *See* Cal. Gov't Code § 65590; *see also Venice Town Council, Inc. v. City of Los Angeles*, 47 Cal. App. 4th 1547, 1558 (1996), as modified on denial of reh'g (Aug. 22, 1996). Low- and moderate-income includes households whose income does not exceed 120 percent of the

area median income, adjusted for household size. Cal. Health & Saf. Code § 50093. San Francisco is not aware of any challenge to this law on takings grounds.

4. Bloomington, Minnesota has required mobile home park owners who close their parks to pay the relocation costs of mobile home tenants to another park within 25 miles. If the tenant could not find a new park to relocate to, "the resident may tender title to the purchaser of the park and *receive compensation equal to the amount of the tax assessed value of the home*." *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 284-85 (Minn. Ct. App. 1996) (emphasis added). In a challenge to this ordinance, the Minnesota court refused to apply *Dolan* because the condition was imposed by legislation rather than individual adjudication. *Id.* at 286. But it held that the ordinance satisfied due process and advanced the legitimate government purpose of protecting residents from the losses they would incur if the park owner closed the park and they could not relocate. *Id.* at 287.

5. Los Angeles County has required property owners converting their buildings to condominiums to provide substantial personal assistance to relocating tenants, including a payment tied to the amount of the tenant's current rent that is designed to protect the tenant from future rent increases. Its ordinance required property owners who converted buildings from rental units to condominiums to provide a wide array of assistance to tenants in relocating, including "driving tenants without cars, and assisting tenants with cars, in order to inspect [new] units." *People v. H&H Properties*, 154 Cal.App.3d 894, 898 n.1 (1984). If the tenant could not find a new unit, the property owner was required to allow the tenant to remain in the condominium for at least a year. *Id.* The landlord was required to pay $500 in moving costs and, to address future rent increases in the new unit, either $1,000 upon the tenant's vacating the unit, or at the tenant's election, a sum equal to the tenant's current monthly rent times the number of years the tenant occupied the unit. *Id.* The California Court of Appeal rejected a claim that the ordinance amounted to an unconstitutional impairment of a developer's vested right to convert its building to condominiums. *Id* at 901.

6. Developers of market-rate development projects in "hundreds of communities nationwide," including more than 100 California jurisdictions, are required to dedicate a percentage of the housing units that they build for low- and moderate-income people. *See* Talbert & Costa, "Current Issues in Inclusionary Zoning," 37 Urb. Law. 557, 558 (2014). Under inclusionary zoning laws,

developers must either set aside units or pay an in-lieu fee to pay for the construction of units for people of limited means. *Id.* These programs have withstood legal challenge, including takings challenges. *See, e.g.*, *Home Builders Ass'n of N. California v. City of Napa*, 90 Cal. App. 4th 188, 194 (2001), as modified (July 2, 2001); *Holmdel Builders Ass'n v. Twp. of Holmdel*, 121 N.J. 550 (1990).

7. Both the federal government and the State of California must provide 42 months of rent differential payments to tenants displaced by eminent domain. When the federal government takes a residential rental unit under eminent domain, it provides the tenant with rental subsidies for up to 42 months to ensure that a displaced tenant can obtain a "comparable replacement dwelling." 42 U.S.C. § 4624(a). While this payment is ordinarily capped at $7,200, federal law permits the head of the displacing agency to exceed the cap "on a case-by-case basis for good cause" if necessary to ensure that comparable replacement housing can be provided. *Id.* §§ 4624(a), 4626(a). Federal law forbids the agency from proceeding with displacements "unless the head of the displacing agency is satisfied that comparable replacement housing is available" to tenants who are losing their apartments. *Id.* § 4626(b). California law imposes similar requirements for exercises of eminent domain. Cal. Gov. Code §§ 7264, 7264.5(b). Under both federal and California law, rental assistance is not limited to low-income tenants, but computation of the required payment must take into account a person's income. 42 U.S.C. § 4624(a); Cal. Gov. Code § 7264(b).

8. California redevelopment agencies are required to provide one-for-one replacement of units when they remove low-income housing from the market. *See Price v. City of Stockton, Cal.*, 394 F. Supp. 2d 1256, 1263 (E.D. Cal. 2005). While this is an obligation of the government and not one imposed on private landlords, this and the eminent domain examples in the prior paragraph show that San Francisco is not imposing any higher standard on private landlords than the government imposes on itself—indeed, private landlords are subject to the lower mitigation standard of 24 months' replacement cost rather than 42 months or one-for-one replacement.

CONCLUSION

For the reasons offered above and in San Francisco's briefing and the evidence in this matter, this Court should enter judgment in favor of San Francisco on Plaintiffs' facial challenges.

Dated: October 10, 2014

DENNIS J. HERRERA
City Attorney

By: /s/*Christine Van Aken*
CHRISTINE VAN AKEN

Attorneys for Defendant CITY AND COUNTY OF SAN FRANCISCO

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