IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

No. A153579

DARTMOND CHERK AND
THE CHERK FAMILY TRUST,

Plaintiffs and Appellants,

v.

COUNTY OF MARIN

Defendant and Respondent,

On Appeal from the Superior Court of Marin County
(Case No. CIV 1602934, Honorable Roy O. Chernus, Judge)

RESPONDENT'S BRIEF

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Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A153579 Division: One

Case Name: *Cherk et al. v. County of Marin*

Please check where applicable:

☒ There are no Interested entities or persons to list in this Certificate per California Rules of Court, Rule 8.208(d)(3).

☐ Interested entities or persons are listed below:

Name of Interested Entity or Person	Nature of Interest
1.	
2.	
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Please attach additional sheets with Entity or Person information.

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

In this matter the appellants are challenging a condition the County of Marin imposed upon the approval of their application to subdivide their property via a tentative subdivision map. That condition was imposed in a decision rendered by a "Deputy Zoning Administrator" after a public hearing on December 13, 2007. Appellants never administratively appealed this -or any other condition- of the tentative subdivision map approval as required by both the Marin County Code and the State Subdivision Map Act. Instead appellants continued over the next nearly ten (10) years to pursue finalizing their "final" subdivision map. As a result, appellants never "exhausted their administrative remedies" which was a "jurisdictional prerequisite" to the filing of this lawsuit. Therefore, this Court should affirm the judgment of the superior court herein denying appellants petition for a writ of administrative mandate without reaching the merits of their appeal.

However, if this Court decides to reach the merits, in June of 2015, the California Supreme Court upheld the exact governmental program at issue in this matter stating: "(a)s one means of addressing the lack of a sufficient number of housing units that are affordable to low and moderate income households, more than 170 California municipalities have adopted what are commonly referred to as 'inclusionary zoning' or 'inclusionary housing' programs." (*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 441; cert denied (2016) 577 U.S. ___, hereinafter "*City of San*

Jose.") As the Court further noted, "...inclusionary zoning or housing programs 'require or encourage developers to set aside a certain percentage of housing units in new or rehabilitated projects for low- and moderate- income residents.'" (*Ibid.* See also, *Home Builders Assn. v. City of Napa* (2001) 90 Cal.App.4th 188, 192, fn. 1: "An inclusionary housing ordinance is one that requires a residential developer to set aside a specified percentage of new units for low- or moderate- income housing.")

Marin County has such a program and implementing ordinance, which, contrary to appellant's arguments herein, is similar in all legally material respects to the ordinance challenged in *City of San Jose*. The Marin County program requires that 20 percent of the total number dwelling units or lots within a subdivision shall be developed as, or dedicated to, affordable housing. Appellants herein challenge the application of this ordinance to their application to subdivide their real property into two (2) residential lots. As they did in the superior court, appellants make essentially the same claims in this lawsuit as those rejected by the Supreme Court in the *City of San Jose* opinion, as well as even more recently by the Court of Appeal in *616 Croft Ave., LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621; review denied; cert denied (2017) 583 U.S. ___. (Hereinafter "*City of West Hollywood.*")

First, appellants continue to claim the affordable housing in-lieu fee at issue herein violates the "Mitigation Fee Act" codified at Gov't Code section 66000 - 66025. (Appellant's Opening Brief ("AOB") at p. 9-10 and 15-20.) But both the Supreme Court and Court of Appeal have held that inclusionary housing ordinances like San Jose's, West

Hollywood's or Marin County's are legitimate land use controls, and not exactions under the Mitigation Fee Act.

Second, appellants continue their claim that the in-lieu fee at issue herein constitutes an "unconstitutional condition" based upon a trio of United States Supreme Court opinions dealing with land use exactions, as well as the California Supreme Court opinion in *Ehrlich v. City of Culver City* (1996) 12 Cal4th 854. (AOB at p. 10 and 26-33.) But, once again, the California Supreme Court specifically rejected these arguments with respect to the San Jose ordinance, which, as we will again discuss is materially identical to Marin County's ordinance.

Appellant's main argument to this Court is their attempt to distinguish Marin County's ordinance from those in *City of San Jose* and *City of West Hollywood* in two (2) ways, by claiming that:

> "(t)he Marin County program differs, however, from other 'inclusionary housing' programs that have been reviewed by other courts. It extends to even the smallest projects, such as (appellant's) division of one lot into two, and for those projects it imposes a bare demand for money – a monetary exaction- as a condition of a permit."

(AOB at p. 9 and 23.) However, with respect to the first argument regarding the size of the subdivisions required to trigger application of the inclusionary housing requirement, appellant's make no principled argument at all regarding how this is legally material and/or relevant. And as we will discuss *infra*, this is a policy decision that must be based upon local conditions and development patterns. In unincorporated Marin County, subdivisions of more than 4 lots are almost unheard of. Therefore, if the Marin County

program limited the application of its inclusionary housing ordinance to 10 or more lots, the ordinance would almost never be able to be applied.

With respect to appellant's second argument that Marin County's ordinance is somehow different from those reviewed previously by the court's because it imposes a "bare demand for money" as a condition of issuing a permit without providing any alternatives, appellants are simply and demonstrably wrong. Instead the issue in this case is how local jurisdictions with inclusionary housing programs deal with the situation where the number of lots or units created by the subdivision results in a fractional requirement of less than one-half (.5) of an inclusionary unit or lot. In that situation, Marin County allows the inclusionary requirement to be an in-lieu fee based upon the same fraction applied to a legislatively determined value of a full inclusionary housing unit. (See *City of West Hollywood, supra,* 3 Cal.App.5th at 625.)

Quite simply, under governing California case law, the application of an inclusionary housing program to a subdivision approval is not an "exaction" under either the California Mitigation Fee Act, or the United States Supreme Court's "unconstitutional conditions" cases and is lawful so long as it is reasonably related to the general welfare. (*California Subdivision Map Act and the Development Process,* [Cal. CEB 2nd ed.], section 6.2.)

II.

FACTUAL AND PROCEDURAL BACKGROUND

As the Superior Court stated in its ruling herein, in an effort to satisfy the "Affordable Housing" element of its General Plan which was created to meet the state's mandated affordable housing goals (See Govt. Code §§ 65580-65589)[1], in 2003 Marin County adopted Ordinance No. 3393 which amended the Development Code by expanding the existing "inclusionary" affordable housing requirement for very low, low and moderate incomes, and requiring new residential projects resulting in *two or more lots,* with or without dwellings, to set aside 20 percent of the total number of lots within a subdivision to be developed or dedicated to affordable housing. (Marin County Code § 22.22.090 A.) (See the Administrative Record, ("AR") transmitted by the Superior Court to this Court at p. 116-118)

As the superior court further noted it was especially important in this case to note that the ordinance also provides that if that "inclusionary housing" calculation "results in any decimal fraction less than or equal to 0.50, the project applicant will pay an *in-lieu*

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[1] Marin County Code § 22.22.010 states in part:
"Marin County is experiencing a shortage of homes affordable to the workforce of the county, seniors, and disabled individuals. The California Legislature has found that the availability of housing is of vital statewide importance and a priority of the highest order, and that local governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community. To help attain local and state housing goals, this Chapter requires new developments to contribute to the County's affordable housing stock through the provision of housing units, land dedication, and/or fees."

fee proportional to the decimal fraction" at a rate adequate to construct the affordable units off-site. (Ordinance No. 3392, (F)(e); § 22.22.090 A.) (AR p. 118.) That is what occurred here. (See Superior Court Ruling herein in the Joint Appendix ("JA") at page 86.)

Beginning in the year 2000 appellants applied to the Marin County Planning Division for tentative map approval to split their undeveloped 2.79 acre parcel into two, single family residential lots consisting of: 1- a 1.79 acres lot to be retained by Appellants; and 2- a 1.00 acre lot to be sold. At that time, the County's "inclusionary" affordable housing ordinance applied only to new projects resulting in 10 or more residential units or lots. (AR p. 20-22, 117)

In December 2000, the Planning Division deemed the application to be "complete" (AR p. 21), and the agency began its environmental review and review of the merits of the project prior to reaching a decision on the project. Appellants were directed to submit various environmental, geotechnical, and utility usage reports as part of that process.

Beginning in 2001 and frequently thereafter, the Planning Division found the application to be "incomplete" due to appellant's failure to provide all of the requested reports. (E.g., AR p. 74)

On September 9, 2002, appellants asked the Planning Division to place their application on hold in response to the Planning Staff's suggesting that upcoming changes

to the Planning Code might support appellant's new request to subdivide their lots into three parcels. (AR p. 102.)

As the superior court stated, further delays for the final approval of the tentative map ensued due to a combination of factors including: appellants' failure to file a tentative map with the required conditions and site improvements; their neighbor's lawsuit; ordinary delays inherent in CEQA review and bureaucratic fact-finding and decision-making; and turn-over of Planning Department staff reviewing the application. (JA 086.)

In February 2004, appellants decided to move forward with their original plan for approval of a two-lot land division after concluding that the 2003 amendment to the Development Code did not result in the anticipated benefits allowing a three-lot subdivision. (AR p. 134-135.) Appellants then changed their minds *again* and on June 14, 2005 appellants' consultant wrote to the County stating Petitioners decided to proceed with a three-lot division. (AR p. 136-137.)

In July 2006, appellants revised the project back to a two-lot division for the final time. (AR p. 151-153, 162-164.)

Following a noticed public meeting on the project on December 13, 2007, the Deputy Zoning Administrator made findings and approved appellants' tentative map. (AR p. 274-285.) Final project approval was conditioned, *inter alia*, upon paying an in-lieu fee of $39,960.00 pursuant to the formula contained in the County's affordable

housing ordinance. (See Development Code 22.22.090) (AR p. 281 ¶ 7.) The amount of the fee was calculated as 40% (.20 x 2 lots) of the market value of a single affordable housing unit. At that time, the County determined the market value of one affordable unit to be $99,900.00. (AR p. 164)

As will be discussed in more detail later in this brief, appellants did not administratively appeal the conditions of approval of their tentative map to the Planning Commission or to the Board of Supervisors as required by the State Subdivision Map Act, (Gov't Code section 66452.5), and Marin County Code § 22.22.040.

Final project approval was delayed primarily due to Petitioners' failure to file a compliant Parcel Map and to pay the requested fees; e.g., the park fee and the "inclusionary" in-lieu fee. (See e.g., AR p. 289-290, 301.)

Later, in a "Project Status" letter dated December 16, 2008 the Planning Division informed appellants that the in-lieu fee has increased to $92,808.00 in light of the County's re-evaluation of the market value of one affordable housing unit. (AR p. 289-290, 301-303.) Ultimately however, the County reconsidered and charged appellants the in-lieu fee in the original amount of $39,960.00, which was the prevailing market value when the application was initially deemed complete. (AR p. 294, 311-312.)

In 2009, purportedly due to the nationwide recession, appellants voluntarily suspended their efforts to complete the subdivision process. (JA 008 at ¶ 17) For several years thereafter appellants obtained extensions of the time to file a Parcel Map that

satisfied the conditions imposed by the Planning Division as part of the tentative map approval. (AR p. 286-301.)

On December 13, 2013, appellants obtained a two-year extension of the agency's tentative map approval, i.e., until December 13, 2015, on which date the two-year period in which to file the Parcel Map commenced. (AR p. 305)

Appellants submitted the Parcel Map to the Planning Division for final review on or about October 14, 2014. (AR p. 329-331.) On December 18, 2014 the Planning Division informed appellants the Parcel Map was approved, but appellants could not record the Parcel Map until they paid the in-lieu affordable housing fee of $39,960.00. (AR p. 332.)

On July 29, 2015 appellants paid the affordable housing fee under protest. (AR p. 338-339)

Seven months later, on February 19, 2016, appellants' prior attorneys wrote to the County stating the fee was paid under protest pursuant to the Mitigation Fee Act (Govt. Code § 66000 *et seq.*) and they requested a refund. The letter challenged the fee as an unconstitutional "exaction" in violation of the Fifth Amendment "taking clauses," and that the imposition of the fee violated Petitioners' Equal Protection rights. (See Pet. Ex. B at JA 21-24.) (AR p. 340; § 22.22.090 A.) The letter also asked the County if there were administrative appeal options available. The County never responded to this demand for a refund made nearly ten (10) years after subject decision became final since petitioners

never attempted to file an administrative appeal as required under Marin County Code section 22.22.090 for any final action taken by the Deputy Zoning Administrator with respect to a tentative subdivision map application.

As appellants note in their brief, the instant case followed on August 15, 2016, when the appellants filed a petition for traditional and administrative mandate and a complaint for declaratory relief in the Marin County Superior Court. The petition challenged the imposition of the fee as abuse of the County's discretion for failing to act in accordance with the law when it imposed the fee in violation of the unconstitutional conditions doctrine and the Mitigation Fee Act. The complaint also asserted an equal protection violation. (*See* JA 5-24.)

The appellants moved for judgment solely on their petition for writ of administrative mandate. (JA 37-56.) The superior court issued a tentative decision denying the writ petition on December 6, 2017, which became final on December 21. The appellants voluntarily dismissed their remaining claims, and the superior court issued a final judgment on January 5, 2018, denying the petition for writ of administrative mandate and disposing of all claims between the parties. (*See* JA 110-11.)

Appellants now appeal from the judgment against the petition for writ of administrative mandate. As stated by appellants in their opening brief, the superior court ruling contains two principal holdings. First, the court held that the fee imposed on the appellants was "not a development impact fee intended to defray the public burden directly caused by" their project and, therefore, "is not subject to the heightened

'reasonable relationship' test under the Mitigation Fee Act." JA 85. Second, the superior court held that the "fee imposed as a condition for approval of Petitioners' project does not impose a 'monetary exaction' subject to" the unconstitutional conditions test established by the U.S. Supreme Court in *Nollan,* 483 U.S. 825, *Dolan*, 512 U.S. 374, and *Koontz* 570 U.S. 595. (JA 98.) As also noted by appellants in their brief, in the course of its analysis, the superior court also noted that under California law, "'legislatively proscribed monetary fees that are imposed as a condition of development are not subject to the *Nollan/Dolan* test.'" (JA 97 (quoting *California Building Industry Ass'n v. City of San Jose,* 61 Cal. 4th 435, 460 n. 11 (2015).)

However, at the end of its ruling, the superior court briefly rejected the County's affirmative defenses that appellants failed to exhaust their administrative remedies and violated the applicable statute of limitations. (JA 098.)

III.

ARGUMENT

A. Standard of Review

Because this matter came to the superior court on a petition for a writ of mandate under Code of Civil Procedure section 1094.5, the County does not dispute that the role of this Court in this matter is precisely the same as the superior court:

> " '[I]n an administrative mandamus action where no limited trial do novo is authorized by law, the trial and appellate courts occupy in essence identical positions in regards to the administrative record, exercising the

> appellate function of determining whether the record is free from legal error. [Citations]' Thus, the conclusions of the superior court, and its disposition of the issues in this case, are not conclusive on appeal. [Citation]" [Citation]' [Citation]"

(*Sierra Club v. California Coastal Com.* (1993) 19 Cal.App.4th 547, 556-557.)

However, appellant's citation of *Yamaha Corp. of America v. State Bd. Of Equalization* (1999) 73 Cal. App.4th 338, 349 for the proposition that an agency's interpretation of statutes and regulations is subject to independent review, is misleading and only partially correct. While appellant's argument may be correct with respect to State statutes and regulations, as well as the interpretation of the relevant principles of constitutional law, such is not the case with respect to the interpretation of local zoning and planning ordinances, policies and plans for which the local agency was the author or creator. In that case courts grant deference to the agency's interpretation: "There is a strong policy reason for allowing the governmental body which passed legislation to be given a chance to interpret or clarify its intention concerning that legislation. The construction placed on a piece of legislation by the enacting body is of very persuasive significance. [Citations.]" *City of Walnut Creek v. Contra Costa,* 101 Cal. App. 3d 1012, 1021 (1980).

In addition, appellate courts apply a de novo standard of review to the legal question of whether the doctrine of exhaustion of administrative remedies applies in a given case. (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 873.)

B. Appellants' Failed to Exhaust Their Administrative Remedies

"The exhaustion of administrative remedies doctrine 'bars the pursuit of a judicial remedy by a person to whom administrative action was available for the purpose of enforcing the right he seeks to assert in court, but who has failed to commence such action and is attempting to obtain judicial redress where no administrative proceeding has occurred at all; it also operates as a defense to litigation by persons who have been aggrieved by action taken in an administrative process which has in fact occurred but who have failed to "exhaust" the remedy available to them in the course of the proceeding itself. [Citation.] As the California Supreme Court has stated it: 'In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." [Citation.] The rule is a jurisdictional prerequisite in the sense that it 'is not a matter of judicial discretion, but it is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts.'" (*Citizens for Open Government v. City of Lodi, supra,* 144 Cal.App.4th 874.)

For example, as in this case, if the administrative proceeding includes a right to appeal an allegedly improper action, a plaintiff must generally pursue that administrative appeal in order to exhaust his or her administrative remedies. "'If some reasonable administrative remedy, such as the right to appeal the action of a planning commission, were afforded to challenge such improper action the doctrine of administrative remedies would bar suit by litigants who failed to employ it.'" (*Tahoe Vista Concerned Citizens v.*

County of Placer (2008) 81 Cal.App.4th 577, 590; see also, *Sea and Sage Audubon Society Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417-418.)

Because this exhaustion requirement depends on the availability of a remedy within the administrative proceeding, courts must examine the procedures applicable to the particular proceeding. "'Consideration of whether such exhaustion has occurred in a given case will depend upon the procedures applicable to the public agency in question.'" (*Tahoe Vista, supra,* 81 Cal.App.4th at p. 591.) Appellate court's review de novo a trial court's interpretation of the applicable provisions of the applicable local ordinances. (*Save Our Heritage Organization v. City of San Diego* (2015) 237 Cal.App.4th 163, 174.)

In their petition herein, as well as the argument portion of their superior court brief, appellants did not address whether it was timely to file this proceeding over seven (7) years after the final decision by the Deputy Zoning Administrator herein nor whether they were required to exhaust their administrative remedies. In our opposition, the County argued that this proceeding was barred by both the "exhaustion of administrative remedies" requirement as well as the applicable 90-day statute of limitations under the Subdivision Map Act. (Gov't Code 66499.37. See JA 67-68.)

In their reply with respect to the statute of limitations defense, appellants responded that since the County never provided the written notice required under the Mitigation Fee Act, (Gov't Code 66020(d)(1), "...the (appellant's) time to protest the fee or file suit has not even begun to run let alone has it lapsed." (See JA 81 citing *Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 925.) With respect to the exhaustion of

administrative remedies defense, however, appellants only argued that the requirement should not apply because of the supposed statewide importance of the issues presented, and alleged uncertainty in the state of the law. (JA 82).

The superior court, in its Ruling on these defenses only stated:

> "In light of the holding in *California Building Industry, supra,* that the *procedural portion* of the Mitigation Fee Act controls the protest of an affordable housing in-lieu fee, Respondent's contentions that this action is time-barred and that Petitioners were required to exhaust their administrative remedies (Oppo. p. 8), are rejected. Since Respondent did not provide Petitioners the 180-day notice required by section 60020(d), the limitations period never started to run."

(JA 98. Emphasis in original.) However, the relevant portion of the opinion in *City of San Jose* dealt only with the applicable statute of limitations to be applied to a challenge to the City of Palo Alto's requirement that 10 units be set aside as below market rate housing units as well as a cash payment to that city's affordable housing trust fund addressed in another California Supreme Court opinion in *Sterling Park, L.P. v City of Palo Alto* (2013) 57 Cal.4th 1193, 1195. (See *City of San Jose, supra,* 61 Cal.4th at 482: "The opinion in *Sterling Park* focused exclusively on the procedural issue presented in that case....")

Nothing in either the *Sterling Park* or *City of San Jose* opinions addressed or even inferred any opinion on the issue of whether the "exhaustion of administrative remedies" doctrine applies to challenges to conditions imposed pursuant to local inclusionary housing programs and ordinances or even the Mitigation Fee Act generally. So, the broad statement by the superior court herein that states otherwise is simply incorrect.

Therefore, unless this Court accepts appellant's argument that this case presents issues of statewide importance in an area of legal "uncertainty," then this jurisdictional doctrine must apply.[2]

And as noted earlier, both the State Subdivision Map Act, (Gov't Code section 66452.5), and the Marin County Code, (MCC section 22.40.020), provide for administrative appeals of decisions of "advisory agencies" such as the Deputy Zoning Administrator herein, (see Gov't Code section 66415), to "appeals boards" (Gov't Code section 66416) such as the Marin County Planning Commission, and, ultimately the "legislative body;" in this case the Marin County Board of Supervisors. (See Table 4-1 in Marin County Code section 22.040.020 related to "Tentative Maps.")

Therefore, this Court should affirm the judgment denying the petition for writ of administrative mandate herein without addressing the merits of appellant's arguments.

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[2] It is worth noting as well that the Supreme Court in *California Building Industry Assn.* called into question whether even the limited holding of *Sterling Park* that the statute of limitations provided in the Mitigation Fee Act (Gov't Code section 66020), applied to the challenge to the City of Palo Alto's affordable housing requirement in that case would apply to "...*all* inclusionary housing ordinances, including inclusionary housing ordinances, like the San Jose ordinance at issue here, that do not require the developer to give the city an option to purchase the affordable housing units...." (61 Cal.4th at 482.) If it would not, the holding of *Branciforte Heights, LLC v. City of Santa Cruz, supra,* 138 Cal.App.4th at 925 that the statute of limitations does not begin to run until the agency provides the "notice" required under Gov't Code section 66020(d)(2) also would not apply. Marin County's ordinance, like San Jose's, does not require a developer to give the County an option to buy the affordable units.

C. Marin County's "Inclusionary Housing" Program and Ordinance is Legally Indistinguishable from Those Approved by the California Supreme Court and Court of Appeal

As stated in the Introduction herein, appellants now appear to concede this Court would be bound by the California Supreme Court's opinion in *California Building Industry Assn.* to uphold Marin County's inclusionary housing requirements applied in this case if the Marin County program were -as we argued in the superior court, and the superior court agreed- indeed legally indistinguishable from the City of San Jose program. (See AOB at pages 9 and 23.) Therefore, as we did in the superior court, we will again briefly explain that the application of our affordable housing program in this matter is legally indistinguishable from those approved by the California Supreme Court in *California Building Industry Assn.* and the Court of Appeal in *City of West Hollywood.* A brief comparison of those programs should assist this Court in its analysis of appellant's continued claims herein.

In October of 2003, Marin County adopted an ordinance amending the "affordable housing regulations" contained in the County's zoning and subdivision ordinances. AR 116 – 119. Among the numerous findings the Marin County Board of Supervisors made at that time in support of the amendments was that the amendments were necessary to implement the policies contained in the County's General Plan, specifically the "Housing Element" of the General Plan in support of promoting the development of new affordable

housing.[3] *Ibid.* As the California Supreme Court noted in *City of San Jose*, 61 Cal.4th at 444 – 446, the California Legislature, over the course of the last 50 years, has adopted measures requiring city and county General Plans, and the Housing Elements of those Plans, to "*...facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community.*" Id at 445; emphasis added by the Supreme Court.

Perhaps the most important part of Marin County's affordable housing regulations was the adoption of a so-called "inclusionary housing approach" requiring all residential developments to provide a percentage of units or an "in-lieu" fee to provide for very low, low and moderate income housing. AR 000117. This same requirement was also the lynch pin of the *City of San Jose* and *City of West Hollywood* affordable housing requirements. (See 61 Cal.4th at 449–450 and 3 Cal.App.5th at 625.)

Also like the *City of San Jose* and *City of West Hollywood* ordinances, Marin County adopted various options for meeting the "inclusionary requirements" including so-called "in-lieu" fees, but with a strong preference for construction of affordable units on the site of the proposed development. AR 000118; see *City of San Jose* 61 Cal.4th at 450 and *City of West Hollywood* 3 Cal.App.5th at 625 fn. 2.

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[3] As the California Supreme Court has also held on several occasions, a city or county General Plan is its land use "constitution" and virtually all land use permits must and approvals, including subdivisions, must be consistent with the Plan. (See e.g. *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 772 - 773)

Finally, as in the *City of San Jose* case, the Marin County Board of Supervisors made it clear in section 22.22.010 of the Marin County Code that the inclusionary housing requirements were intended to be a broad, legislative and universally applicable approach to conditioning all subdivision approvals in the unincorporated area in order to "enhance the general welfare" pursuant to "...the well-established principle that under the California Constitution a municipality has broad authority, under its general police power to regulate the development and use of real property, within its jurisdiction....." (See 61 Cal.4th at 449 and 455 citing Cal. Const., Article. XI Section 7.)

D. Appellants Attempts to Distinguish the Marin County Inclusionary Housing Program From Those Approved in *City of San Jose* and *City of West Hollywood* is Without Merit.

1. There is no Legal Basis to Distinguish an Inclusionary Housing Program that Applies Even to "Small" Subdivisions From Those That Only Apply to Subdivisions of Ten (10) or More Units.

As noted in the Introduction to this brief, appellants arguments to this Court are focused upon attempting to distinguish Marin County's Inclusionary Housing Program from those judicially approved in *City of San Jose* and *City of West Hollywood* in two (2) ways. Appellant's first argument is that Marin County's "...program differs, however, from other 'inclusionary housing' programs' programs that have been reviewed by other courts...," because it "...extends to even the smallest projects, such as the (appellants) division of one lot into two...." (AOB at page 9.) However, appellant's thereafter make no argument whatsoever about how this difference is legally relevant, much less significant.

In reality, as one of the standard texts on California land use practice notes, the determination of the "...classes and size of development that will be subject to the inclusionary housing program," is a "...policy decision to be based on numerous factors." (Barclay and Gray, California Land Use and Planning Law, (35th Ed., Solano Press, 2016), at page 453.) As the authors go on to state:

> "However, one key consideration must be an understanding of the community development patterns; otherwise, an ineffective inclusionary program may well result. For example, consider a community that has a limited supply of available land, and thus few development applications for projects over 50 units are submitted. An inclusionary program that applied to projects with 50 or more units, therefore, would not result in the production of much affordable housing. Since the success of inclusionary housing depends on the approval and production of market-rate projects, jurisdictions are well advised to assess construction patterns and establish an inclusionary program that captures the majority of that development."

In unincorporated Marin County, subdivisions of more than four (4) units have become as rare as Bigfoot sightings in Muir Woods. Therefore, as noted earlier herein, Marin County decided in 2003 to apply its updated "affordable housing regulations" to subdivisions of 2 or more lots based upon a "Housing Linkage Study." (AR 00116 – 00117; Finding V.)

2. The Marin County Inclusionary Housing Program Never Imposes a "Bare Demand for Money" as a Condition of a Permit. Instead the Ordinance Allows the Payment of an In-Lieu Fee in Any Instance Where a Fractional Unit or Lot Less Than One-Half (.5) Would Otherwise be Required.

As noted in the introduction of this brief, appellant's primary argument to this Court in their attempt to distinguish Marin County's inclusionary housing program from

those approved in *City of San Jose* and *City of West Hollywood* is their claim that with respect to the "smallest projects" Marin County's ordinance "...imposes a bare demand for money – a monetary exaction- as a condition of a permit." (AOB at page 9.) But as we also stated in our introduction herein, this is simply and demonstrably wrong. Instead, the issue in this case -as the superior court recognized- is how local jurisdictions with inclusionary housing programs deal with the situation where the number of lots (or housing units) created by the subdivision results in a fractional requirement of less than one-half (.5) of an inclusionary unit or lot. In that situation, Marin County allows the developer to "round down" and pay an in-lieu fee based upon the same fraction applied to a legislatively determined value of a full inclusionary housing unit. This is very similar to the situation in *City of West Hollywood* where the applicable ordinance allowed developers creating less than ten (10) net units to pay an in-lieu fee also based upon a legislatively determined proportional value. (See *City of West Hollywood, supra,* 3 Cal.App.5th at 625 and 631 – 632.)

However, unlike the situation in *City of West Hollywood*, Marin County's ordinance allows developers to opt for a fee that is significantly less than the value of a full inclusionary housing unit in any situation where the subdivision results in a fractional calculation of less than one half (.5) or 50% of a required inclusionary unit or lot. While the appellant's two (2) lot subdivision was allowed to use this approach since the calculation resulted in 40% of a unit or lot being required (2 times the 20% inclusionary

requirement), the same would apply to subdivisions of 6 or 7 lots, (120 or 140%), 11 or 12 lots, (220 or 240%), and so on as to any fractional requirement of less than 50%.

Contrary to appellant's repeated arguments, this "requirement" is not a "bare demand for money" as a condition for a permit, but in reality an option or alternative for developers who do not wish to "round up." Of course, any developer who preferred to give an additional unit or lot based upon a 20% or 40% fraction could choose to do so.

Admittedly, the language of Marin County Code section 22.22.090 A. may have caused some confusion in this regard. As stated previously, this section provides:

> **A. Number of inclusionary units/lots required.** 20 percent of the total number of dwelling units or lots within a subdivision shall be developed as, or dedicated to, affordable housing. Where the inclusionary housing calculation results in a decimal fraction greater than 0.50, the fraction shall be rounded up to one additional dwelling unit or lot. Where the inclusionary housing circulation results in decimal fraction less than or equal to 0.50, the project applicant shall pay an in-lieu fee proportional to the decimal fraction.

Obviously, the issue herein could have been simpler if the County had used the word "may" instead of "shall" in the last sentence. However, it is well settled that the word "shall" depending upon the context in which it is used, is not necessarily mandatory. (*California Redevelopment Ass. v. Matosantos* (2011) 53 Cal.4th 231, 257.) Most importantly, "(i)t is well established that statutes must be given a reasonable construction that conforms to the apparent purpose and intention of the law makers [citations], and the various parts of the statutory enactment must be harmonized by considering the particular

clause in the context of the whole statute. [citations.]" (*Nunn v. State of California* (1984) 35 Cal.3d 616, 625.)

As we have discussed at length in this brief, the clear intent of the Marin County Board of Supervisors in adopting its inclusionary housing policies and implementing ordinances and guidelines was to maximize the amount of affordable housing required without being so draconian as to create a disincentive to all subdivision creation. Therefore, the Board of Supervisors adopted an ordinance that allows subdividers to "round down" and pay an in-lieu fee where requiring another full lot or unit would create such a disincentive. However, for appellants to suggest that a civic minded developer could not -if s/he so chose- to provide an additional lot or unit instead of paying the in-lieu fee, is simply absurd.

With this background in place, the County will now briefly revisit the holdings of *City of San Jose* and *City of West Hollywood* that apply equally to Marin County's inclusionary housing program.

E. The "Mitigation Fee Act" (Gov't Code sections 66000 – 66025) Does Not Apply to Inclusionary Housing Ordinances Like the Ordinance at Issue Herein.

As we argued in the superior court, the *City of West Hollywood* case is factually very similar to this matter. Marin County's inclusionary housing ordinance requires subdividers to set aside 20 percent of the total number of dwelling units for affordable housing. (Marin County Code section 22.22.090. See also AR 000118.) In this case, however, because the subdivision in question only created two (2) lots, the County's

inclusionary housing ordinance could only require the developer to be responsible to provide 4/10ths (or 40%) of an affordable unit. Therefore the "in-lieu" fee was imposed instead equal to the value of 40% of the cost of the housing unit. (*Ibid*: "Where the inclusionary housing calculation results in any decimal fraction less than or equal to 0.50, the project applicant shall pay an in-lieu fee proportional to the decimal fraction.")

Similarly, since the City of West Hollywood ordinance required that 10% of the units be affordable, and the developer was only proposing nine (9) net units, those developers were entitled to pay the in-lieu fee instead of actually providing a full unit. (*City of West Hollywood, supra,* 3 Cal.App.5th at 625 and fn.2.)

In rejecting the appellants' contention that the application of the in-lieu fee in *City of West Hollywood* was an exaction under the Mitigation Fee Act, the Court of Appeal held that the reasoning of the *City of San Jose* case applied and stated in part as follows:

> "In addition, and as in *San Jose*, the purpose of the in-lieu housing fee here is not to defray the cost of increased demand on public services resulting from Croft's specific development project, but rather to combat the overall lack of affordable housing. (*San Jose, supra*, 61 Cal4th at p.444.) This type of fee is not "for the purpose of mitigating the adverse impact of new development but rather to enhance the public welfare by promoting the use of available land for the development of housing that would be available to low-and moderate-income households." (*Id.* at p. 454.) Assuming the fee is such a land use regulation, "[a]s a general matter, so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property such a restriction does not violate the takings clause insofar as it governs a property owner's future use of his or her property," (*Id.* at p. 462.) This is especially true when the regulation, like the once here, broadly applies nondiscretionary fees to a class of owners because the risk of the government extorting benefits as conditions for issuing permits to individuals is unrealized. (*San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 668-670 [117

> Cal.Rptr.2d 269, 41 P.3d 87]; see also *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 860, 880-881 [50 Cal.Rptr.2d 242, 911 P.2d 429] [applying the *Nollan/Dolan* requirements to an individual fee charged to a developer, in part, because it was not "a *generally* applicable development fee or assessment"].)"

(3 Cal.App.5th at 628-629; footnote omitted.) As discussed in the prior sections of this brief, these exact same elements apply to the application of Marin County's in-lieu fee in this matter.

F. The Inclusionary Housing Requirement Herein is not an "Exaction" On a Developer's Property Under the Takings Clauses of the Federal and California Constitutions so as to Bring into Play the Unconstitutional Conditions Doctrine.

Appellant's second, and primary argument herein is that the County's inclusionary housing in-lieu fee as applied in this case is an "exaction," and therefore the federal "*Nollan/Dolan*" test applies in this matter. (See *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374, as well as *Koontz v. St. Johns River Water Management District* (2013) 133 S. Ct. 2586. See also, *City of San Jose, supra,* 61 Cal.4th at 457 – 469.) But as discussed at length herein, the California Supreme Court specifically rejected this argument in *City of San Jose* with respect to an ordinance that is legally indistinguishable from Marin County's ordinance.

As the Court said:

> "(i)n sum, for all the foregoing reasons, the basic requirement imposed by the challenged ordinance – conditioning the grant of a development permit for new developments of more than 20 units upon a developer's agreement

> to offer for sale at an affordable housing price at least 15 percent of the on-site for-sale units – does not constitute an exaction for purposes of the takings clause, so as to bring into play the unconstitutional conditions doctrine under the *Nollan, Dolan,* and *Koontz* decisions."

(61 Cal.4th at 468.) As previously discussed Marin County's ordinance is identical in all material respects to the San Jose ordinance. The only differences are in the "numbers" adopted. Instead of requiring 15 percent of the units in developments of 20 or more units be affordable, Marin County requires 20 percent of the units in developments of 2 or more units be affordable. Petitioners do not even attempt to argue or explain why this difference would be material to their arguments.

In addition, as also previously explained herein, the Court of Appeal in *City of West Hollywood* explicitly approved the use of in-lieu fees as an alternative to the actual provision of units pursuant to the reasoning of the *City of San Jose* case. (3 Cal.App.5th at 628 – 629.) And as also explained herein, the imposition of the in-lieu fee in Marin County's program is always an "alternative" to the normal requirement to set-aside a percentage of the proposed lots or units. Thus, the Marin County inclusionary housing program is legally indistinguishable from those in *City of San Jose* and *City of West Hollywood.*

G. Marin County's Imposition of the In-Lieu Fee in this Matter was a Fully "Legislatively Prescribed Fee" and not an "Ad Hoc" Exaction.

Finally, appellant's make an odd argument that "the distinction between legislative and adjudicative exactions finds no support in U.S. Supreme Court precedent, history, or scholarship of the unconstitutional conditions doctrine." (AOB at page 33.) We say this

argument is odd because appellants readily admit -as the superior court herein recognized- that the California Supreme Court has explicitly recognized this distinction. "Our court has held that legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan/Dolan* test. [Citations.]" (*City of San Jose, supra,*61 Cal.4th at 460, fn. 11.) Therefore, we must assume appellants only include this argument in order to preserve it for potential future appeals a court or courts not bound by the California Supreme Court's holdings. (See AOB at page 34.)

However, as part of this argument, appellants also argue that the imposition of the in-lieu fee in this matter was not "legislatively prescribed" but indeed "as hoc" because the County ordinance allows for "waivers" or adjustments of the fee in the discretion of the relevant decisionmaker if an alternative means would further the County's affordable housing goals. (See AOB at page 33 citing Marin County Code section 22.22.060.) But contrary to appellant's assertions such a provision in an inclusionary housing ordinance is actually a necessary feature to survive a facial attack to the ordinance. (See *Home Builders Assn. v. City of Napa, supra,* 90 Cal.App.4th at 199: "When an ordinance contains provisions that allow for administrative relief, we must presume the implementing authorities will exercise their authority in conformance with the Constitution. [Citation.]"

In addition, as we argued to the superior court herein, the County's exercise of its discretion to allow appellant's to base the amount of the in lieu fee upon the formula that was in effect at the time their application was deemed complete instead of at the much

later time that their tentative subdivision map was approved, was done at their request and resulted in a significantly lower fee. So it is difficult to understand how they can be heard to complain about granting their request.

IV.

CONCLUSION

The exhaustion of administrative remedies doctrine is a jurisdictional prerequisite to seeking judicial review of administrative action where the doctrine applies. As we have shown in this brief, the doctrine clearly applies in this matter.

On the merits, as appellants now concede, the *City of San Jose* case "...stands for the proposition that an inclusionary housing ordinance that requires a developer to set aside a percentage of proposed housing units for sale as affordable housing is akin to traditional land use regulation, and not an exaction." (AOB at page 22). As discussed in detail in this brief, appellants efforts to distinguish Marin County's affordable housing program from the *City of San Jose* program is totally without merit.

Therefore, the judgment of the superior court herein denying appellants petition for a writ of mandate must be affirmed.

Dated: June 5, 2018

Respectfully Submitted,

BRIAN E. WASHINGTON,
County Counsel
David L. Zaltsman, Deputy

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing RESPONDENT'S BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 8583 words as calculated by the Microsoft word processing program.

Dated: June 5, 2018

David L. Zaltsman

DECLARATION OF SEVICE

I, David L. Zaltsman, declare as follows:

I am a resident of California, residing or employed in San Rafael, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 3501 Civic Center Dr. RM 275, San Rafael, CA 94903.

On June 5, 2018, a true copy of RESPONDENT'S BRIEF was electronically filed with the Court through truefiling.com. Notice of this filing will be sent to those below registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. mail, postage thereon fully prepaid, and deposited in a mailbox regularly maintained by the United States Postal Service in San Rafael, California.

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COURT CLERK
Marin County Superior Court
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San Rafael, CA 94903

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 5th day of June, 2018, at San Rafael, California.

/s/ David L. Zaltsman
David L. Zaltsman