SUPERIOR COURT OF CALIFORNIA
COUNTY OF MARIN

DATE: 12/06/17 TIME: 1:30 P.M. DEPT: B CASE NO: CV1602934

PRESIDING: HON. ROY O. CHERNUS

REPORTER: CLERK: CHRISTINA ASLESON

PETITIONER: DARTMOND CHERK, ET AL vs. RESPONDENT: COUNTY OF MARIN	

NATURE OF PROCEEDINGS: WRIT – OF MANDATE [PETR] DARTMOND CHERK [PETR] THE CHERK FAMILY TRUST

RULING

As discussed in detail below, the court finds that the mandatory in-lieu affordable housing fee imposed by Respondent County of Marin as a condition for approval of Petitioners' two-lot subdivision (Marin County Code § 22.22.090), is not a development impact fee intended to defray the public burden directly caused by Petitioners' project, and that the imposition of the in-lieu fee is not subject to the heightened "reasonable relationship" test under the Mitigation Fee Act (Govt. Code § 66000 *et seq.*), nor is it reviewed under the unconstitutional conditions/takings analysis under the U.S. and California Constitutions. As such, Petitioners have not demonstrated that Respondent County failed to proceed in the manner required by law, and the petition for writ of administrative mandate is denied. (Code Civ. Proc. § 1094.5.)

Background

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

[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."

developed or dedicated to affordable housing. (Marin County Code § 22.22.090 A.) (AR p. 116-118.)

Importantly for our purposes, that ordinance also provides that if that "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" 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.

FACTS

Beginning in 2000 Petitioners applied to the 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 Petitioners; 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. Petitioners 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 Petitioners' failure to provide all of the requested reports. (E.g., AR p. 74.)

On September 9, 2002, Petitioners 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 would support Petitioners' new request to subdivide their lot into three parcels. (AR p. 102.)

Further delays for the final approval of the tentative map ensued due to a combination of factors including: Petitioners' failure to file a tentative map with the required conditions and site improvements; their neighbors' lawsuit; ordinary delays inherent in CEQA review and bureaucratic fact-finding and decision-making; and turn-over of Planning Division staff reviewing the application.

In February 2004, Petitioners 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.) Petitioners changed their minds *again* and on June 14, 2005 Petitioners' consultant wrote to the County stating Petitioners decided to proceed with a three-lot division. (AR p. 136-137.)

In July 2006, Petitioners 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 Petitioners' 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.)

Petitioners did not administratively appeal the conditions for approval of their tentative map to the Planning Commission or to the Board of Supervisors as allowed by Marin County Code § 22.40.020.

Final project approval was delayed primarily due to Petitioners' failure to file a compliant Parcel Map and to pay the required 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 Petitioners 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, the County reconsidered and charged Petitioners 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, Petitioners voluntarily suspended their efforts to complete the subdivision process. (¶ 17) For several years thereafter Petitioners obtained extensions of the time to file a Parcel Map that satisfied the conditions imposed by the Planning Division. (AR p. 286-301.)

On December 13, 2013, Petitioners 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.)

Petitioners 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 Petitioners the Parcel Map was approved, but Petitioners could not record the Parcel Map until they paid the in-lieu housing fee of $39,960.00. (AR p. 332.)

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

Seven months later, on February 19, 2016, Petitioners' original 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 Am. "takings clauses", and that the imposition of the fee violated Petitioners' Equal Protection rights. (Pet. Ex. B.) (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 the demand for a refund.

Section 66020 of the Mitigation Fee Act provides in relevant part:
(a) Any party may protest the imposition of any fees, dedications, reservations, or other exactions imposed on a residential housing development by a local agency by meeting both of the following requirements:

(1) Tendering any required payment in full or providing satisfactory evidence of arrangements to ensure performance of the conditions necessary to meet the requirements of the imposition.

> (2) Serving written notice on the governing body of the entity, which notice shall contain all of the following information:
>
> (A) A statement that the required payment is tendered, or that any conditions which have been imposed are provided for or satisfied, under protest.
>
> (B) A statement informing the governing body of the factual elements of the dispute and the legal theory forming the basis for the protest.

That statute requires the fee "protest" to be filed within 90 days after the government agency delivers a notice at the time of approval of the project or the imposition of the fee, informing the applicant that the 90-day protest period has commenced. (§ 60020(d)(1).) The subdivider then has 180 days from the delivery of the notice by which to file a legal action. (§ 66020(d)(2).) There is no evidence in the administrative record indicating that Respondent sent Petitioners the notice under the Act, triggering the running of the 180-day limitations period.

On August 15, 2016 Petitioners filed this verified petition for traditional and administrative mandate and for declaratory relief. Petitioners have raised an "as applied" challenge to the fee, alleging the County's imposition of the affordable housing in-lieu fee as a condition for their subdivision approval is an illegal monetary exaction for use of their property. Petitioners contend:

1 – the in-lieu fee violates the Mitigation Fee Law (Govt. Code §§ 66001, 66020), because the fee was imposed without a determination that it was reasonably related to any deleterious public impact caused by their lot-split. (¶ 21);
2 – the fee paid by Petitioners imposes an unconstitutional condition for obtaining the subdivision approval because there is neither an "essential nexus", nor a "rough proportionality" between the basis for imposing the fee and any adverse public impact caused by the lot-split, in violation of the unconstitutional conditions "takings clauses" of the California and U.S. Constitutions. (¶s 22-25); and
3 – the County's rejection of Petitioners' request to waive the fee amounted to a denial of equal protection, since the County waived the fee for other similarly situated property owners. (¶s 26-27.)

The only matter before the court is Petitioners' noticed motion to grant the sixth cause of action for a peremptory writ of mandate. That cause of action alleges Respondent's approval of the two-lot subdivision upon payment of the in-lieu fee violated Respondent's statutory and constitutional duties, and Respondent has a mandatory duty to refund the fee.

For purposes of this hearing, the writ petition is ordered bifurcated from the rest of the complaint. (See e.g., *Ehrlich v. City of Culver City, supra,* 12 Cal.4th at p. 863.)

DISCUSSION

Respondent's decision to approve Petitioners' subdivision application was a "quasi-adjudicatory" decision. (See *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612.) Judicial review of quasi-adjudicatory decisions is through administrative mandamus, and is restricted to the administrative record. (Code Civ. Proc. § 1094.5 (a).) The scope of review is "whether the administrative agency has proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion." (Code Civ. Proc. § 1094.5(b).) Abuse of discretion is established if the administrative agency has not proceeded in the manner required by law, the order is not supported by the findings, or the findings are not supported by the evidence. (§ 1094.5(b); *Lechuza Villas West v. California Coastal Com.* (1997) 60 Cal.App.4th 218, 233-234.)

At the trial of an administrative mandamus proceeding, the Petitioner has the burden of proof to show the agency's decision is invalid and should be set aside because it is presumed the agency regularly performed its official duty. (Ev. Code § 664; *Desmond v. County of Contra Costa* (1993) 21 Cal.App.4th 330, 335-336.)

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Mitigation Fee Act (Govt. Code § 66000 *et seq.*)

Petitioners argue the County failed to demonstrate that the in-lieu fee imposed as a condition of subdivision approval bore a "reasonable relationship" between the government purpose for imposing the fee and the public impact on the availability of affordable housing posed by their project, as required by the Act. (Govt. Code § 60001(b).) (MPA p. 5.)

In pertinent part, Government Code section 66001 requires the local agency to determine "how there is a *reasonable relationship*" between both "the type of development project", and "the need for the public facility and the type of development project on which the fee is imposed." (Gov. Code, § 66001, subd. (a)(3), (4), italics added.) In addition, the local agency must determine how there is *a "reasonable relationship*" between "the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." (*Id.*, § 66001, subd. (b), italics added.)

Based on the authorities discussed below, the court concludes that imposition of the affordable housing in-lieu fee is not "monetary exaction" "imposed for the purposes of defraying all or a portion of the cost of public facilities related to the development project, . . ." as defined by the Act (§ 66000(b).)

Rather it is a permissible land use restriction that does not trigger the County's duty under the Act to demonstrate that the amount of the fee and the need for the public facility bear a "reasonable relationship" to the burden created by the development project. (Govt. Code § 66001(a)(3),(4), (b); generally *Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 561 ["The local agency must also determine that both 'the

fee's use' and 'the need for the public facility' are reasonably related to the type of development project on which the fee is imposed. [Citation.]"].)

Accordingly, Petitioners' contention that the Act required the County to make that determination before conditioning tentative map approval upon payment of the affordable housing in-lieu fee is rejected.

As succinctly discussed in *Walker v. City of San Clemente* (2015) 239 Cal.App.4th 1350, the Mitigation Fee Act sets standards and limitations that local agencies must follow before imposing "development fees" on new projects:

The Legislature passed the Act " 'in response to concerns among developers that local agencies were imposing development fees for purposes unrelated to development projects.' " (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 864.) The Act creates uniform procedures for local agencies to follow in establishing, imposing, collecting, accounting for, and using development fees. (*Centex Real Estate Corp. v. City of Vallejo* (1993) 19 Cal.App.4th 1358, 1361–1362.) In passing the Act, the Legislature found and declared that "untimely or improper allocation of development fees hinders economic growth and is, therefore, a matter of statewide interest and concern." (§ 66006, subd. (e).)

The Act defines a development fee as "a monetary exaction other than a tax or special assessment ... that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project ...." (§ 66000, subd. (b).) "A fee shall not include the costs attributable to existing deficiencies in public facilities, but may include the costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan." (§ 66001, subd. (g).) " 'Public facilities' includes public improvements, public services, and community amenities." (§ 66000, subd. (d).)

To establish a development fee a local agency must identify "the purpose of the fee" and "the use to which the fee is to be put." (§ 66001, subd. (a).) The agency also must determine that both "the fee's use" and "the need for the public facility" are reasonably related to "the type of development project on which the fee is imposed." (*Ibid.*; see *Home Builders Assn. of Tulare/Kings Counties, Inc. v. City of Lemoore* (2010) 185 Cal.App.4th 554, 561.) "The Act thus codifies, as the statutory standard applicable by definition to nonpossessory monetary exactions, the 'reasonable relationship' standard employed in California and elsewhere to measure the validity of required dedications of land (or fees in lieu of such dedications) that are challenged under the Fifth and Fourteenth Amendments." (*Ehrlich, supra,* 12 Cal.4th at p. 865.)

To impose an established development fee as a condition of approval for a specific development project, a local agency must "determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." (§ 66001, subd. (b).) The agency also must "identify the public improvement that the fee will be used to finance." (§ 66006, subd. (f).) (*Walker, supra,* 239 Cal.App.4th at pp. 1357–58, *emphasis added.*)

Petitioners assert that the County did not demonstrate the existence of a "reasonable relationship" between the purpose of the in-lieu affordable housing fee imposed under the ordinance, and any adverse impact on the availability of affordable housing in the County that is attributable to Petitioners' land division project. (MPA p. 5-6.) To the contrary, Petitioners argue the undisputed facts show that their "proposal will not result in a decrease in housing – affordable or otherwise." (MPA p. 7.) Additionally, Petitioners contend that any findings made by the County on this matter, *post*, were inadequate.

In the Resolution approving the land division, the Deputy Zoning Administrator found in part:

The project is consistent with the goals and policies of the Countywide Plan because it would create two residential parcels within the City-Centered Corridor consistent with existing low to moderate density residential development in the vicinity . . . . The project would result in a future increase in the availability of housing opportunities in an existing residential community. (AR p. 279 (VI),(A).)

Recent decisions in *California Building Industry Assn. v. City of San Jose* (2015) 61 Cal. 4th 435, and *616 Croft Ave., LLC City of West Hollywood* (*Croft*) (2016) 3 Cal.App.5th 621 have reviewed similar affordable housing ordinances, and have held that the validity of the "inclusionary" affordable housing conditions like the ones present in the Marin County Code, are not "exactions" intended to mitigate or offset the impact on public facilities caused by the development, but are instead permissible land use regulations enacted under the local government's broad police powers in order to promote the public welfare. (*California Building Industry, supra,* 61 Cal. 4th at p. 457; *Croft, supra,* 3 Cal.App.5th at pp. 628-629.) These cases held that the validity of these inclusionary conditions are not reviewed under the "reasonable relationship" test.

In *California Building Industry,* our Supreme Court reviewed a similar inclusionary housing ordinance enacted by the City of San Jose, which required all new residential development projects of 20 or more units to sell at least 15 percent of the on-site units at a price that is affordable to low- or moderate-income households. (*Id.* 61 Cal.4th at p. 442.) Like the Marin County ordinance, the San Jose ordinance also provided alternative compliance options for: 1 – constructing off-site affordable units; and 2 – paying an in lieu-fee based on the median sales prices of a moderate income affordable unit. (*Id.* 61 Cal. 4th at pp. 450-451.)

Before that ordinance went into effect, the Plaintiff building trade group filed a lawsuit challenging the ordinance as unconstitutionally invalid on its face, and asserting the "exactions" required under the ordinance constituted an unconstitutional taking because at no time before it adopted the ordinance did the City provide substantial evidence to "demonstrate a reasonable relationship" between any adverse impacts on the City's affordable housing problem that was caused or attributable to the new residential developments that are subject to the Ordinance. (*Id.*, 61 Cal.4th at pp. 442-443.)

The Court rejected that argument and held that the affordable housing conditions imposed on future developments do not impose "exactions" on the developer's property which trigger the heightened scrutiny called for in a Fifth Am. "takings" analysis[2], but are proper land use regulations which place limits on the way a developer uses its property; e.g., to promote the public welfare. (*Id.* at pp. 456-457, 461-462.) The Court explained:

[T]here can be no valid unconstitutional-conditions takings claim without a government exaction of property, *and the ordinance in the present case does not effect an exaction*. Rather, the ordinance is an example of a municipality's permissible regulation of the use of land under its broad police power.
(*California Bldg. Industry, supra,* 61 Cal.4th at pp. 456- 457, *emphasis added.*)

The Court went on to explain that the basic requirement imposed by San Jose's inclusionary housing ordinance – requiring the developer to sell 15 percent of the units at an affordable price – is not an "exaction" for purposes of the takings clauses because the inclusionary housing ordinance "does not require the developer to dedicate any portion of its property to the public or to pay any money to the public." (*Id.* at p. 461.)

Instead, the Court upheld the affordable housing requirement as a legitimate "price control" regulation on the use of the property for the public benefit, so long as it is not confiscatory under established constitutional analysis. (*Id.* at pp. 464-465.) Under that view, the Court held that "like many other land use regulations, this condition simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale. [Citations.]" (*Id.* at pp. 461, 468.)

Although the question of the validity of the in-lieu fee was not directly before that Court, it distinguished cases which applied the "reasonable relationship" test to "development *mitigation* fees" – i.e., "whose purpose is to mitigate the effects or impacts of the developer on which the fee is imposed" – from the land use restrictions or price controls as mandated in the affordable housing ordinance and which "serve a broader constitutionally permissible purpose or purposes unrelated to the impact of the proposed development." (*Id.* 61 Cal. 4th at p. 472.)

In making this distinction, the court specifically disapproved of the holding in *Building Industry Ass'n of Cent. California v. City of Patterson* (2009) 171 Cal.App.4th 886, which case applied the heightened "reasonable relationship" test to determine the validity of the payment of the affordable housing in lieu fee:

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[2] Under the *Nollan v. California Coastal Comm'n.* (1987) 483 U.S. 825, and *Dolan v. City of Tigard* (1994) 512 U.S. 374 line of Fifth Am. "takings clause" cases, the Supreme Court held that the local permitting authority must show proof of both: an "essential nexus" or relationship between the permit condition and the public impact of the proposed development; and of a "rough proportionality" between the magnitude of the fiscal exaction and the effects of the proposed development. (See *California Building Industry, supra,* 61 Cal. 4th at pp. 457-458.)

For the reasons discussed above, we disapprove the decision in *Building Industry Assn. of Central California v. City of Patterson, supra,* 171 Cal.App.4th 886, to the extent it indicates that the conditions imposed by an inclusionary zoning ordinance are valid only if they are reasonably related to the need for affordable housing attributable to the projects to which the ordinance applies.
(*California Bldg. Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 479.)

Applying that logic, the Court distinguished San Jose's inclusionary housing ordinance from an "impact" development fee intended to avoid or mitigate the burden on public services that are attributable to a specific development:

Like other zoning or land use regulations that are intended to shape and enhance the character and quality of life of the community as a whole, San Jose's inclusionary housing ordinance is intended to advance purposes beyond mitigating the impacts or effects that are attributable to a particular development or project and instead "to produce a widespread public benefit" (*Penn Central, supra,* 438 U.S. at p. 134, fn. 30) that inures generally to the municipality as a whole, providing such benefits to residents of new market-rate housing as well as to the other residents of the community.
(*California Bldg. Industry, supra,* 61 Cal.4th at pp. 474-475.)

The court then concluded that the courts do not review the validity of the affordable housing law based on "a judicial means-end determination that focuses exclusively on the restrictions' relationship to the adverse impact that would result from an alternative use of a particular parcel or a particular proposed project. [Citations.] Similarly, when a municipality enacts a broad inclusionary housing ordinance to increase the amount of affordable housing in the community and to disperse new affordable housing in economically diverse projects throughout the community, *the validity of the ordinance does not depend upon a showing that the restrictions are reasonably related to the impact of a particular development to which the ordinance applies*. Rather, the restrictions must be reasonably related to the broad general welfare purposes for which the ordinance was enacted." (*Id.* 61 Cal.4th at p. 474, *emphasis added.*)

Under that analysis the Court likewise held that the validity of an in-lieu fee does not depend on whether there is a "reasonable relationship" between the fee and the development's impact on the need for affordable housing:

[T]he validity of the in lieu fee—which is an alternative to the on-site affordable housing requirement—logically cannot depend on whether the amount of the in lieu fee is reasonably related to the development's impact on the city's affordable housing need.
(*California Building Industry, supra,* 61 Cal.4th at p.477.)

Applying that analysis to the mandatory in-lieu fee imposed by Respondent on Petitioners' lot-split (Marin County Code § 22.22.090 A), this court concludes that the validity of the inclusionary affordable housing conditions contained in Marin County's ordinance are not viewed under the Mitigation Fee Act's "reasonable relationship" test. (Govt. Code § 66001 (a)(3),(4), (b).)

This result is consistent with the holding by the court in *Croft, supra,* 3 Cal.App.5th 621. That court reviewed the validity of the imposition of an in-lieu fee in an affordable housing ordinance virtually identical to the County's. The West Hollywood ordinance requires developers to sell or rent a portion of their newly constructed units at specified below-market rates or, if not, to pay an "in-lieu" fee designed to fund construction of the equivalent number of units the developer would have otherwise have had to set aside. (*Croft, supra,* 3 Cal.App.5th at p. 625.) In 2005, the developers of an 11-unit condominium complex obtained the City's approval of their demolition and construction permits by agreeing to pay an in-lieu fee instead of selling or renting a portion of their units at specified below market rates, as provided by the City's affordable housing ordinance. (*Id.* ,3 Cal.App.5th at pp. 624-625.)

As the Petitioners did here, the *Croft* developers cited the economic crisis and obtained extensions of the permit approvals. But by the time the developers finally requested issuance of the building permit years later in 2011, the City had revised its fee schedule and the amount of the in-lieu fee nearly doubled to $540,393.00. (*Id.* at p. 625.)

Petitioners paid the fees under protest in order to allow the project to go forward, as permitted by the Mitigation Fee Act. (*Id.* 3 Cal.App.5th at pp. 625-626.) The protest letter challenged the fees as unjustified and also challenged the in-lieu fee as facially invalid under the *Nollan v. California Coastal Comm'n., supra,* 483 U.S. 825, and *Dolan v. City of Tigard, supra,* 512 U.S. 374 line of "unconstitutional conditions" cases. Also, as in our case, the *Croft* developers asked the City to advise them of any available administrative review or appeal options. The City did not respond.

The developers later sued for declaratory and injunction relief alleging, *inter alia*, the in-lieu fees were illegal, the City violated the Mitigation Fee Act, and they also sought a writ of mandate to compel the City to refund the fees. The suit was stayed while the City held an administrative hearing on the request to return the fees. At the hearing, the City upheld the collection of almost all of the fees, and the developers added a cause of action for a writ of administrative mandamus to their complaint. Petitioners severed that claim, and the trial court denied the writ. (*Id.*, 3 Cal.App.5th at p. 626.)

The *Croft* court adopted the *California Bldg. Industry's* analysis and held that the inclusionary housing conditions, *specifically the in-lieu fee imposed on the developer*, was not an "exaction" under the Mitigation Fee Act. The *Croft* court rejected the same challenge that Petitioners make here – i.e., the City had the burden to prove its fees were reasonably related to the development's impact on the City's affordable housing need. (3 Cal.App.5th at pp. 628-629.)

Based on these authorities, the court finds the County did not have to demonstrate a "reasonable relationship" between the in-lieu fee imposed and the deleterious impact caused by Petitioners' project as required by the Mitigation Fee Act, before it imposed the fee. Petitioners' claim that the in lieu fee was invalid under the Mitigation Fee Act is rejected.

In support of their claim that the validity of the in-lieu fee is viewed under the Mitigation Fee Act's reasonable relationship test, Petitioners rely on the Supreme Court's case in *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, also an inclusionary housing ordinance case. (MPA p. 9.)

In *Sterling Park* the developer of a planned 96-unit residential condominium development entered into a development agreement with the City which agreement provided that in lieu of building at least 20% of the units as affordable units or pay an in-lieu fee equal to 10% of the sales price of the market rate units as required by the ordinance, he agreed to build 10 affordable units and pay an in-lieu fee of 5.3488 % of the sales price of the market rate units. After the final subdivision map was approved and nearing the completion of the construction, the development refused to comply with the agreement, and sent the City a notice of protest. (*Id.* 57 Cal. 4th at p. 1197.)

The issue before that court was which of two statutes of limitation applied to the lawsuit. One of the potentially applicable statutes of limitation—Government Code section 66499.37, a part of the Subdivision Map Act—was a general statute of limitations requiring lawsuits challenging the validity of conditions attached to the approval of a tentative or final map to be filed "within 90 days after the date of the decision" attaching the condition. If that statute applied, the developer's lawsuit was time barred.

The other potentially applicable statute of limitations—Government Code section 66020, a part of the Mitigation Fee Act—permitted a developer to protest "the imposition of any fees, dedications, reservations, or other exactions" by "[t]endering any required payment in full" under protest and thereafter to file a lawsuit within 180 days after receiving notice of the required payment. The lawsuit was timely under that statute.

The *Sterling Park* court concluded that the statute of limitations provisions of Government Code section 66020 (part of the Mitigation Fee Act) should properly be interpreted to apply to the requirements imposed by the Palo Alto inclusionary housing ordinance, reasoning that this conclusion would further the purpose behind the Act – to permit a developer who wished to challenge a fee that was a condition of development to pay the contested fee under protest and to continue with the construction of the development while its legal challenge to the fee went forward. (*Id.* at 57 Cal. 4th pp. 1206-1207.)

In language relied upon by Petitioners, the *Sterling Park* court rejected the developer's argument that the inclusionary housing conditions imposed on his development "are not exactions but merely land use regulations . . . that section 66020 does not govern." (*Id.* at p. 1207.) That court held:

The program offers developers two options, either of which, by itself, would constitute an exaction [under § 66020]. The imposition of the in-lieu fees is certainly similar to a fee. (*Sterling Park,* 57 Cal.4th at p. 1207.)

In constructing this same language, the *California Building Industry* court explained that its *Sterling Park* decision did <u>not</u> hold that affordable housing ordinance conditions are viewed under the heightened "reasonable relationship" test. That Court held:

But whether or not the affordable housing requirements of the San Jose ordinance should be considered "exactions" as that term is used in Government Code section 66020, and thus are subject to the procedural protest and statute of limitations provisions of that statute—an issue we

need not and do not decide—it is clear that our decision in *Sterling Park* did not address or intend to express any view whatsoever with regard to the legal test that applies in evaluating the substantive validity of the affordable housing requirements imposed by an inclusionary housing ordinance. The opinion in *Sterling Park* focused exclusively on the procedural issue presented in that case and made no mention of the passage in *San Remo Hotel, supra,* 27 Cal.4th 643, 117 Cal.Rptr.2d 269, 41 P.3d 87, or any other substantive legal test. Nothing in *Sterling Park* supports CBIA's claim that the challenged San Jose ordinance is subject to a judicial standard of review different from that traditionally applied to other legislatively mandated land use development requirements.
(*California Bldg. Industry, supra,* 61 Cal.4th at p. 482, *emphasis added.*)

While the Act's procedural language in section 66020 may be broad enough to apply the 180-day statute of limitations to monetary protests of in-lieu fees at issue here, despite the fact the fee does do not fall within the narrow statutory definition of "exactions" – i.e., imposed to mitigate the public impact directly caused by Petitioners' development – the holding in *California Building Industry* makes clear that the heightened "reasonable relationship" test does not apply to determine if the imposition of the inclusionary housing conditions are valid. As instructed by the court in *California Building Industry,* the validity of the County's legislatively-mandated, affordable housing ordinance is determined under the simpler, standard test – "As a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible. [Citations.]" (*California Bldg. Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 455; also *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 601 ["[T] he land use restriction withstands constitutional attack if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare."].)

2.

Unconstitutional Conditions/Takings Clause

Next, Petitioners contend that under both the Fifth Am. and Cal. Const. art. 1 § 19, the in-lieu fee is a "monetary exaction" upon Petitioners' property subject to the *Nollan/Dolan* (*Nollan v. California Coastal Comm'n., supra,* 483 U.S. 825, *Dolan v. City of Tigard, supra,* 512 U.S. 374), and assert that Respondent has not sustained its burden to demonstrate the existence of an "essential nexus" and a "rough proportionality" between the affordable housing in-lieu fee imposed as a condition for the lot split, and the adverse public impact on affordable housing caused by their project. (MPA p. 8-11.)

Under the federal takings clause made applicable to the states through the Fourteenth Amendment (*Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226, 239) private property cannot be taken for public use without just compensation. Under Cal. Const. art. I, § 19 (a), private property shall not be taken or damaged for public use without just compensation.

In *Nollan v. California Coastal Comm'n., supra,* 483 U.S. 825 and *Dolan v. City of Tigard, supra,* 512 U.S. 374, the local agencies required the landowners to dedicate or transfer a portion of their lands for public use as a condition for granting the respective land use permits. Because these cases involved the actual *conveyance* of a portion of the landowners' properties, purportedly to ameliorate the public impact of the development, the Supreme Court held that

heightened scrutiny of the government action was warranted. (See *California Building Industry, supra,* 61 Cal. 4th at pp. 457-458, discussing the cases.)

The Court in *Nollan/Dolan* held that the government may demand a dedication or conveyance of private lands as a condition for changing the use of their property, only when the government demonstrates that there is an "essential nexus" between the condition imposed and the governmental interest advanced as the justification for the condition (*Nollan, supra,* 483 U.S. at p. 837), and a "rough proportionality" between the extent of the condition demanded and the development's anticipated impacts. (*Dolan, supra,* 512 U.S. at p. 391; see *California Building Industry, supra,*, 61 Cal. 4th at pp. 457-458.)

In the more recent case of *Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. ____ ; 133 S.Ct. 2586, the Supreme Court held that the *Nollan/Dolan* test also applies when the government conditions approval of a land use permit upon the owner's payment of money as an alternative to dedicating a portion of the owner's land to mitigate the environmental impact caused by the development . The *Koontz* court held that the "nexus" and "rough proportionality" test applied to "monetary exactions" which are a substitute for the property owner's dedication of property to the public and which is intended to mitigate the public impact caused by the project. (*Id.* 133 S.Ct. a p. 2602.)

As discussed above, the *California Building Industry* court concluded that the takings analysis announced in *Nollan/Dolan/Koontz, does not* apply to test the validity of the affordable housing conditions' land use restrictions which are similar to the conditions contained in the Marin County ordinance:

Moreover, as we have explained above, the validity of the ordinance's requirement that at least 15 percent of a development's for-sale units be affordable to moderate or low income households does not depend on an assessment of the impact that the development itself will have on the municipality's affordable housing situation. Consequently, *the validity of the in lieu fee—which is an alternative to the on-site affordable housing requirement—logically cannot depend on whether the amount of the in lieu fee is reasonably related to the development's impact on the city's affordable housing need.*
California Bldg. Industry, supra, 61 Cal.4th at p. 477, *emphasis added.*)

Significantly, that Court further distinguished the alternative fee payment in *Koontz* which was imposed on the developer by the local government on an "*ad hoc basis*", unlike the formulaic, "legislatively prescribed condition applied to a broad class of permit applications" as in our case. (*California Building Industry, supra,* 61 Cal. 4th at p. 460, n. 11.) For such legislatively-mandated conditions, our Supreme Court held:

The *Koontz* decision does not purport to decide whether the *Nollan/Dolan* test is applicable to legislatively prescribed monetary permit conditions that apply to a broad class of proposed developments. (See *Koontz, supra,* 570 U.S. at p. ____, 133 S.Ct. at p. 2608, 186 L.Ed.2d at p. 723 (dis. opn. of Kagan, J.).) 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. (*San Remo Hotel, supra,* 27 Cal.4th at pp. 663–671, 117 Cal.Rptr.2d 269, 41 P.3d 87; see *Santa Monica*

Beach, Ltd. v. Superior Court (1999) 19 Cal.4th 952, 966–967, 81 Cal.Rptr.2d 93, 968 P.2d 993 (*Santa Monica Beach*).)
(*California Bldg. Industry, supra,* 61 Cal.4th at p. 460, n. 11.)

In applying this reasoning to the San Jose ordinance, the *California Building Industry* court held that the "inclusionary housing ordinance does not violate the unconstitutional conditions doctrine because there is no exaction—the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process." (*California Bldg. Industry, supra,* 61 Cal.4th at p. 461.)

While the Court in *California Building Industry* did not have directly before it the issue of the validity of the legislatively-mandated in-lieu fee, the court in *Croft, supra,* did.

That court applied the *California Building Industry* analysis to the alternative in-lieu fee paid under protest and concluded that the validity of the imposition of the in-lieu fee is *not* governed by *Nollan/Dolan/Koontz.* (*Id.* 3 Cal.App.5th at pp. 628-629.)

Under these authorities, the court is compelled to conclude that the affordable housing in-lieu fee imposed as a condition for approval of Petitioners' project does not impose a "monetary exaction" subject to the *Nollan/Dolan/Koontz* test for unconstitutional conditions, and Petitioners' contrary contention must be rejected.

3.

Equal Protection

Petitioners' moving or reply papers do not cite legal authorities nor discuss evidence in the administrative record that would support their claim that imposition of the in-lieu fee violated their Equal Protection rights, as alleged in the verified petition. (¶s 26-27). Petitioners are deemed to have abandoned this claim.

4.

Untimeliness

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.

Conclusion

The court finds that the legislatively-mandated affordable housing in-lieu fee is not imposed to defray the public burden caused by Petitioners' project, and therefore Respondent was not required to determine if the fee bore a "reasonable relationship" between the County's purpose in imposing the fee and the public impact on the availability of affordable housing posed by their project, as required by the Mitigation Fee Act (Govt. Code § 60001(b)); nor is the validity of the in-lieu fee reviewed under the unconstitutional takings analysis announced in *Nollan/Dolan/Koontz.* The petition for writ of administrative mandate is denied.

Parties must comply with Marin County Superior Court Local Rules, Rule 1.10(B) to contest the tentative decision. In the event that no party requests oral argument in accordance with Rule 1.10(B), the prevailing party shall prepare an order consistent with the announced ruling as required by Marin County Superior Court Local Rules, Rule 1.11.