IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S238136

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616 CROFT AVE., LLC, et al.,

Appellants,

v.

CITY OF WEST HOLLYWOOD,

Respondent.

After an Opinion by the Court of Appeal,
Second Appellate District, Division One
(Case No. B266660)

On Appeal from the Superior Court of Los Angeles County
(Case No. BC498004, Honorable Luis A. Lavin, Judge)

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioners Shelah and Jonathan Lehrer-Graiwer and 616 Croft Ave., LLC, hereby submit the following Reply to the Answer to the Petition for Review filed by the City of West Hollywood.

The Lehrer-Graiwers seek review of the court of appeal's opinion, entitled *616 Croft Ave., LLC, et al. v. City of West Hollywood*, No. B266660, slip op. (Cal. Ct. App. Sept. 23, 2016) (Opinion), to resolve an important question of constitutional law. Specifically, the Petition asks whether a legislatively mandated, low-income housing condition must satisfy the "essential nexus" and "rough proportionality" standards set out by *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013). Although this Court previously held legislative exactions to be exempt from *Nollan*/*Dolan* scrutiny,[1] the recent decision, *California Bldg. Indus. Ass'n v. City of San Jose* (*CBIA*), acknowledged that the legislative exactions question remains unresolved and subject to a nationwide split of authority. 61 Cal. 4th 435, 459 n.11 (2015) (citing *Koontz*, 133 S. Ct. at 2599). *CBIA*, however, never reached that question. Instead, *CBIA* reviewed the various conditions required by San Jose's inclusionary zoning ordinance and concluded that the law did not compel developers to dedicate a protected

[1] *See, e.g.*, *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996).

property interest or pay an in-lieu fee. *CBIA*, 61 Cal. 4th at 443-44, 461. Thus, insofar as *CBIA* addressed the legislative exactions question, the decision is limited to the proposition that a legislatively mandated condition *that does not exact a property interest* is not subject to heightened nexus and proportionality scrutiny. *Id*.

The decision below skipped that essential inquiry, which is required of any *Nollan*/*Dolan*/*Koontz* analysis. Opinion at 5, 7-9. Instead, the lower court misread *CBIA* as holding that, as a matter of law, all legislatively mandated, affordable-housing conditions are exempt from *Nollan*, *Dolan*, and *Koontz*—regardless of whether the law demands the dedication of a property interest (or an in-lieu fee). Opinion at 7-9; Answer at 15 ("The court also found it would be inappropriate to apply the unconstitutional conditions doctrine where, as here, the fee is . . . legislatively imposed[.]"). As a result, the lower court upheld the City's exaction of a $540,393.28 in-lieu fee despite acknowledging marked differences between Hollywood's affordable-housing condition and San Jose's ordinance. Opinion at 9.

The City opposes the Lehrer-Graiwers' petition on three grounds, none of which has any merit. First, the City insists that the lower court faithfully applied *CBIA*. The City's argument, however, is belied by a plain reading of this Court's opinion, which acknowledged that a fee imposed in lieu of a dedication of property is subject to the nexus and proportionality tests of *Nollan* and *Dolan*. *CBIA*, 61 Cal. 4th at 459 (citing *Koontz*, 133 S. Ct.

at 2599-2600). Contrary to the City's claim, *CBIA* did not exclude all legislative exactions from the *Nollan*/*Dolan*/*Koontz* doctrine. *Id*. at 461-62. Instead, as stated above, *CBIA* subjected the challenged ordinance to the doctrine's threshold test to determine whether its mandatory permit conditions demanded a dedication of private property to the public (*id*.)—an inquiry the court of appeals refused to engage in based on the mistaken belief that *CBIA* had broadly excluded affordable-housing conditions from the protections guaranteed by *Nollan*, *Dolan*, and *Koontz*.

Second, the City contends that legislatively mandated permit conditions can only be challenged in a facial lawsuit attacking the entire exaction scheme. Answer at 16-18. According to the City, once the time to bring a facial challenge has passed, courts are barred from considering the size or scope of a permit condition—even after the condition is imposed on a permit. *Id*. Thus, in this case, the City argues that the Lehrer-Graiwers were barred from challenging the amount of money demanded as an in-lieu fee and that the underlying condition demanded a dedication of property in their as-applied challenge. *Id*. The City, however, offers no reasoned analysis or explanation for that position, which proposes a rule contrary to the universal practice to analyze as-applied challenges on their individual merits.

Third, the City suggests that legislative exactions do not implicate the same policy concerns as adjudicative conditions. Not so. The purpose of the nexus and proportionality tests is to prevent the government from taking

advantage of the permit process to force "some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The affordable housing crisis is just such a public burden. As this case demonstrates, an act of general legislation can place that burden on a small segment of the population that does not have the political capital to oppose such measures.

Ultimately, the City does not dispute that the court of appeal's decision implicates a critical question of constitutional law. Nor can it when the U.S. Supreme Court has repeatedly recognized the importance of this unresolved issue. *See Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting); *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1117 (1995) (Thomas, J., joined by O'Connor, J., dissenting from denial of certiorari); *see also California Bldg. Indus. Ass'n v. City of San Jose*, 136 S. Ct. 928, 928 (2016) (Thomas, J. concurring in denial of certiorari). Instead of addressing the issue presented and the advisability of review, the City argues that the court of appeals correctly determined the legislative exactions question. The City's argument, however, simply predicts the outcome of the merits argument. It does not contest the conflicts set out in the petition, and does not comment on whether review should be granted.

Review should be granted.

ARGUMENT

I

A FEE IMPOSED IN LIEU OF A DEDICATION OF PRIVATE PROPERTY MUST SATISFY *NOLLAN*, *DOLAN*, AND *KOONTZ*

The *CBIA* decision did not "rest on the distinction (if any) between takings effectuated through administrative versus legislative action." *California Bldg. Indus. Ass'n*, 136 S. Ct. at 929 (Thomas, J. concurring in denial of certiorari). Indeed, the decision recognized that, as a matter of settled law, "a monetary payment that is a substitute for the property owner's dedication of property to the public and that is intended to mitigate the environmental impact of the proposed project" is subject to heightened scrutiny under *Nollan*/*Dolan*/*Koontz*. *CBIA*, 61 Cal. 4th at 459 (citing *Koontz*, 133 S. Ct. at 2599). As a corollary to that rule, this Court also recognized that "there can be no valid unconstitutional-conditions takings claim without a government exaction of property." *CBIA*, 61 Cal. 4th at 457; *see also id.* at 460 ("Nothing 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.").

Applying the *Nollan*/*Dolan*/*Koontz* threshold inquiry, *CBIA* analyzed San Jose's inclusionary zoning ordinance to determine whether the law demanded that owners dedicate a property interest (or pay an in-lieu fee). *Id*. at 460-61. Upon concluding that the ordinance did not do so, *CBIA* held that

> the San Jose 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.

Id. at 461; *but see Sterling Park, L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 1207 (2013) (where inclusionary zoning ordinance demanded a property dedication, the dedication was subject to *Nollan* and *Dolan*). There is nothing in *CBIA* establishing a per se rule exempting legislatively mandated exactions from heightened scrutiny without that necessary inquiry.

Indeed, as indicated in the petition, all three unconstitutional conditions cases decided by the U.S. Supreme Court involved legislatively mandated exactions. Petition at 18-19. The case most on-point is *Koontz*, which also involved a fee imposed in lieu of a dedication of private property to the public. *Id.* at 2592-93. The permitting authority in *Koontz* determined the amount of the fee pursuant to a generally applicable regulation setting the minimum mitigation ratio. *Id.*; *see also* Respondent's Brief in Opposition, *Koontz v. St. Johns River Water Mgmt. Dist.*, No. 11-1447, 2012 WL 3142655, at *5 n.4 (U.S. Aug. 1, 2012) (citing Fla. Dep't of Envtl. Reg., *Policy for "Wetlands*

Preservation-as-Mitigation" (June 20, 1988)). Florida's Department of Environmental Protection adopted the regulation nearly a decade before Koontz submitted his permit application. *Id.* The fact that the fee was legislatively required did not deter the U.S. Supreme Court from concluding that it was subject to the nexus and proportionality tests (*Koontz*, 133 S. Ct. at 2599-2600)—a fact that compelled Justice Kagan, writing in dissent, to question whether the majority had rejected the legislative-versus-adjudicative distinction. *Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting). The City, attempting to distinguish *Koontz*, fails to address those essential facts, relying instead on its own unexplored and unexplained conclusion that *Koontz* involved an "ad hoc" decision and this case did not. Answer at 18-19.

Both *CBIA* and *Koontz* hold that when the government imposes an in-lieu fee on a permit approval, the Court must look at the underlying condition to determine whether it implicates the doctrine of unconstitutional conditions. *See Koontz*, 133 S. Ct. at 2599 (An in-lieu fee is the "functional[] equivalent" of the demand for a dedication of property). Thus, as a predicate to an as-applied challenge, the Court must first determine whether any of the alternative demands (in this case, the dedication of low-income units) would violate the constitution. *Koontz*, 133 S. Ct. at 2598; *CBIA*, 61 Cal. 4th at 460-61. Both cases subjected permit conditions to this threshold inquiry, without regard to the particular government body that made the demand. *Id.*

Here, the City admits that its inclusionary zoning law goes further than the price control at issue in *CBIA* by demanding that the owner give the City a right of first refusal—a well recognized property interest—as a mandatory condition of permit approval. Answer at 20-22. The court of appeal, however, upheld the in-lieu fee without any analysis of the underlying condition based on the court's erroneous conclusion that legislatively mandated, affordable-housing conditions are per se excluded from the protections guaranteed by *Nollan*/*Dolan*/*Koontz*. Opinion at 9; Answer at 20-22. That conclusion conflicts with binding precedent and warrants review.

II

COURTS UNIVERSALLY RECOGNIZE THE JUSTICIABILITY OF AS-APPLIED *NOLLAN*/*DOLAN* LAWSUITS

The City alternatively argues that the only avenue available for the Lehrer-Graiwres to challenge the amount of the in-lieu fee was via a facial lawsuit asserting that the entire fee schedule violates the Constitution. Answer at 16-18. However, the only support the City can muster for that radical proposition is the Opinion itself at pages 7-11. Answer at 16-18. There is absolutely no case law limiting an owner's right to seek redress for a violation of the unconstitutional conditions doctrine in an as-applied lawsuit—Courts universally recognize the justiciability of as-applied challenges. *See, e.g.*, *Travis v. Cnty. of Santa Cruz*, 33 Cal. 4th 757, 767 (2004); *see also Nollan*, 483 U.S. at 828-30 (as-applied challenge to condition imposed pursuant to

requirements set forth in the California Coastal Act and California Public Residential Code); *Dolan*, 512 U.S. at 377-78 (as-applied challenge to conditions required by city's development code); *Koontz*, 133 S. Ct. at 2592 (as-applied challenge to in-lieu fee required by state regulations). The City's contention to the contrary is baseless.

Furthermore, the City's argument seeking to limit the scope of as-applied challenges is based on a misunderstanding of the nature of an unconstitutional conditions claim. In its most basic formulation, the unconstitutional conditions doctrine provides that government may not withhold a discretionary benefit on the condition that the beneficiary surrender a constitutional right. *Koontz*, 133 S. Ct. at 2594 (The doctrine "vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up."). Typically, a government demand that a person waive a constitutional right in exchange for a discretionary benefit constitutes a per se violation of the doctrine. *See Perry v. Sindermann*, 408 U.S. 593, 597-98 (1972); *Speiser v. Randall*, 357 U.S. 513, 526 (1958). But, in the land use context, the nexus and rough proportionality tests limit the government's ability to require landowners to mitigate negative externalities. *Koontz*, 133 S. Ct. at 2599. The City's argument that any inquiry into the size and scope of a legislatively mandated exaction must be raised in the context of a facial challenge to the general regulatory scheme undermines the purpose of the nexus and proportionality tests, which focus on the impact of the exaction on

a particular development. *See Dolan*, 512 U.S. at 391 (Nexus and proportionality require "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

III

THE LEGISLATIVE EXACTIONS ISSUE RAISES AN IMPORTANT AND UNRESOLVED QUESTION OF CONSTITUTIONAL LAW

The City's claim that this case does not implicate an important question of constitutional law is baseless. Answer at 6. Indeed, Courts across the country are split over the question whether legislatively imposed permit conditions are subject to review under *Nollan* and *Dolan*. *See Parking Ass'n of Georgia*, 515 U.S. at 1117 (recognizing a nationwide split of authority); *California Bldg. Indus. Ass'n*, 136 S. Ct. at 928 (division has been deepening for over twenty years). For example, the Texas, Ohio, Maine, Illinois, New York, and Washington Supreme Courts and the First Circuit Court of Appeals do not distinguish between legislatively and administratively imposed exactions, and apply the nexus and proportionality tests to generally applicable permit conditions.[2] The Supreme Courts of Alabama, Alaska, Arizona, and

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[2] *See, e.g.*, *Town of Flower Mound v. Stafford Estates Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004); *Home Builders Ass'n of Dayton & Miami Valley v. City of Beavercreek*, 729 N.E.2d 349, 355-56 (Ohio 2000); *Curtis v. Town of South Thomaston*, 708 A.2d 657, 660 (Maine 1998); *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 16 (1st Cir. 1995); *Northern Illinois Home Builders* (continued...)

Colorado, and the Tenth Circuit Court of Appeals limit *Nollan* and *Dolan* to administratively imposed conditions.[3] Meanwhile, the Ninth Circuit is internally conflicted on this issue.[4] By holding that the unconstitutional conditions doctrine does not apply to legislatively mandated exactions, the court of appeal merely took a side in this split of authority—it did not settle the issue, as the City suggests.

Likewise, the City's insistence that a legislative exaction does not implicate the same policy concerns as an ad hoc condition lacks merit. Answer at 24-27. In *Koontz*—which involved a legislatively mandated

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[2] (...continued)
Ass'n, Inc. v. Cnty. of Du Page, 649 N.E.2d 384, 397 (Ill. 1995); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 483 (N.Y. 1994), *cert. denied*, 514 U.S. 1109 (1995).

[3] *See, e.g.*, *Alto Eldorado P'ship v. City of Santa Fe*, 634 F.3d 1170, 1179 (10th Cir. 2011); *St. Clair Cnty. Home Builders Ass'n v. City of Pell City*, 61 So. 3d 992, 1007 (Ala. 2010); *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702 (Alaska 2003); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001); *Home Builders Ass'n of Cent. Arizona v. City of Scottsdale*, 930 P.2d 993, 996 (Ariz. 1997), *cert. denied*, 521 U.S. 1120 (1997).

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

condition—the U.S. Supreme Court explained that allowing the government to enjoy unfettered power to make such demands exposes landowners to the type of unlawful coercion that the unconstitutional conditions doctrine protects against:

> [L]and-use permit applicants are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than the property it would like to take. 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. Extortionate demands of this sort frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them.

Koontz, 133 S. Ct. at 2594-95.

Along these lines, two Justices of the U.S. Supreme Court have expressed marked skepticism at the very idea that the need for heightened scrutiny is obviated when a legislative body—as opposed to some other government entity—decides to exact a property interest from developers. In *Parking Ass'n of Georgia*, the Atlanta City Council, motivated by a desire to beautify the downtown area, adopted an ordinance that required the owners of parking lots to include landscaped areas equal to at least 10% of the paved area at an estimated cost of $12,500 per lot. 515 U.S. at 1116. Despite an apparent lack of proportionality, the Georgia Supreme Court upheld the ordinance, concluding that legislatively-imposed exactions are not subject to *Nollan* and *Dolan*. *Id.* at 1117. Writing in dissent to the denial of certiorari, Justice

Thomas (joined by Justice O'Connor) stated that there appeared to be no meaningful distinction between legislatively imposed conditions and other exactions:

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

Id. at 1117-18. Both Justices argued that the question warrants review because it raises a substantial question of federal constitutional law. *Id.* at 1118.

Justice Thomas reaffirmed that position in his concurring opinion in support of the Court's denial of certiorari in *California Bldg. Indus. Ass'n*, 136 S. Ct. at 928. There, he wrote that the "lower courts have divided over whether the *Nollan*/*Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one" for at least two decades. *Id.* at 929. Once again, he expressed "doubt that 'the existence of a taking should turn on the type of governmental entity responsible for the taking.'" *Id.* (citing *Parking Ass'n of Georgia*, 515 U.S. at 1117-18). Justice Thomas further noted that the Court should resolve this issue as soon as possible:

> Until we decide this issue, property owners and local governments are left uncertain about what legal standard

> governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.

Id.; *see also Koontz*, 133 S. Ct. at 2608 (Kagan, J., dissenting) (The fact that this Court has not yet resolved the split of authority on this question "casts a cloud on every decision by every local government to require a person seeking a permit to pay or spend money."). The court of appeal's conclusion that legislatively mandated exactions are exempt from *Nollan*/*Dolan*/*Koontz* implicates all of the policy concerns identified by members of the U.S. Supreme Court and warrants review.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

DATED: December 2, 2016.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing REPLY TO ANSWER TO PETITION FOR REVIEW is proportionately spaced, has a typeface of 13 points or more, and contains 3,383 words.

DATED: December 2, 2016.

_____
LAWRENCE G. SALZMAN

DECLARATION OF SERVICE BY MAIL

I, Barbara A. Siebert, declare as follows:

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

On December 2, 2016, a true copy of REPLY TO ANSWER TO PETITION FOR REVIEW was placed in an envelope addressed to:

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

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 2nd day of December, 2016, at Sacramento, California.

_____

BARBARA A. SIEBERT