ANTHONY L. FRANÇOIS, No. 184100
E-mail: alf@pacificlegal.org
J. DAVID BREEMER, No. 215039
E-mail: jdb@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

*Attorneys for Plaintiff*
*Building Industry Association – Bay Area*

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

BUILDING INDUSTRY ASSOCIATION — BAY AREA,

Plaintiff,

v.

CITY OF OAKLAND,

Defendant.

No. 3:15−cv−03392−VC

**OPPOSITION TO MOTION TO DISMISS**

Hearing: January 4, 2018
Time: 10:00 A.M.
Courtroom: 2
Judge: Hon. Vince Chhabria

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Statutes**

**Rule**



**Miscellaneous**

## INTRODUCTION

Plaintiff Building Industry Association – Bay Area's Second Amended Complaint (SAC) alleges that Defendant City of Oakland (City, or Oakland) has violated Plaintiff's, and its members', First and Fifth Amendment rights. The City does so by forcing Plaintiff's members, who build and provide housing in Oakland, to purchase artworks and put them on public display as a condition of approving their housing developments. The Supreme Court has said in a variety of contexts that "the government may not deny a benefit to a person because he exercises a constitutional right." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013) (quoting *Regan v. Tax'n With Representation of Wash.*, 461 U.S. 540, 545 (1983)). "Those cases reflect an overarching principle, known as the unconstitutional conditions doctrine, that vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz*, 133 S. Ct. at 2594.

The unconstitutional conditions doctrine has long been applied to protect First Amendment rights. *See Lafayette Ins. Co. v. French*, 59 U.S. (18 How.) 404, 407 (1855); *Speiser v. Randall*, 357 U.S. 513, 528-29 (1958); *Sherbert v. Verner*, 374 U.S. 398, 407 (1963); *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 210 (2003). Government may not compel speech or demand that anyone engage in protected speech as a condition of approving a permit. The artworks that Oakland requires Plaintiff's members to buy and publicly display are fully protected artistic speech under the First Amendment. But the government may no more compel anyone to engage in First Amendment protected speech than it may ban such speech.

The unconstitutional conditions doctrine also protects the Fifth Amendment right to just compensation for a taking of property, by constraining the government's power to demand that permit applicants give up property as a condition of obtaining the permit. *Koontz*, 133 S. Ct. at 2594 (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 547 (2005)). Here, Oakland's ordinance unconstitutionally conditions approval of Plaintiff's members' development permits on their purchase and public display of artwork or payment of an in-lieu fee, even though building new homes does not reduce Oakland's supply of public art, or create a need for more.

Plaintiff has associational standing to bring these claims on behalf of its members.

## FACTS

In 1989 Oakland adopted the Percent for Public Art Ordinance, Ordinance No. 11086, Oakland Mun. Code § 15.70.010[1], *et seq.* (Public Art Ordinance). This Public Art Ordinance applied only to City-funded capital improvement projects. Section 15.70.120A; SAC ¶ 11.

In 2014, Oakland amended the Public Art Ordinance to add requirements that developers of private homes pay 0.5% of their project budgets to City-verified artists to install public artworks in publicly accessible places in the developments. *See* Ordinance No. 13275, Public Art Requirements for Private Development, Complaint, Exhibit A, ECF 1 (the 2014 Ordinance). The 2014 Ordinance was codified along with the Public Art Ordinance at § 15.70.010, *et seq,*. of the Oakland Mun. Code. SAC ¶ 12, ECF 60.

In June of 2017, Oakland revised the 2014 Ordinance by moving its private development provisions into a new section of the municipal code, and making minor changes to some provisions via Oakland Ordinance No. 13443, Public Art Requirements for Private Development (the Ordinance or 2017 Ordinance). SAC ¶ 12, Exhibit A.[2]

The 2017 Ordinance requires that developers of private home projects spend .5% of their project budget on original artworks from eligible artists, and display them where they are freely accessible to the public. SAC Exhibit A at 6, 8, 10, §§ 15.78.030, 15.78.070A.2 In lieu of purchasing artworks, permit applicants may dedicate space in their project for public use as gallery space or arts programming, or pay the City a fee equal to the required artwork purchase, to be used to fund the City's purchase of public artworks. SAC Exhibit A at 9, § 15.78.070B.

## PROCEDURAL HISTORY

Plaintiff filed this action against Oakland on July 23, 2015. ECF 1. The original Complaint alleged that the 2014 Ordinance imposed unconstitutional conditions in violation of the First and

---

[1] Subsequent section references are to the Oakland Mun. Code, available online at http://library.municode.com/ca/oakland/codes/code_of_ordinances.

[2] The 2017 Ordinance moves the private development public art requirements to § 15.78.010, *et seq.*, of the Oakland Mun. Code. The 2017 Ordinance has not yet been codified to the official Oakland Mun. Code, which still shows the 1989 Public Art Ordinance as modified by the 2014 Ordinance. The original provisions of the 1989 Public Art Ordinance remain at § 15.70.010, *et seq*.

Fifth Amendments to the United States Constitution, as applied to Oakland through the Fourteenth Amendment. Oakland filed an Answer on August 31, 2015. ECF 12. Plaintiff filed a First Amended Complaint on July 24, 2017, ECF 41, which Oakland moved to dismiss on September 6, 2017. ECF 45. The Court dismissed Plaintiff's First Amended Complaint for failure to adequately allege actual or imminent injury, with leave to amend, on October 26, 2017. ECF 58. Plaintiff filed its Second Amended Complaint (SAC) on October 31, 2017, ECF 60, which Oakland again moved to dismiss, on November 29, 2017, ECF 62.

**STANDARD OF REVIEW**

The party asserting federal jurisdiction has the burden of establishing that the jurisdictional requirements are met. *See, e.g.*, *McNutt v. Gen. Motors Acceptance Corp. of Ind. Inc.*, 298 U.S. 178, 189 (1936). At the pleading stage, "general factual allegations of injury resulting from defendant's conduct may suffice" since the facts alleged in the pleadings are presumed true on a motion to dismiss. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). Likewise, on Oakland's Rule 12(b)(6) motion, the Court must "accept as true all of the factual allegations set out in plaintiff's complaint, draw allegations in the light most favorable to plaintiff, and construe the complaint liberally." *Leite v. Crane Co.*, 749 F.3d 1117, 1121 (9th Cir. 2014).

A facial Fifth Amendment takings claim challenges the mere enactment of a law, not its enforcement. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 494 (1987). This differs from the more generally applied "not capable of constitutional application" standard that is used to judge facial challenges in other contexts. *See Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) ("different rules adhere in the facial takings context"); *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1119 (9th Cir. 2010) (en banc) ('"In the takings context, the basis of a facial challenge is that the very enactment of the statute has . . . effected a transfer of a property interest.'") (quoting *Levald*, 998 F.2d at 688). In a Fifth Amendment unconstitutional conditions claim, this standard is applied by asking whether the Ordinance as adopted imposes unconstitutional conditions on those who apply for covered development permits. *See City of L.A., Cal. v. Patel*, 135 S. Ct. 2443, 2451 (2015).

///

## ARGUMENT

### I. PLAINTIFF HAS STANDING

Oakland now challenges Plaintiffs' standing for the first time, but the effort fails. "[A]n association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977); *Associated Builders & Contractors, Golden Gate Chapter, Inc. v. Baca*, 769 F. Supp. 1537, 1541-42 (N.D. Cal. 1991) (association had standing to challenge cities' prevailing wage requirements on behalf of its members), *aff'd*, 64 F.3d 497 (9th Cir. 1995).

Plaintiff meets the first prong because at least some of its members have standing to sue in their own right. "Some of the Association's members are applicants for development permits before the City, and will be required to comply with the Ordinance as a condition of the City's approval of their applications." SAC, ¶ 6, at 2:7-9. They thus must accede to Oakland's unconstitutional demands to waive First and Fifth Amendment rights in exchange for development permits; these demands would be removed if this Court declares the Ordinance invalid and/or enjoins its enforcement. SAC, ¶ 6, at 2:9-10. *Lujan*, 504 U.S. at 560-61 (standing requires concrete and particularized injury in fact, causally connected to the defendant's conduct, which is likely to be redressed by a favorable decision of the court). Plaintiff's members have experienced concrete and particularized injuries (having to comply, as current applicants for development permits, with Oakland's unconstitutional demand to waive First and Fifth Amendment rights in exchange for permission to develop property) that are directly traceable to the City's Ordinance (which imposes the unconstitutional condition), and which would be effectively redressed through the requested declaratory and injunctive relief (by preventing the imposition of the unconstitutional condition).

These injuries are actual. *Lujan*, 504 U.S. at 560. As to the First Amendment claim, the members are not required to have been denied permits, or even to show they have applied for them, to mount a First Amendment challenge to a permitting system. *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022, 1034 (9th Cir. 2006). Nonetheless, the SAC alleges that they

have applied for permits and are required to comply with the Ordinance. SAC, ¶ 6, at 2:7-9. Plaintiff's members' Fifth Amendment injuries are also actual. *Lujan*, 504 U.S. at 560. They have applied for development permits in Oakland, for projects that must comply with the Ordinance in order to be approved. SAC, ¶ 6, at 2:7-9.

For this reason, neither *Warth v. Seldin* nor *Carrico v. City and Cty. of S.F.* apply to this case. In *Warth* the Supreme Court ruled that the plaintiff lacked standing because its members had not sought development permits. 422 U.S. 490, 516 (1975). Here, Plaintiff's members have applied for permits and are required to comply with the challenged Ordinance. SAC, ¶ 6, at 2:7-9. And in *Carrico*, the Ninth Circuit held that the allegation that a plaintiff was "subject to" an ordinance, with no more, was inadequate to allege an injury. 656 F.3d 1002, 1007 (9th Cir. 2011). Here, the SAC alleges specifically that some of Plaintiff's members are required to comply with the terms of the Ordinance because they are current applicants for permits in Oakland. SAC, ¶ 6, at 2:7-9.

The second part of the *Hunt* standing test is met as well. Plaintiff's "mission includes . . . legal representation of its members and . . . enforcement of the law governing housing and residential development." SAC ¶ 5, at 2:1-4. The "law governing residential development" includes the Supreme Court's unconstitutional conditions jurisprudence.

Finally, since Plaintiff brings a facial claim which seeks to invalidate the Ordinance entirely, Plaintiff's members need not individually participate in the suit. Facial claims look only at the challenged legislative act and not at specific facts arising from particular applications of the act. In this facial context, associational standing is particularly appropriate. *See Associated Builders*, 769 F. Supp. at 1541. Additionally, Plaintiff seeks equitable relief, not "just compensation" for any of its members, so it is unnecessary to consider factual "damages" issues related to individual members. Plaintiff has standing.

## II. PLAINTIFF STATES A COMPELLED SPEECH CLAIM UNDER THE FIRST AMENDMENT AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

Plaintiffs' First Amendment claim alleges that, on its face, the Ordinance unconstitutionally compels developers to speak, through the purchase and public display of art, in order to use and develop their property. Oakland argues that Plaintiff fails to state a compelled speech claim. But it is wrong. Art is speech, not mere "expressive conduct." The government may

not force a citizen to speak, in violation of the compelled speech doctrine of the First Amendment, as a condition of securing a permit to build on private property.

**A. The Ninth Circuit Holds Art To Be First Amendment Protected Speech**

A plaintiff states a claim under the First Amendment's compelled speech doctrine when it (1) identifies a government-required message, (2) of a type otherwise protected by the First Amendment, (3) which the government compels the plaintiff to convey through the use of the plaintiff's property. *Wooley v. Maynard*, 430 U.S. 705, 714-15 (1977) (New Hampshire could not require Wooley, as a condition of driving his car, to display the state motto on it.).

Oakland argues that the artwork patronage required by its Ordinance is not protected speech under the First Amendment, and the ordinance does not compel speech. It is wrong.

In *White v. City of Sparks*, 500 F.3d 953, 954 (9th Cir. 2007), the Ninth Circuit made clear that art is protected speech.[3] There, the court stated: "While not having spoken directly on the protections afforded visual art, the Supreme Court has been clear that the arts and entertainment constitute protected forms of expression under the First Amendment." *Id.* at 955 (citing cases). "Any artist's original painting holds potential to 'affect public attitudes,' by spurring thoughtful reflection in and discussion among its viewers. So long as it is an artist's self-expression, a painting will be protected under the First Amendment, because it expresses the artist's perspective." *Id.* at 956 (citation omitted). *White* accordingly held that an "original artwork constitutes speech protected under the First Amendment."

Precedent which Oakland relies on supports this. The City cites *Comm. for Responsible Reg. v. Tahoe Reg'l Planning Agency*, 311 F. Supp. 2d 972, 1004-05 (D. Nev. 2004) (*CFRR*). But

---

[3] Because the artworks which Oakland requires Plaintiff's members to purchase and publicly display are fully protected speech under the First Amendment, *Rumsfeld v. FAIR*'s analysis of "expressive conduct" is not applicable. Whether a regulated activity amounts to expressive conduct is only relevant when the activity is not fully protected speech. 547 U.S. 47, 65 (2006). *Pruneyard v. Robins* does not apply to the residential developments which Plaintiff's members build. 447 U.S. 74, 78 (1980) ("It bears repeating that we do not have under consideration the property or privacy rights of an individual homeowner.") (quoting *PruneYard Shopping Center v. Robins*, 23 Cal. 3d 899, 910-11 (1979)). *Demarest v. City of Leavenworth*, 876 F. Supp. 2d 1186, 1194 (E.D. Wash. 2012), is inapplicable because it addresses commercial speech, not fully protected artistic expression.

that decision says only that architecture and design are not generally the same as artistic expression. *Id*. It does not address actual artwork, like that required here. Oakland also relies on a portion of *Ehrlich v. Culver City*, 12 Cal. 4th 854, 885-86 (1996), stating that public art is "akin" to aesthetic standards. But that statement was not made in a First Amendment context; the case did not even consider if art is protected speech. The Ninth Circuit's conclusion that artwork is speech controls here, *White*, 500 F.3d at 954, not the inapposite, non-binding decisions of state courts.

It is clear that the Ordinance regulates protected speech in the form of creative artworks. The Ordinance's purpose is to "maintain Oakland's art and culture for generations, [and] make a lasting contribution to the intellectual, emotional and creative life of the community at large[.]" § 15.78.020, SAC Exhibit A at 5. To this end, the Ordinance requires property owners to purchase and install "freely accessible artworks" to provide public art to the City. *Id.* The Ordinance defines "Artist" as "an individual generally recognized by critics and peers as a professional practitioner of the visual, performing, or literary arts[.]" *Id.* "Artists" may not include members of the architectural, engineering, design, or landscaping firms retained for design and construction of a development project." SAC Exhibit A at 10, § 15.78.090. The term "public art," used throughout the Ordinance, is defined in the City code as: "a process resulting in the incorporation of original works of art by artists in publicly accessible spaces and which serves a socio-environmental function identifiable with people; is accessible to the mind and eye, is integral to the site and responds to the concept of place-making; is integrated with the work of other design professionals," and is "unique to its moment in time and place." 1989 Public Art Ordinance, § 15.70.020. There is no doubt that the Ordinance's art requirements trigger First Amendment protections, including the guarantee that citizens cannot be compelled to speak- either directly or through coercion in the form of making government benefits contingent on required speech. *Wooley*, 430 U.S. at 714 (The "freedom of thought protected by the First Amendment . . . includes both the right to speak freely and . . . refrain from speaking at all.").

**B. The Ordinance Compels First Amendment Protected Speech**

In *Wooley*, the Supreme Court held that New Hampshire could not require would-be drivers to carry the state's message on their vehicle as a condition of obtaining a driver's license because

this amounted to an unconstitutional compelled speech condition. Similarly, in *Frudden v. Pilling*, 742 F.3d 1199 (9th Cir. 2014), the Ninth Circuit rejected a policy requiring students to place a school motto on a mandatory school uniform as a violation of the compelled speech doctrine of the First Amendment. *Id*. at 1201.

Through the Ordinance, Oakland is compelling a series of government-mandated artistic messages that go beyond architecture and design and into the realm of protected speech. *White*, 500 F.3d at 956; SAC Exhibit A at 10, § 15.78.090. The fact that each mandated artistic message may be unique and non-ideological does not make it any less compelled. *Frudden*, 742 F.3d at 1206 ("The right against compelled speech is not, and cannot be, restricted to ideological messages." (quoting *Nat'l Ass'n of Mfrs. v. NLRB*, 717 F.3d 947, 957 (D.C. Cir. 2013))). Nor does an ability to disclaim the message make it less compelled. *Frudden*, 742 F.3d at 1205-06.

The Ordinance's alternatives—the in-lieu fee (which funds public art) and "space for public art" options—do not allow the City to escape the compelled speech problem. After all, those alternatives still require developers to provide or fund some form of art and thus compel speech. The Ordinance compels speech in every possible application, and is therefore facially invalid.

The administrative appeal mechanism cannot change this calculus for at least two reasons. First, even if an administrative appeal could result in the absolute waiver of the art requirement for a particular developer (there is no clear authority for that), such a waiver situation would not count as an "application" of the Ordinance for purposes of determining whether it is unconstitutional in all or almost all applications and thus facially invalid. *City of L.A., Calif. v. Patel*, 135 S. Ct. at 2451. Only actual applications of the law count for facial scrutiny. *Id*. Second, even if one could hypothesize an appeal instance that might result in no art requirement under the Ordinance, the possibility of such an instance does not change the general effect of the Ordinance or cure the Ordinance's facial invalidity. *N.Y. v. Ferber*, 458 U.S. 747, 769–71 (1982) (First Amendment facial challenges require a showing that a "'substantial number' of its applications are unconstitutional, "'judged in relation to the statute's plainly legitimate sweep.' ) (quoting *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973)).

Plaintiff states a valid claim that the Ordinance facially violates the First Amendment.

## III. PLAINTIFF STATES A *NOLLAN/DOLAN* CLAIM

Plaintiff's Fifth Amendment unconstitutional conditions claim asserts that the Ordinance violates the unconstitutional conditions doctrine because it requires Plaintiff to ether purchase and publicly display, or pay to fund, public art as a condition of securing building permits without any connection between the development and the need for new art. *Nollan*, 482 U.S at 832-36. In other words, since development itself does not cause the need for new art (for instance by destroying pre-existing art), the ordinance's demand for the provision of such art as a condition of securing a land use permit is facially unconstitutional. *Id.*

The original artworks that Oakland requires Plaintiff's members to acquire are clearly property, interests in which the government may not take without paying just compensation. *See, e.g.*, *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1202-03 (C.D. Cal. 2001), *aff'd Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (adequate allegation that painting taken without just compensation). The requirement that the mandated artworks be publicly displayed takes the right to exclude others, which in this context includes the right to withhold an artwork from public view. Cf. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 831 (1987) ("We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.') (citations omitted).

### A. The Ordinance Is Not an Aesthetic Regulation

Oakland makes much of the truism that cities may impose land use regulations that protect aesthetics in the development process. But none of the cases Oakland cites stand for the proposition that a requirement to purchase and publicly display unique artworks is a mere aesthetic regulation. The Court should reject this contention for three reasons.

First, C*FRR*, 311 F. Supp. 2d at 1004-05, holds that architecture and design are not the same as artistic expression. Oakland's reliance on *Ehrlich v. Culver City* is also misplaced. In that decision, the California Supreme Court stated that a permit requirement that the developer place art in public places was "akin" to aesthetic zoning requirements, and dismissed the argument that *Nollan* and *Dolan* applied to it. 12 Cal. 4th at 885-86. *Koontz* effectively repudiates this holding,

by clarifying that all requirements to pay money, as a condition of development approval, are subject to the *Nollan*/*Dolan* nexus and proportionality requirements. *Ehrlich*'s public art holding does not survive *Koontz*, nor can Oakland rely on *Ehrlich* in this case. Whatever Culver City's requirements were, Oakland's requirement is that residential permit applicants spend 0.5% of their project budget on a public art project. This is precisely the type of exaction (expenditure of funds on third party services as condition of permit approval) that the Supreme Court of the United States said in *Koontz* is subject to *Nollan* and *Dolan*.

Second, Oakland has made clear that its Art Ordinance does not regulate aesthetics at all. Under the Ordinance, ""Artists" may not include members of the architectural, engineering, design, or landscaping firms retained for design and construction of a development project." SAC Exhibit A at 10, § 15.78.090. The term "public art," used throughout the Ordinance, is defined in the City code as: "a process resulting in the incorporation of original works of art by artists in publicly accessible spaces and which serves a socio-environmental function identifiable with people; is accessible to the mind and eye, is integral to the site and responds to the concept of place-making; is integrated with the work of other design professionals," and is "unique to its moment in time and place." 1989 Public Art Ordinance, § 15.70.020. The Ordinance deals with unique artistic creation and expression, not color schemes and landscape requirements.

Third, if this Court accepts Oakland's argument that unique creative artworks are subject to plenary city aesthetic regulation, then the door will be wide open for cities to censor publicly displayed artworks, with great deference from the courts. In *Breneric Assocs. v. City of Del Mar*, 69 Cal. App. 4th 166 (1998), the California court of appeal upheld, on substantial evidence review, a city denial of a building permit on purely aesthetic grounds, based on what a neighbor felt the proposed construction's effect on the neighborhood would be. *Id* at 176-77. Legally equating unique artistic creations with mere aesthetics authorizes every city to censor and veto public artworks that are fully protected by the First Amendment. This Court should close that door.

**B. *Nollan*/*Dolan* Apply to Legislative Exactions Like Oakland's Art Mandate**

Plaintiff's *Nollan*/*Dolan* claim is valid. The SAC alleges that the Ordinance imposes an unconstitutional requirement on housing developers that they purchase and publicly display

artworks, or dedicate space in their projects for public use, and/or pay fees, as a condition of development approval. SAC paragraphs 1-2, 4, 12, 14-18, 20, 31-44. The obligation to spend money to purchase artworks (and then display them publicly), dedicate space to public use, or to pay an in-lieu fee, brings the Ordinance under *Nollan* and *Koontz*. 133 S. Ct. at 2600. These conditions violate *Nollan* because new housing does not decrease the present supply of, or create a new need for, public art. *Id.* at 837.

Oakland argues that unconstitutional conditions claims may not be levelled at legislative acts. But this Court has adjudicated facial *Nollan*/*Dolan*/*Koontz* challenges in *Levin v. City and Cty. of S. F.*, 71 F. Supp.3d 1072 (N.D. Cal. 2014), and *Ophca LLC v. City of Berkeley*, No. 16-cv-3046 CRB, 2016 WL 6679560, at *3-4 (N.D. Cal. Nov. 14, 2017) (determining that plaintiff had standing to bring facial *Nollan*/*Dolan* claims against portion of city ordinance, deciding same by distinguishing *Levin*).[4] Oakland points to *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008). But, *McLung* says it does not apply to legislative conditions, like in this case, which are wholly unrelated to development impacts. *Id* at 1225, n.3. And, *McClung* has little if any force on this point after *Koontz*. 133 S. Ct. at 2594 (*McClung* among courts holding against applying *Nollan*/*Dolan* to monetary exactions).[5] *Levin*, 71 F. Supp.3d at 1079. Nor could or did *McClung* abrogate the prior Ninth Circuit decision in *Commercial Builders of N. Cal. v. City of Sacramento*, which involved a *Nollan* claim against legislation. 941 F.2d 872 (9th Cir. 1991).

Oakland also relies on the California Supreme Court's decision in *San Remo Hotel*, 27 Cal. 4th 643, 670-71 (2002). This non-binding state court decision must bow, however, to the binding

---

[4] Other federal courts have done likewise. *See ABN 51st St. Partners v. N.Y.C.*, 724 F. Supp. 1142, 1153 (S.D.N.Y. 1989) (facially applying *Nollan* to a claim against an ordinance that required the owner to reserve units for low-income renters when renovating property); *Crow-N.J. 32 Ltd. P'ship v. Twp. of Clinton*, 718 F. Supp. 378, 384 (D.N.J. 1989) (applying *Nollan*'s "nexus" test to terms of a land use ordinance); *McNulty v. Town of Indialantic*, 727 F. Supp. 604, 606 (M.D. Fla. 1989) (applying *Nollan* to a setback ordinance).

[5] *McClung*'s discussion of legislative exactions is so entwined with its abrogated repudiation of monetary exactions that the two cannot be parceled out. For example, the Ninth Circuit in *McClung* rejected the argument that *Nollan*/*Dolan* applied to the drainage pipe fee in that case on the ground that it did not think *Nollan*/*Dolan* applied to money. 548 F.3d at 1228, abrogated by *Koontz*, 133 S. Ct. at 2594.

Ninth Circuit decision in *Commercial Builders* and this Court's decision in *Levin*. To the extent the law is indeterminate on the issue, this Court should defer to the purposes of *Nollan*. Those decisions are designed to alleviate the danger that the government will use its permitting powers to exact property which it could not directly take without payment. *Nollan*, 483 U.S. at 831; *Koontz*, 133 S. Ct. at 2594-95. When, as here, a city uses legislation to require a minority of citizens to cede property for a public purpose, as a condition of their property ownership, and there is no clear link between the property use and the condition, the danger remains that the government is improperly using the permit power to take private property. *See generally*, Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. Rev. 242, 267-74 (2000). In such cases, distinctions between legislative and adjudicative exactions make no sense, and *Nollan*/*Dolan* should be applied.

**C. Equitable Relief Is Available Under *Nollan* and *Dolan***

Oakland argues that Plaintiff may not seek equitable relief, relying on *Wash. Legal Found. v. Legal Found. of Wash.*, 271 F.3d 835, 849-50 (9th Cir. 2001). This is incorrect. *Wash. Legal Found.* acknowledges that injunctive and declaratory relief are available in appropriate takings cases. 271 F.3d at 849-50. Oakland concedes that this Court, in *Levin*, determined that injunctive and declaratory relief are available under *Nollan*/*Dolan*. 71 F. Supp. 3d at 1074; *id* at 1079 n.3 (relying on *Wash. Legal Found.* for availability of equitable relief where challenged ordinance "neither provides nor sensibly contemplates compensation"). And the plaintiffs in *Nollan* sought to have the challenged easement set aside, not paid for. 483 U.S. at 829 ("Accordingly, the Superior Court . . . directed that the permit condition be struck."). If injunctive relief were not available for such a claim, one would expect the Supreme Court to have said so in *Nollan*. Oakland's argument also ignores that the injury alleged in the SAC is being subjected to illegal conditions as a permit applicant. *See Koontz*, 133 S. Ct. at 2596 ("Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases . . ., the impermissible denial of a government benefit is a constitutionally cognizable injury.").

**D. Oakland's Claimed Need for a "Fact Specific Inquiry" Is Wrong**

Oakland also contends it is impossible to assert a facial *Nollan/Dolan* unconstitutional conditions claim, because a fact specific inquiry into each permit applicant's damages is said to be necessary. This argument, which relies on the Ninth Circuit's decision in *Garneau*, is incorrect.

As an initial matter, Oakland concedes this Court has fully heard and adjudicated a facial claim under *Nollan*/*Dolan* in *Levin*, 71 F. Supp. 3d at 1086 ("The Ordinance's constitutional infirmity being one inherent in the nature of what the monetary exaction is intended to recompense—a dislocation that necessarily arises in all of the Ordinance's applications—it fails on its face to survive Fifth Amendment scrutiny."). The Ninth Circuit has also decided a facial *Nollan* challenge. *Commercial Builders*, 941 F.2d 872.

Oakland's refusal to recognize this precedent rests on its apparent belief that every *Nollan/Dolan* claim requires development of facts showing exactly how much an exaction might cost a property owner because only this (in its view) can resolve whether the exaction is proportional to the development project's impact. But this is not true. Many *Nollan* claims, including that here, rest on a lack of connection between the development and the *nature* of the exaction. Such claims assert that the nature of the exaction is entirely unrelated to the development it is applied to and is unconstitutional under *Nollan*/*Dolan* for that reason. Since the exact amount of the exaction is irrelevant in this context, so is factual development or particularized application. Courts can and do decide facial *Nollan*/*Dolan* claims that challenge exactions on their face when it is the *nature* of the exaction that is the alleged problem. *See Levin.*

*Garneau v. City of Seattle* does not refute this. In *Garneau*, a divided panel[6] concluded that a *Dolan* facial challenge was not the proper way to address the constitutionality of a development fee. 147 F.3d 802, 806 (9th Cir. 1998). Judge Brunetti's lone opinion rests on the conclusion that *Dolan's* rough proportionality analysis required facts relating to the scope and amount of the monetary fee challenged in the case. *Id.* at 811. But fatally to Oakland's argument here, Plaintiff's

[6] The two *Garneau* judges who supported the result had entirely different reasoning, so the case is not precedent in the Ninth Circuit. *Lair v. Bullock*, 697 F.3d 1200, 1205 (9th Cir. 2012).

challenge is that the art exaction fails *Nollan*, by being unrelated to any impact of residential development in the first place. Without the requisite nexus, the Ordinance fails under *Nollan*, and no fact specific inquiry under *Garneau* or *Dolan* is even relevant. Plaintiff need not challenge the .5% art purchase or fee payment on the ground that the amount is disproportionate every time it is charged. The art requirement itself as an exaction that has no relation to the impact of the development under *Nollan*, by its enactment and every time it is applied. [7] This is a proper facial challenge, as *Commercial Builders*, 941 F.2d 872, and *Levin*, 71 F. Supp. 3d at 1086, confirm.[8]

**E. The Ordinance's Appeal Provision Does Not Protect It from Judicial Review**

Oakland also wrongly argues that Plaintiff's members must exhaust administrative and state court remedies before pursuing its Fifth Amendment claim.

As a general matter, a property owner need not exhaust administrative remedies before bringing a constitutional claim in federal court. *Patsy v. Fla. Bd. of Regents*, 457 U.S. 496 (1982); In *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192-93 (1985), the Court held that some as-applied regulatory takings claimants may need to utilize "variance" procedures to secure a final decision that ripens their claim. However, the Court stressed that this does *not* mean that takings claimants must exhaust administrative remedies. *Id.* Rather, exhausting administrative remedies is still *not* required. *Id.* at 193-94.

The appeal provision in Oakland's Ordinance is not a variance procedure which *Williamson Cty.* would require for final decision ripeness, or to which Oakland's California authorities might apply. *Williamson Cty.*, 473 U.S. at 193. Instead, the Ordinance's appeal provision is solely to correct potential legal error in the administration of the Ordinance's art requirements. *See* § 15.78.080. Even the Administrator's plenary power to "impose such

---

[7] Oakland points to the unpublished decision in *Koontz Coalition v. City of Seattle*, No. C14- 0218JLR, 2014 WL 5384434 (W.D. Wash. Oct. 20, 2014), but it is also inapplicable. There, the district court addressed a factually developed record on summary judgment which demonstrated that none of the plaintiff coalition members had applied for permits. *Koontz Coalition*, 2014 WL 5384434, at *4. Here, the SAC alleges that some of Plaintiff's members are current permit applicants before the City and must comply with the Ordinance. SAC ¶ 6, at 2.

[8] This Court should rely on *Levin* rather than *Kamaole Pointe Dev. v. Cty. of Maui*, 573 F. Supp. 2d 1354 (D. Haw. 2008), which relies on *Garneau* and is also superseded by *Koontz*.

reasonable conditions as are . . . judg[ed] necessary" requires a predicate determination, made under appellate standards of review, that the decision of the Director/Commission does not "conform to" the Ordinance or a constitutional provision. This regime functions as an administrative appeal, but such a remedy is not required for a takings suit. 473 U.S. at 193.

*Home Builders Ass'n of N. Cal. v. City of Napa*, 90 Cal. App. 4th 188, 194 (2001), and *San Mateo Cty. Coastal Landowners'*, 38 Cal. App. 4th 523, 546 (1995), do not help Oakland. These non-binding state court decisions ignore *Williamson Cty*. The procedure in *San Mateo Cty. Coastal Landowners' Ass'n v. Cty. of San Mateo* is expressly described as a variance, and is therefore irrelevant to the appeal procedure here. 38 Cal. App. 4th 523, 546-47 (1995). Ultimately, *Williamson County*'s "no exhaustion of administrative remedies" principle, not California state appellate decisions, controls whether property owners must exhaust administrative remedies before bringing their federal constitutional claims in federal court. Under that jurisprudence, that answer is clearly "no."

Oakland also wrongly argues that Plaintiffs must sue in state court under *Williamson Cty.*, 473 U.S at 194-96, before bringing their unconstitutional conditions claim against the Ordinance in federal court. This is false because the requirement to seek just compensation in state court (1) does not apply where a claim challenges a requirement (not yet fulfilled) that a property owner pay money, *see Levin*, 71 F. Supp. 3d at 1079 or (2) where the claimant seeks equitable relief only, rather than just compensation. *Id.* (not applicable "to takings claims that do not seek monetary compensation"); *see also, San Remo Hotel, L.P. v. City and Cty. of S.F.*, 545 U.S. 323, 345-46 (2005) (facial takings claims were instantly ripe because they "requested relief distinct from the provision of 'just compensation'").

Here, the art requirement is a demand that Plaintiffs spend money (.5% of project costs) for art. While this sort of exaction is subject to *Nollan*, it is not subject to *Williamson County*'s state litigation requirement. *Levin*, 71 F. Supp. 3d at 1079. Further, Plaintiff seeks an injunction and declaratory relief, not compensation. Given the nature of the exaction and remedies, the state litigation rule is inapplicable.

## CONCLUSION

Oakland's motion should be denied.

Dated: December 13, 2017.

Respectfully submitted,

ANTHONY L. FRANCOIS, No. 184100
J. DAVID BREEMER, No. 215039

/s/ Anthony L. Francois
Pacific Legal Foundation
930 G Street
Sacramento CA 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7444
jdb@pacificlegal.org
alf@pacificlegal.org

*Attorneys for Plaintiff*
*Building Industry Association – Bay Area*

**CERTIFICATE OF SERVICE**

I hereby certify that copies of the foregoing **OPPOSITION TO MOTION TO DISMISS** have been served through the Court's CM/ECF system on all registered counsel this 13th day of December, 2017.

Respectfully submitted,

/s/ Anthony L. Francois,
ANTHONY L. FRANCOIS

*Attorneys for Plaintiff*
*Building Industry Association – Bay Area*