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County of Marin

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

DARTMOND CHERK, AND THE CHERK FAMILY TRUST,

Petitioners and Plaintiffs,

v.

COUNTY OF MARIN,

Respondent and Defendant.

Case No.: CIV 1602934

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR JUDGMENT ON VERIFIED PETITION FOR PEREMPTORY WRIT OF MANDATE

Date: December 6, 2017
Time: 1:30 p.m.
Judge: Hon. Roy O. Chernus
Department: B

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

In June of 2015, the California Supreme Court noted that "(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, similar in all legally material respects to the ordinance challenged in *City of San Jose*. Petitioners herein challenge the application of this ordinance to their application to subdivide their real property into two (2) residential lots. (See generally, *California Subdivision Map Act and the Development Process*, (Cal CEB 2nd ed.), section 6.2.) As will be discussed herein, petitioners 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, petitioners claim the affordable housing fee at issue herein violates the "Mitigation Fee Act" codified at Gov't Code section 66000 - 66025. (Petitioners Memorandum of Points and Authorities ("MPA") at p. 1: 16 – 18.) 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.[1]

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[1] In light of this, as we will discuss infra, this Court should not even reach petitioners' second "constitutional" argument since petitioners failed to "exhaust their administrative remedies."

Second, petitioners 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. (P's MPA at p. 1: 19 – 24.) But, once again, petitioners fail to even mention that the California Supreme Court specifically rejected these arguments with respect to the San Jose ordinance, which, as we will discuss is materially identical to Marin County's ordinance.

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, supra,* section 6.2.)

II. STATEMENT OF FACTS AND THE CASE

As petitioners state in their brief, petitioners originally applied to subdivide their undeveloped, but residentially zoned property in unincorporated San Rafael into two (2) lots in October of 2000. (Administrative Record, "AR" 0001 – 0006.) As is often the case however, the development application created significant conflicts –including litigation- with the petitioners' neighbors as well as other environmental and aesthetic concerns. AR 00050 – 00060 and AR 87 - 90. As late as mid - 2004, petitioners' consultants were still not sure that the proposed driveway design would pass muster with the neighbors and an earlier stipulated judgment. AR 134 – 135. In addition, between 2004 and 2006, petitioners' consultant's proposed changing the project to a 3 lot subdivision incorporating an "affordable" housing unit pursuant to recent changes in the Marin County Code. AR 00134 - 137. Then in July of 2006, petitioner and their consultants revised the project back to a two (2) lot subdivision. AR 000162 – 164.

The tentative map for the two (2) lot subdivision was approved by the County's Deputy Zoning Administrator ("DZA") on December 17, 2007. As petitioners note, that approval was conditioned – among other things- upon compliance with Marin County's affordable housing regulations. AR 00281. In this case, since petitioners were only creating two (2) developable lots and Marin County's inclusionary housing ordinance requires that 20% of the created units be affordable, the ordinance

required an in-lieu fee equal to 40% of the value of a full unit. *Ibid.* See also Marin County Code section 22.22.090.

Importantly, petitioners never administratively appealed the imposition of the inclusionary housing condition to either the Marin County Planning Commission, or the Board of Supervisors.

According to their complaint and brief, the approved project "...stalled again after they determined that the value of their property was impaired by the (2008) nationwide financial crisis." (MPA page 3: 3 – 5.)

When petitioners decided to move forward with their approved tentative subdivision map seven (7) years later in 2014, they claim the County "compelled" them to resubmit their plans and "reconsider" the prior approval. (Citing AR 00306 -312.) This, of course, is completely false and misstates the record as well as the law applicable to the approval of tentative and final subdivision maps. Instead, as the letter from the County planner clearly states, under State law, approved tentative subdivision maps "expire" after a certain number of years if a "final" or "parcel" map is not recorded or a request for extension is approved. (See e.g. *California Subdivision Map Act and the Development Process*, *supra*, at section 5.28 – 5.28A). The County approved the extension in this case. AR 305. The additional fees were required to review whether the proposed "final" or "parcel" map was in substantial conformance with the 2007 approval of the tentative map. (See AR 00311 – 312.) This "additional" processing is required by State and local subdivision law whether the final or parcel map is submitted seven (7) months or seven (7) years after the approval of the tentative map. (See *ibid* at section 5.37.)

The approval of the final or parcel map occurred on December 18, 2014. AR 000332 – 000333. But this lawsuit was not filed until ~~one year and nine (9)~~ months later on August 15, 2016.

III. ARGUMENT

A. Standard of Review

Petitioners herein are challenging a condition imposed upon the approval of a tentative subdivision map. To their credit, petitioners do not argue that this approval affects any fundamental vested right. Therefore the standard of judicial review is governed by the administrative mandate provisions Code of Civil Procedure section 1094.5 (c) and this Court must uphold the administrative decision if it was supported by substantial evidence and was made in accordance with legal duties. (See

California Subdivision Map Act and the Development Process, *supra*, at section 13.20 and cases cited therein. See also *Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 317 also involving a small subdivision: "Where, as here, a land use decision is challenged by administrative mandamus, courts are to apply the substantial evidence standard of review.")

B. 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, the County's position in this proceeding is that the application of our affordable housing program in this matter is legally indistinguishable from those approved by the California Supreme Court in *City of San Jose*, and the Court of Appeal in *City of West Hollywood.* Therefore, a brief comparison of those programs should assist this Court in its analysis of petitioner's 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.[2] *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

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[2] 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)

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.

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.)

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

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 petitioners' 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 relied on the *City of San Jose* case, 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 629; footnote omitted.) As discussed in the prior section of this brief, these exact same elements apply to the application of Marin County's in-lieu fee in this matter.

Petitioners' effort in its brief to attempt to distinguish Marin County's ordinance from the typical broad legislative land use regulation at issue in *City of San Jose* and *City of West Hollywood* is devoid of merit. Petitioners argue that since the fee was established by multiplying the fraction of the full unit inclusionary fee requirement, that somehow this converts Marin's ordinance into an ad hoc exaction. (MPA at p. 7 18 – 20.) But as already explained herein, and as petitioners seem to concede, multiplying the fraction is simply the only possible basis for calculating the fee where a full unit is not triggered for the developer to set aside; i.e. only a fractional unit is required based upon the overall 20% set aside requirement.

It is true that the County exercised its "discretion" to allow petitioners to base the in-lieu fee to be paid upon the cost of the full unit that was in effect when their tentative subdivision map was approved in 2007, as opposed to the much higher cost applicable at the time of approval of the final map in 2014. But this was done at petitioners' specific request. AR 000301 -00302. It is difficult to

understand how petitioners can be heard to complain about the County reducing the fee at their request. If that reduction is somehow illegal, of course the remedy would be for them to pay the fee that would normally have been applied; i.e. $92,808. *Ibid.*

Even more strange is petitioners' quotation of a statement from the *City of San Jose* opinion that is taken totally out of context and moreover was rejected in that very opinion. Petitioners cite the Supreme Court opinion at pages 7 and 8 of their MPA as follows:

> "While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees … the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster." [Citing *City of San Jose* 61 Cal.4th at 471.]

But as the Chief Justice in the *City of San Jose* opinion noted, that passage is actually from the California Supreme Court's opinion in *San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643, 671. And as the Chief Justice explained in great detail, that language does not apply to broad inclusionary housing ordinances applied as permit conditions, such as that at issue in this case (or in *City of San Jose*), but only to specific "mitigation" fees which inclusionary housing conditions are not:

> "(w)hen a municipality enacts a broad inclusionary housing ordinance to increase the amount of affordable housing in the community and to disperse new affordable 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."

(61 Cal.4th at 474.)

1. Since the Mitigation Fee Act Does Not Apply to this Case, the Normal Requirements Applicable to a Judicial Challenge of a Subdivision Map Action Apply Herein. In this Case Petitioners Neither "Exhausted Their Administrative Remedies" nor Filed this Lawsuit Within the Applicable Statute of Limitations.

Petitioners herein rely upon the fact that the County "…had not provided the (petitioners) with the statutory notice of their right to judicially challenge the fee, as required by the Mitigation Fee Act…," as their authority for filing this judicial challenge a year and a half after the final administrative

decision was rendered. (MPA at page 3: 18 -23.) However, as just demonstrated herein, the Mitigation Fee Act has no application to this lawsuit. Therefore the normal rules for challenging subdivision map conditions apply herein. And petitioners have violated at least two (2) of these jurisdictional requirements.

First, petitioners concede they never administratively appealed the decision of the deputy zoning administrator herein. However, since the Mitigation Fee Act does not apply to this proceeding, the normal statutes and ordinances requiring administrative appeals prior to filing a judicial challenge apply. (See generally, *California Subdivision Map Act and the Development Process*, section 13.22 – 13.33 and cases and statutes cited therein.) In this case administrative appeals were provided and required to both the Marin County Planning Commission and, ultimately the Board of Supervisors prior to seeking judicial review. (See Government Code section 66452.5 and Marin County Code section 22.40.020.)

Second, even if the decision of the Deputy Zoning Administrator were considered "final" the statute of limitations for filing any judicial challenge to that decision is ninety (90) days. (Government Code 66499.37; see also *California Subdivision Map Act and the Development Process, supra,* at section 13.13 and cases cited therein.)

D. 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.

Petitioners 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.)

IV. CONCLUSION

For the reasons discussed herein, petitioner's motion for judgment on their petition for a peremptory writ of mandate must be denied.

Date: November 2, 2017

Respectfully submitted,

BRIAN E. WASHINGTON
COUNTY COUNSEL

By: _____
David L. Zaltsman
Deputy County Counsel

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is County Counsel of Marin County, Suite 275, Civic Center, San Rafael, CA 94903. On November 2, 2017, I served the within documents:

MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT ON VERIFIED PETITION FOR PEREMPTORY WRIT OF MANDATE

X by transmitting via electronic delivery to the email address set forth below.

X by placing the document(s) listed above in a sealed envelope for collection and mailing on that date following ordinary business practices. I am readily familiar with the County's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U. S. postal service on that same day with postage thereon fully prepaid in the ordinary course of business.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Rafael, California addressed as set forth below.

☐ by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.

Via US Mail & E-mail:

Damien M. Schiff, Esq. Lawrence G. Salzman, Esq. Pacific Legal Foundation 930 G Street Sacramento, CA 95814 LSalzman@pacificlegal.org	

☒ I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on November 2, 2017, at San Rafael, California.

Joyce Oliveira

Barbara A. Siebert

From: Larry Salzman
Sent: Thursday, November 02, 2017 3:05 PM
To: Incoming Lit
Subject: FW: Memorandum of Points and Authorities in Opposition
Attachments: 4803_001.pdf

4-1574

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PACIFIC LEGAL FOUNDATION
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From: Oliveira, Joyce [mailto:JOliveira@marincounty.org]
Sent: Thursday, November 2, 2017 2:57 PM
To: Larry Salzman <LSalzman@pacificlegal.org>
Subject: Memorandum of Points and Authorities in Opposition

Good afternoon,

Please see the attached document filed today.

Thank you,

COUNTY OF MARIN

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