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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' RESPONSE TO DEFENDANT'S SUPPLEMENTAL BRIEF**

Trial Date: October 6, 2014
Judge: Hon. Charles R. Breyer
Courtroom 6, 17th Floor

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Although the Court graciously gave Defendant City and County of San Francisco (City) one last chance before October 24, 2014,[1] to show how the 2014 Ordinance's tenant Payment mandate is adequately and proportionately related to Plaintiffs' decision to leave the rental business, as required by *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), no amount of briefing can help the City. This is because nothing can change the Ordinance's drastic and flawed nature. In particular, nothing can change the fact that the Ordinance requires rental owners like Daniel and Maria Levin (Levins) to give massive sums of money (1) directly to tenants (2) without regard for tenant need, (3) with no mechanism for ensuring the money is spent on housing or (4) in San Francisco, and (5) without any basis for setting the amount of the Payment at a level sufficient to subsidize a tenant's rental expenses for two years. Because the City cannot change these facts, the law cannot withstand the heightened scrutiny of *Nollan* and *Dolan*.

Indeed, the more one considers the Ordinance, the further it departs from the required nexus and proportionality. For instance, with reflection, it is clear that neither the Levins nor any other owners can cause the "loss of rent control" impact posited by the City simply by deciding to use property for personal purposes, rather than as a rental. The only tenant impact that such a decision can cause is that the tenant needs to move. If a tenant feels a "loss of rent control" as part of having to move, that is due to the *City's* decision to impose rent control on the property in the first place. Since the Payment is directly tied to the effects of the City's regulatory system, not use of property, it fails *Nollan*.

The Ordinance fails, even assuming owners can be charged with causing a loss of rent control, because it does not alleviate this purported problem. The City funds many affordable housing programs and, in every one, it ensures that its funds actually provide housing and that the programs serve those who need it. It is only in the 2014 Ordinance, where rental owners like the Levins have to foot the bill, that the City fails to include any means to ensure that money is used

[1] October 24, 2014, remains the date on which Plaintiff Park Lane's withdrawal of units from the rental market is to become complete, the date on which the remaining tenants must vacate, and the date on which Park Lane must pay tenants whatever relocation fees are lawfully due them.

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for housing and/or by those who need it. *Seawall Associates v. City of New York*, 542 N.E.2d 1059, 1068 (N.Y. 1989) (connection between apartment restrictions/exactions and goal of providing housing for homeless was "conjectural" and insufficient for *Nollan* when the law did not earmark units for homeless).

Indeed, if the City can jump every other hurdle, it still runs into the brick wall created by the Ordinance's inability to ensure the $117,000 taken from the Levins is spent on San Francisco housing. *Dolan*'s rough proportionality test can no more sanction the resulting loose fit between the City's tenant housing goal and the Payment than it can accept the loose fit between the City of Tigard's goal of stopping flooding and requiring Ms. Dolan to deed her land to the public. Additionally, because the City has now made clear the Ordinance is meant to compel rental owners to provide replacement accommodations for tenants, the law violates the Ellis Act. *Reidy v. City & County of San Francisco*, 123 Cal. App. 4th 580, 589, 593 (2004) (Ellis Act preempted requirement that residential hotel owners provide replacement units or pay in-lieu fee before removal of units); *Bullock v. City & County of San Francisco*, 221 Cal. App. 3d 1072 (1990) (same).

## ARGUMENT

## I

## THE CITY HAS FAILED TO IDENTIFY A NEXUS BETWEEN THE UNRESTRICTED ENHANCED TENANT PAYMENT AND THE IMPACT OF AN OWNER'S DECISION TO STOP RENTING

The City contends the enhanced Payment satisfies *Nollan*'s "nexus" test because (in its view) it redresses a tenant's loss of rent control, a loss for which the City blames owners. City Supplemental Brief at 2. But it is wrong, both in its judgment of the impacts on tenants from withdrawal of rental property and its broader conclusion the Payment advances tenant housing needs.

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**A. Under *Nollan*, a Property Owner must Create the Problem an Exaction Mitigates**

Under *Nollan* and *Dolan*, the government bears the burden to prove an exaction is reasonably related in "both in nature and extent *to the impact of the proposed*" project. *Dolan*, 512 U.S. at 391 (emphasis added). Put differently, "*Nollan* and *Dolan* . . . allow[] the government to condition approval of a permit on a dedication of property to the public so long as there is a 'nexus' and 'rough proportionality' between the property that the government demands and the social costs of the applicant's proposal." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2595 (2013).

This test requires a direct cause and effect link between an owner's use of property and the need for an exaction. If a property use *does not cause the need* for the exaction (i.e., the targeted social problem), it cannot be imposed. *See Dolan*, 512 U.S. at 390-91; *Nollan*, 483 U.S. at 838; *William J. (Jack) Jones Ins. Trust v. City of Fort Smith*, 731 F. Supp. 912, 914 (W.D. Ark. 1990); *Surfside Colony v. California Coastal Comm'n*, 226 Cal. App. 3d 1260, 1267-69 (1991); Jan G. Laitos, *Causation and the Unconstitutional Conditions Doctrine: Why the City of Tigard's Exaction Was a Taking*, 72 Denv. U. L. Rev. 893, 904-08 (1995). As the City concedes, "it is not a taking to require a property owner to mitigate the harms that he *causes* by changing the use of a property." City's Supplemental Brief at 1 (emphasis added). A property owner can be held responsible for solving social problems which trace directly to the owner's decision on where, how, and when to use his property (assuming the solution is proportionate). But he cannot be charged with fixing social problems predominately caused by forces outside the owner's control. *Koontz*, 133 S. Ct. at 2595.

**B. A Tenant Experiences a Loss of Rent Control Due to the City's Imposition of a Rent Control System, Not an Owner's Decision To Use Property for Personal Purposes**

According to the City, the Payment exaction is meant to allow tenants displaced by an Ellis Act withdrawal to effectively remain in rent control-priced housing in San Francisco. The Payment supposedly achieves this by making landlords fund the difference between a tenant's old rent control pricing and open market rates—for two years. The City contends this scheme reflects

a constitutionally adequate "nexus" because owners cause a tenant to lack rent control. But this premise is false.

One must remember that property owners do not ask to be subject to rent control when they lease. The City *requires* it. The property owner has no power to determine whether a unit is rent controlled. And he has no power, in deciding to stop renting, to determine whether a displaced tenant has to go from rent controlled to non-rent controlled units. The City is in control of all of this.

If the City did not force owners like the Levins to submit to rent control, tenants would not experience a loss of rent control when the owners stop renting. They would simply have moving expenses. They would relocate from open market unit to open market unit. Similarly, if City rent control covered all units, rather than just some, tenants would not go from a rent control to open market pricing; they would go from rent control to rent control. Again, it is City regulatory decisions to impose its rent control system, not the use of property, that causes a tenant to experience the loss of rent control as part of displacement. It follows that, in seeking to redress a loss of rent control, the Payment mandate is not mitigating for tenant impacts caused by rental owners.

The situation here is akin to the Coastal Commission requiring all new beach construction to encroach into a public beach area then contending that when individuals apply for permits, each proposal will cause a negative impact on public access necessitating the taking of an easement. It would not be proper or fair to conclude that in this situation the owners are causing the need for the exaction. Neither is it proper, fair, or reasonable to say withdrawing property owners are causing a need for an exaction securing rent control for the tenant when the City imposed that benefit in the first place. Consider the background context: the City imposes rent control, requiring owners to accept less than the value of their property when renting. Then when they stop renting, it says "since state law allows you to prevent a tenant from appropriating the value of your property through rent control, we are going to make you pay to mitigate for the tenant's inability to continue taking your property value."

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The only impact an owner can possibly cause by a decision to stop renting is a *tenant's need to relocate*. Any secondary effects related to the rent controlled nature of former or future housing are an impact of City regulatory decisions.[2] Perhaps one could say an owner's decision causes a tenant to need housing, but it cannot be said to cause a need for rent control. Therefore, the 2014 Ordinance can only satisfy the *Nollan* "nexus" test here if it addresses basic tenant relocation needs. But, of course, as the City candidly notes, the new Ordinance "does not compensate the tenant for moving expenses, the time it takes to find a new apartment, the stress of moving, etc." City's Supplemental Brief at 3. The *2005* Ordinance *is* designed to mitigate a tenant's moving expenses, and it is not challenged here. But the Ordinance at issue is meant to provide something more: to enable a displaced tenant to continue enjoying the benefits of rent control *after relocating* (for two years) by making the landlord fund the difference between rent control and open market rates. In so doing, the 2014 Ordinance is addressing a concern that cannot reasonably be said to arise from an owner's decision to use property for non-rental purposes. It is addressing an externality caused by the City's regulatory system. Owners are not responsible for this. *See William J. (Jack) Jones Ins. Trust*, 731 F. Supp. at 914 (City failed to satisfy *Nollan* because it did not show a proposed store was more responsible for congestion than the pre-existing commercial environment in which the store was built.).

### C. Even If Withdrawal Causes a Tenant's Need for Replacement Rent Control-Priced Housing in San Francisco, the Payment Mandate Is Not Related To Solving That Concern

Even if one concludes that the Levins' decision to use their property for family, rather than for renting, causes the problem their $117,000 Payment is said to address—a displaced tenant's need for rent control housing in San Francisco—the Payment fails *Nollan* because it is not sufficiently related to solving that tenant housing issue.

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[2] The City's suggestion that a lifetime of rent subsidies would be proper under the Ordinance confirms that owners are not responsible for the problems for which the Ordinance mitigates. If a tenant has an expectation of a lifetime of rent controlled housing, that is a result of a City regulatory system in which a tenant gets rent control, and is then immune from eviction. It is not caused by owner decisions. Consequently, any sense that a tenant is "losing" a lifetime of rent control, upon an Ellis Act withdrawal, has everything to do with the system the City has imposed on property owners and nothing to do with the owner's personal decision to stop being a landlord.

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Contrary to the City's arguments, City's Supplemental Brief at 9, *Nollan* requires not only that the need for an exaction directly arise from the regulated property, but that the exaction actually solve the social problem. The City tries to erase this means-end aspect of *Nollan*, but it is an integral aspect of the decision and ingrained in precedent. *See Nollan*, 483 U.S. at 837; *Seawall Associates*, 542 N.E.2d at 1068 (posing the *Nollan* issue as: "Is there a sufficiently close nexus between these burdens and 'the end advanced as the justification for [them]'?") (quoting *Nollan*, 483 U.S. at 837); *Burton v. Clark County*, 958 P.2d 343, 356-57 (Wash. Ct. App. 1998) ("[T]he government must show that its proposed condition or exaction (which in plain terms is just the government's proposed solution to the identified public problem) tends to solve, or at least to alleviate, the identified public problem."); Frank Michelman, *Takings, 1987*, 88 Colum. L. Rev. 1600, 1607-14 (1988) (noting *Nollan*'s "semi-strict or heightened judicial scrutiny of regulatory means-ends relationships").

Applying the means-ends inquiry here, the enhanced Payment cannot be reasonably related to the Ordinance's goal of replacing a tenant's rent control housing so tenants can stay in San Francisco because it transfers money directly to tenants without any constraints on where or how tenants use it. They may use it in the city or they may decide to go across the Bay Bridge to a less expensive area, pay the same amount as before, and use the money from the Payment for other desires. They may use some for housing and some to take care of their personal wish list. They may decide that, with a $100,000+ of landlord money in hand, they want to leave the Bay Area altogether and simply travel for a while. For these reasons, any connection between the Payment and the Ordinance's goal of supplying tenants with San Francisco housing is "indirect and conjectural," and therefore, insufficient for *Nollan*. *Seawall Associates*, 542 N.E.2d at 1068 (connection between apartment restrictions/exactions and goal of providing housing for homeless was "conjectural" and insufficient to satisfy *Nollan* when restrictions did not reserve or ensure any units for homeless).

The City offers two responses: (1) that it's rational to believe some tenants might use the money for housing in San Francisco, and the Court must defer to this potentiality and (2) money is fungible so that, even if tenants use the Payment for non-housing needs, they will take funds

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previously meant for non-housing expenses and use it for new, higher housing costs. These arguments fail. As to the first point, the *Nollan* nexus test is simply not a deferential rational basis test. *Nollan*, 483 U.S. at 837-39. It imposes a heightened level of scrutiny on the link between the government's means and ends. *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 606 (M.D. Fla. 1989) (*Nollan* "used strict scrutiny to examine the fit between the challenged regulation and the claimed state interest."). There must be a *close* connection between the exaction and goal it purports to serve. *Seawall Associates*, 542 N.E.2d at 1068 (construing *Nollan* to require a "close nexus"). No such connection exists between the Payment and securing affordable housing for tenants in San Francisco if all the City has is: "people might use the Payment for housing in the city."

The City's "fungibility" argument fails because it too does not account for the fact that the Ordinance gives Payment recipients unlimited options as to where to live, and how to use the money. The City assumes displaced tenants will add to their normal (non-housing) expenses by leasing a high rent unit in the City, and that the Payment will defray the added cost. But it is just as plausible that the tenant will avoid a high-rent burden (for example, by leaving the city), and simply use the Payment as surplus income, or use a portion for housing and the rest for fun. And there's the rub. Without any certainty as to where and how tenants use the Payment, it does not reasonably advance the goal of providing housing in San Francisco. *Seawall Associates*, 542 N.E.2d at 1068-69.

## II

## THE CITY HAS FAILED TO SHOW THAT THE PAYMENT MANDATE IS ROUGHLY PROPORTIONAL TO TENANT (SAN FRANCISCO) HOUSING NEEDS ARISING FROM WITHDRAWAL

Even if the Payment mandate satisfies the "nexus" test, the City cannot show that it meets *Dolan*'s rough proportionality test, for multiple reasons. That test "ensures the government's implementation of the regulations is tailored to the interest the government seeks to protect."

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*Horne v. U.S. Dep't of Agric.*, 750 F.3d 1128, 1144 (9th Cir. 2014).[3] It should be obvious that a "no-strings attached" tenant Payment, in an amount sufficient to subsidize a tenant's rental expenses for two years, is not proportionately tailored to direct moving/relocation expenses arising from withdrawal. Even if the withdrawal impact is loss of rent control housing in San Francisco, the Payment is not properly tailored to reversing that problem due to absence of any restraint on the tenant's use of money.

The City would prefer that Plaintiffs stop referring to the lack of accountability in the Ordinance. But that sad fact won't go away. It raises its head when the City analogizes to rent control, because rent control has built-in accountability. Rent control appropriates some of the value of rental property, but tenants can use that value for only one possible purpose: to afford housing. Not here. The Levins' tenant can take their $117,000 and do anything. Regardless of whether this passes rational basis scrutiny, it cannot possibly meet the higher scrutiny of rough proportionality. As *Dolan* made clear, the City's belief that the exaction "could" remedy a problem fails. 512 U.S. at 395.

A similar problem arises from the issue of tenant need, *i.e.*, the fact that the 2014 Ordinance does not limit its Payment to tenants who have a need for housing subsidies. The City requires landlords to prove their finances if they want a hardship adjustment. S.F. Admin. Code § 37.9A(e)(3)(G). It requires people who seek access to the City's other affordable housing programs to prove financial need. City & County of San Francisco, Ellis Act of Housing and Community Development, *available at* http://sf-moh.org/index.aspx ?page=1259 (last visited Oct. 13, 2014) ("Certain tenants who have been or may be displaced by Ellis Act evictions may apply for an EAHP [Ellis Act Housing Preference] Certificate. EAHP Certificate holders will be given priority consideration for City-funded (including Downpayment Assistance) and

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[3] "The rough proportionality test involves a broader, more in-depth analysis, focusing on the substance of the regulation. The rough proportionality test legitimizes only the declared ends and not other uncompensated ends. The rough proportionality test asks whether the means serve the ends, giving the public the kinds of benefits intended to result from the government regulation." James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development Under the Takings Clause*, 27 Tex. Tech L. Rev. 73, 132 (1996).

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Inclusionary affordable housing. The Certificate holder must still meet the eligibility rules for any particular housing unit including *income limits*.") (emphasis added). But the 2014 Ordinance does not care if tenants are rich or poor. Since owners like the Levins, not the City, fund displaced tenant housing under the Ordinance, the law dispenses with normal need-based limits, and has no way to track the tenant's use of the payment.

The City's new response is that rent control does not hinge on tenant need, so why should it matter that the Payment exaction also has no income testing? The answer is that no one here is challenging rent control regulation as an exaction. And rent control is normally not subject to *Nollan* and *Dolan*'s scrutiny of the fit between the burden on property and governmental purpose. But the Payment at issue here *is* a monetary exaction, and the City does not dispute this. As such, it *is* subject to robust scrutiny of the fit between its demand for landlord money and the goal of funding tenant housing in San Francisco.

The lack of tenant financial means testing is important to this inquiry. If a displaced tenant already has the financial means to stay in San Francisco without the landlord's money (as the $5,000-$10,000 per month Park Lane renters do, and the Levins' tenant may) then the Payment will simply enable the recipient to go on a shopping spree, or vacation, or invest in Google. It will not serve a housing need because there is no need. If the Ordinance included some kind of check on tenant finances—as all the other City affordable housing programs do—or constrained use of the Payment to housing, the Payment mandate would more closely fit its purported housing goals. But it does not.

## III

## THE CITY'S RE-HASHED PROCEDURAL ARGUMENTS ARE CONTRARY TO THE LAW OF THE NINTH CIRCUIT, AND LACK ANY CREDIBLE LOGICAL OR DOCTRINAL SUPPORT

The Court gave the City another chance to brief the "merits" of *Nollan* and *Dolan*, not to simply re-hash previously raised procedural points. But the City cannot resist raising the same alleged procedural barriers to *Nollan/Dolan*—most likely because it remains insecure about its merits points. But these arguments have not gotten more persuasive over the last week. Indeed, the City continues to ignore important precedent and points that refute its argument that

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legislatively imposed exactions cannot be challenged under *Nollan* and *Dolan*. For instance, the City's latest briefing on this issue ignores *Horne*, 750 F.3d at 1144, the most recent and topical decision in the Ninth Circuit applying *Nollan/Dolan*. *Horne* applied the "nexus" and "rough proportionality" tests to a generally applicable monetary exaction, *id.*, but the City ignores it. The City refers to some state court cases, but of course those cases do not trump *Horne*, and none deals with an exaction like the one here.

The City is also silent on the doctrinal flaws in its position. Plaintiffs have pointed out that it is illogical to believe (as the City does) that an otherwise unconstitutional exaction becomes constitutional by the mere fact that a City Council, rather than a Planning Commission, imposes it. The City has no response. Plaintiffs have noted that there is no basis in logic or constitutional doctrine to conclude that legislative bodies are immune from the takings means-ends test of *Nollan/Dolan*, when they are routinely constrained by similar tests in the equal protection, due process, and First Amendment context. The City has no answer. It does not explain why it recognizes that a due process rational relationship test applies to legislative enactments but objects to *Nollan* and *Dolan*'s "reasonable relationship" test. Most likely, it is simply because the latter test defeats its law.

The pattern continues. Plaintiffs have pointed out that both *Nollan* and *Dolan* favorably cited many lower court decisions adjudicating legislative exactions when creating the "nexus" and "rough proportionality" tests. *See Nollan*, 483 U.S. at 839-40; *Dolan*, 512 U.S. at 390. The main state court case cited in the *Dolan* Court as the basis for the "rough proportionality" test was a legislative exaction case. *Dolan*, 512 U.S. at 390 (citing *Simpson v. North Platte*, 292 N.W.2d 297, 301 (Neb. 1980)). It defies reason to think the Court would rely on such cases to create its tests while secretly intending those same cases to be immune from that very test. And in fact, as Plaintiffs have already noted, *Dolan* distinguished exaction standards only from the legislative *zoning* context. *Id.* at 391 n.8. The City says nothing about any of these points because there is nothing it can say. "The nature, not the source, of the imposition is what matters." *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360, 365 (Or. Ct. App. 1994); *see also id.* ("'[T]he character of the [condition] remains the type that is subject to the analysis in *Dolan*,' whether it is

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legislatively required or a case-specific formulation.") (quoting *Schultz v. City of Grants Pass*, 884 P.2d 569, 573 (Or. Ct App. 1994)).

In the end, the City's position boils down the incredible belief that it can pass laws exacting land, huge sums of money or other property from its citizens with no constitutional limitation except due process rational basis review (which the City claims is so deferential it amounts to a rubber stamp). This has never been the law and is certainly not the law after *Koontz*. Indeed, the City still has not faced the fact that, even if *Nollan* and *Dolan* did not apply (they do), its Payment exaction would be reviewed and fall under the pre-*Nollan* "reasonable relationship" test. *Parks v. Watson*, 716 F.2d 646, 651-53 (9th Cir. 1983). This earlier standard falls somewhere just below *Dolan*'s "rough proportionality" test, and above rational basis review, in terms of the level of scrutiny. Like the *Nollan* and *Dolan* tests, the pre-*Nollan* "reasonable relationship" test weighs the fit between an exaction and a social problem said to arise from a proposed property use. The City does not dispute that it covers legislative exactions. The 2014 Ordinance's enhanced Payment mandate would fail this "reasonable relationship" standard for the same reasons its fails *Nollan* and *Dolan*.

## IV

## THE CITY HAS FOUND NO LAW LIKE THE 2014 ORDINANCE AND EVEN IF IT DID, IT WOULD NOT MAKE THE ENHANCED PAYMENT ANY LESS BURDENSOME OR UNCONSTITUTIONAL

With extra time, the City has searched for laws similar to the 2014 Ordinance. But it has done so in vain. None of its examples turn the Ordinance's extraordinary new Payment mandate into a common regulation—much less constitutionalize it. Plaintiff will comment only on a few of the examples.

The closest the City comes to finding a law as oppressive as the 2014 Ordinance is New York State's regulations pertaining to demolition of rental housing. The laws are not the same though. First, the New York law only applies to demolitions; it does not pertain to the Levins' or Park Lane's situation, *i.e.*, attempts by owners to use their rental property for personal purposes. Second, the New York law does not say those who demolish "must" pay 72 months of

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rent differential, as the City asserts. It says that the State "may" require such a payment, after reviewing a demolition application, if the subject property owner cannot find replacement accommodations for the tenant at the same rate. Those are two important caveats absent from the 2014 Ordinance. Finally, it should be noted that New York does not have an Ellis Act. Even without such an Act, it is almost certain the New York law would fail *Nollan/Dolan*. *See, e.g.*, *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 480 (N.Y. 1994) (striking down as a taking an ordinance that required landlords to renew leases because it did not advance the purported interest); *Seawall Associates*, 542 N.E.2d at 1061 (holding that a law designed to preserve the stock of affordable housing by requiring apartment owners to continue providing tenants with rent control units as a physical and regulatory taking). But the fact is that no court has weighed the New York law, so it really has no bearing here.

The City also makes much of its own law requiring owners of residential hotels to provide "one-for-one replacement of converted units." S.F. Admin. Code ch. 41. This is an extraordinarily poor analogy when California courts have struck down the City's hotel conversion ordinance under the Ellis Act. *Bullock*, 221 Cal. App. 3d at 1101-1103. Therefore, if the 2014 Ordinance follows the path of hotel conversion ordinance, as the City suggests, the Ordinance must also be considered to be preempted by the Ellis Act.[4] *Id.* Moreover, the hotel conversion law does not require an unrestricted transfer of cash from property owners *to individuals* like the Ordinance at issue; it required a payment to the City's housing fund. Thus, the exactions of the hotel ordinance are *at least minimally related to the goal of securing housing*—quite unlike the Payment mandate. Far from supporting the City, the hotel conversion law highlights the unusual and untailored nature of the Payment mandate here.

Ultimately, all of the City's examples either differ in important ways from the 2014 Ordinance and/or are untested under *Nollan/Dolan*. In any event, the fact that the City believes a few other exactions demand a ransom as significant as the 2014 Ordinance provides no comfort

[4] The City cites extensively to *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87 (Cal. 2002), in analogizing the 2014 Ordinance to its hotel conversion ordinance. But, unlike here, *San Remo* did not involve a federal takings claim. That case was resolved solely on state constitutional grounds. *Id.* at 91.

to the Levins and other owners. They certainly never before faced a law that requires an unrestricted payment of $100,000 or more to (maybe) fund a tenant's rent needs, before owners can stop being a landlord. The City never had such a law until now, and it did not even exist when the Levins filed to stop renting. It's a misguided experiment that goes too far.[5] The City can protect tenants, and address affordable housing issues, but it cannot require the Levins and others to shoulder the burden of solving a housing "crisis" they did not cause, through means that do not advance housing goals.

## V

## IF THE CITY IS RIGHT THAT THE ORDINANCE EFFECTIVELY REQUIRES RENTAL OWNERS TO CONTINUE TO PROVIDE RENT CONTROL HOUSING TO TENANTS FOR TWO YEARS, IT VIOLATES THE ELLIS ACT

Unwittingly, the City rekindles Plaintiffs' Ellis Act claim with its assertions that the enhanced Payment mandate is meant to give a tenant the same type of accommodations (rent control priced) the tenant enjoyed before an owner leaves the market. After all, the Ellis Act bars the City from "compel[ling] the owner of any residential real property to . . . continue to offer, accommodations in the property for rent or lease." Cal. Gov't Code § 7060(a). If, as the City claims, the point of the Ordinance is to continue to take the value of a rental owner's property, as when it is rent controlled, so that a displaced tenant can continue to enjoy similar accommodations at the landlord's expense (for two years), then the Ordinance is forcing owners to provide accommodations. This violates the Ellis Act. *Reidy*, 123 Cal. App. 4th at 589, 593 (Ellis Act

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[5] The relocation assistance ordinances in the City of Berkeley and City of Santa Monica offer far more useful comparisons than the City's examples. Under the Berkeley law, tenants displaced by Ellis Act withdrawal are entitled to $8,700 in relocation monies, divided equally among all tenants in the unit, with an additional $5,000 to households whose tenancies began before January 1, 1999. Low-income, elderly, and disabled tenants, and tenant households with minor children, who claim and prove their status, are entitled to an additional relocation payment of $2,500. Berkeley Municipal Code § 13.77.055. Under Santa Monica's law, displaced tenants are entitled to between approximately $8,00-$19,000 depending on how many rooms the rental unit they must depart has (which is presumably related to how much it will cost to move their household goods). *See* http://www.smgov.net/Departments/HED/Housing_and_Redevelopment/Housing/Fee_-_Tenant_Relocation/Fee_-_Tenant_Relocation.aspx (last visited Oct. 14, 2014).

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preempted requirement that residential hotel owners provide replacement units or pay in-lieu fee before removal of units).

Would the Ellis Act allow the City to pass a law that requires a rental owner to provide replacement housing or an in-lieu fee to every tenant (regardless of age, health, or need) for two years after withdrawal before the owners can actually cease renting the property? The answer is unequivocably "no." *Bullock*, 221 Cal. App. 3d at 1100-01; *Reidy*, 123 Cal. App. 4th at 589, 593; *see also, Embassy LLC v. City of Santa Monica*, 185 Cal. App. 4th 771, 773 (2010) ("The Ellis Act gives landlords 'the unfettered right,' as outlined in the statute, to remove their residential units from the rental market . . . .") (quoting *City of Santa Monica v. Yarmark*, 203 Cal. App. 3d 153, 165 (1988)). Yet, at this point, the City views the Ordinance to do exactly that: require the owner to pay a "fee" to subsidize tenant housing with the same value that the tenant consumed in rent controlled housing. In other words, ensure the tenant has a replacement for the prior rent-controlled housing for two years. For this reason, the Payment violates the Ellis Act, as well as *Nollan/Dolan*.

## CONCLUSION

The Court has given this case a full hearing. At the end of the day, the 2014 Ordinance is just as unconstitutional now as the first time the Court considered it, because its terms have not changed. The law is defeated by the combination of the incredible financial and real property burdens it imposes and the lack of any definite relationship to property owner actions or housing goals.

The Court should declare the "Rental Differential Payment" mandate unconstitutional and illegal, and enjoin it.

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Respectfully submitted,

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By /s/ J. David Breemer
J. DAVID BREEMER

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