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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

DANIEL LEVIN; MARIA LEVIN; PARK LANE ASSOCIATES, L.P.; THE SAN FRANCISCO APARTMENT ASSOCIATION; and THE COALITION FOR BETTER HOUSING, Plaintiffs, v. CITY AND COUNTY OF SAN FRANCISCO, Defendant, and DAVID GREENE and ALL OTHERS SIMILARLY SITUATED, Intervenors.	No. 3:14-CV-03352-CRB **PLAINTIFFS' TRIAL REPLY BRIEF** Trial Date: October 6, 2014 Judge: Hon. Charles R. Breyer Courtroom 6, 17th Floor

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INTRODUCTION

It has been clear for some time that the 2014 Ordinance and its enhanced Payment violates *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), and other precedent, due to the lack of a clear connection between the Payment and the impact of withdrawal of rental units. Nevertheless, the City's briefs have totally failed to identify a real "nexus" between the Payment mandate and the city housing needs of displaced tenants. It has not explained how anything but a speculative, and insufficient, nexus exists when tenants need not use the Payment for housing and need not use it in San Francisco. Nor has the City rebutted Plaintiffs' argument that the Payment is not "roughly proportionate" to the impact of rental withdrawal on tenants because it is not limited to relocation costs, fails to include any (income) means requirement for recipient tenants, and (inexplicably) requires rental owners to subsidize an entire two years of a tenant's rents after the tenant leaves, rather than say, the first month.

Instead, the City remains content to rest on conclusory assertions and alleged procedural barriers. But these fail. An exaction that is not tailored in any sense to the impact of the regulated property use is tantamount to extortion, and the legislative origin of the exaction does not change that fact. This is the situation the City finds itself in with the enhanced Payment mandate, and it has no answer.

ARGUMENT

I

THE CITY HAS YET TO REBUT PLAINTIFFS' *NOLLAN/DOLAN* ARGUMENTS ON THE MERITS AND ITS LEGISLATIVE EXACTION DEFENSE FAILS

The City's primary defense against Plaintiffs' *Nollan/Dolan* challenge to the Ordinance is procedural: that the heightened means-ends scrutiny articulated in *Nollan* and *Dolan* does not apply to exactions enacted by law. City's Opposition Trial Brief at 10. This concept is contrary to Ninth Circuit precedent, Plaintiffs' Trial Response Brief at 7-8, and has never been endorsed by the Supreme Court. Indeed, in *Nollan*, the Supreme Court favorably cited a number of cases involving legislated exactions in articulating the "nexus" test. 483 U.S. at 839-40. Federal courts

have applied *Nollan* and *Dolan* to strike down laws, *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 46-48 (1st Cir. 2002).

Yet, there is something even more fundamentally wrong about the City's "no legislative exactions scrutiny" argument: its incompatibility with the Constitution itself. The basic intent of the Bill of Rights is, after all, to protect individuals against the usurpation of their rights by majorities wielding the *legislative power*. As stated in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943):

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property . . . and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

The idea that constitutional scrutiny of property invasions waxes or wanes depending on whether the invasion occurs by law or not is inimical to the very foundation of the Constitution.

The City's "no legislative scrutiny" argument is also incompatible with the history of constitutional adjudication. Equal Protection, First Amendment, and Due Process rights typically hinge on the application of a means-ends test similar to that in *Nollan* and *Dolan* in, and courts have no hesitation to apply such tests to legislative acts. What basis is there for exempting legislation only from the *Nollan/Dolan* means-ends takings test? There is none. *Dolan*, 512 U.S. at 392 ("We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment or Fourth Amendment, should be relegated to the status of a poor relation in these comparable circumstances."). The Court has distinguished the *Dolan* test only from the standards applicable to legislated *zoning* disputes, *id.* at 385,[1] which this is surely not. This is a straightforward monetary exactions case, and, as the Supreme Court recently held (without caveat), "'monetary exactions' must satisfy the nexus and rough proportionality

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[1] In *Dolan*, the Court cited *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), and *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980), in stating that the "legislative determinations classifying entire areas of the city" in such cases were not "the sort of land use regulations" subject to heightened exactions scrutiny. *Dolan*, 512 U.S. at 385. None of the cases involved an exaction. All were instead typical zoning cases.

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requirements of *Nollan* and *Dolan*." *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2599 (2013).

Thus, the dispositive issue is the merits question: does the City have any argument that can sustain the 2014 Ordinance under the *Nollan/Dolan* "nexus" and "rough proportionality" tests? The answer is no. The City offers nothing except bare and unsupported conclusions that the 2014 Ordinance meets the *Nollan/Dolan* test. *See* City's Opposition Trial Brief at 10. It leaves unanswered Plaintiffs' contention that the 2014 Ordinance lacks the requisite "nexus" between exaction and property impact because it does not require the enhanced Payment to go toward relocation or housing or to be spent in San Francisco. It has no rejoinder to Plaintiffs' argument that the Payment is disproportionate on its face because it is not limited to needy tenants but also applies to the rich who need no housing assistance and because it requires landlords to subsidize two years of tenant rents.

II

EVEN IF THE HIGHER SCRUTINY OF *NOLLAN* AND *DOLAN* DOES NOT APPLY, THE PRE-*NOLLAN* REASONABLE RELATIONSHIP TEST APPLIES AND DEFEATS THE ORDINANCE

The City has spent so much energy trying (unsuccessfully) to knock out *Nollan* and *Dolan* that it has neglected to consider whether its Ordinance can survive pre-*Nollan* exaction scrutiny. It cannot. Even without *Nollan* and *Dolan*, an exaction must bear a reasonable relationship to the social impact of the proposed property use. *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872, 873-74 (9th Cir. 1991); *Parks v. Watson*, 716 F.2d 646, 653 (9th Cir. 1983) (exaction "should have some reasonable relationship to the needs created by the subdivision").

Here, there is no reasonable relationship between the enhanced Payment and the purported goal of helping displaced tenants get housing in San Francisco because tenants do not have to use the money for housing and do not have to spend it in San Francisco. The argument that some tenants might use the money in the desired way does not create a reasonable relationship, it creates a speculative one.

Notably, no court has ever held that the pre-*Nollan* "reasonable relationship" test is inapplicable to legislative exactions. Courts instead regularly applied that test to legislation. *See Commercial Builders*, 941 F.2d at 873-74; *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 273 A.2d 880, 885 (Conn. 1970); *Town of Longboat Key v. Lands End, Ltd.*, 433 So. 2d 574, 576 (Fla. Dist. Ct. App. 1983).

III

THE ORDINANCE FAILS *PENN CENTRAL* REGULATORY TAKINGS ANALYSIS

This Court has asked the parties to analyze the 2014 Ordinance as a regulatory taking. Plaintiffs are unsure of the test the Court is referring to by the term "regulatory taking," and they have accordingly filed a motion for clarification. At present, Plaintiffs will proceed on the assumption the Court is asking for analysis of the Ordinance under the multi-factor regulatory takings test established in *Penn Central Transportation Company v. New York City*, 438 U.S. 104, 124 (1978).[2] If this assumption is wrong, the Court should ignore this section.

A property regulation will cause a taking under *Penn Central* depending on the economic impact of the regulation, the degree to which it frustrates investment-backed expectations and the character of the governmental action. 438 U.S. at 124. The 2014 Ordinance fails this test on its face.[3]

First, enactment of the 2014 Ordinance frustrated the expectations of the Levins and Park Lane because it retroactively subjected them to the Payment mandate based on their pre-Ordinance application to withdraw property from the rental market. The Levins filed their application to withdraw their two-unit home in reliance on a 2005 Ordinance in place at the time which limited

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[2] Plaintiffs did not explicitly plead a *Penn Central* facial takings claim in their Complaint, though their repeated, general allegation that the Ordinance causes a taking may be sufficient to encompass a *Penn Central* theory. If not, Plaintiffs are willing to amend their Complaint, if the Court believes that is useful.

[3] The City will likely argue that the *Penn Central* test cannot be facially applied. While the test is seen more often in the as-applied context, neither the Supreme Court nor Ninth Circuit has ever barred a facial *Penn Central* claim. *Philip Morris*, 312 F.3d at 30-31 (adjudicating facial takings claim under *Penn Central*).

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their tenant liability to a "relocation" fee of approximately $9,000. The enactment of the 2014 Ordinance dramatically increased their liability after they had completed the process to withdraw under the earlier law and destroyed their reasonable expectations. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532-35 (1998).

Second, the economic impact on Plaintiffs is substantial. The City concedes the law requires the Levins to pay $117,000 to a single tenant and requires Park Lane to pay more than $1,000,000. Third, and finally, the character of the Ordinance is consistent with a taking for several reasons: (1) the Payment mandate burdens Plaintiffs' right to exclusively occupy their property, a fundamental right that is protected under federal and state law; (2) the Payment mandate unfairly singles out Plaintiffs to remedy a general tenant "affordability crisis," and (3) the Payment is not tailored to the impact of Plaintiffs' withdrawal of property from the rental market on tenants. The Ordinance therefore fails the *Penn Central* takings analysis. *Eastern Enterprises*, 524 U.S. at 537, *Philip Morris*, 312 F.3d at 46.

DATED: October 2, 2014.

Respectfully submitted,

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