LAWRENCE G. SALZMAN, No. 224727
E-mail: lsalzman@pacificlegal.org
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747

Attorney for Plaintiffs and Petitioners

SUPERIOR COURT OF CALIFORNIA

COUNTY OF MARIN

DARTMOND CHERK, and THE CHERK FAMILY TRUST, Plaintiffs and Petitioners, v. COUNTY OF MARIN, Defendant and Respondent.	No.: CIV 1602934 **REPLY BRIEF** Date: December 6, 2017 Time: 1:30 pm Place: Department B Judge: The Hon. Roy O. Chernus

TABLE OF CONTENTS

TABLE OF AUTHORITIES

I. INTRODUCTION

The Cherk family applied for a permit to split their 2.79-acre residentially-zoned vacant parcel into two lots. As a condition of the permit, the County demanded $39,960, which it called an affordable housing fee. The Cherks established in their opening brief that because there is no nexus or proportionality between the fee and any adverse public impact created by the Cherks' division of their land, the fee violates the Mitigation Fee Act (MFA) and the unconstitutional conditions doctrine.

The government does not and cannot dispute the utter lack of a relationship between the fee and a negative impact of the lot-split. The thrust of its opposition is an argument that because the fee paid by the Cherks is not intended to mitigate anything related to their project, it is not an exaction subject to the Mitigation Fee Act or the unconstitutional conditions doctrine set out by the U.S. Supreme Court. On that basis, the government further argues that this lawsuit is untimely. The County's view rests on recent cases that uphold "inclusionary housing ordinances" against unlawful exaction challenges. But, as explained below, those cases do not control this case. There are material legal and factual differences between the ordinances at issue in those cases and Marin County's law, as well as in the application of the County's ordinance to the Cherks.

At bottom, the County's positions rest on the idea that a permit fee designed to mitigate an adverse impact of a proposed land use is subject to the MFA and unconstitutional conditions doctrine, but a fee imposed for purposes entirely unrelated to a project's impact evades scrutiny. The California Supreme Court correctly rejected that premise in its *Sterling Park* decision: the County's argument would turn takings and unconstitutional conditions doctrines on their head. The Takings Clause is designed to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The County's fee does just that: it singles out individual property owners to pay for a general social program as a condition of a permit to change the use of their land. As the U.S. Supreme Court explained in *Koontz*, whenever a "monetary obligation burden[s] . . . a specific parcel of land" through the permitting process, the unconstitutional conditions doctrine applies to ensure that government does not use that process

as an end-run around the Takings Clause. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2599 (2013). When seen as the monetary exaction that it is, the fee imposed on the Cherks must be refunded.

II. RECENT "INCLUSIONARY HOUSING ORDINANCE" CASES DO NOT CONTROL THIS CASE

The government argues that the "affordable housing program in this matter is legally indistinguishable from those approved by the California Supreme Court . . . and the Court of Appeal," citing *California Building Industry Association v. San Jose*, 61 Cal. 4th 435 (2015) (*CBIA*), and *616 Croft Ave., LLC v. City of West Hollywood*, 3 Cal. App. 5th 521 (2016) (*616 Croft*), thereby foreclosing the Cherks' claims. Opp. Br. at 4-5. But neither court ruled on the precise question presented here. First, although both cases "approved" some type of affordable housing program, their holdings hinged on the fact that the petitioners in those cases were provided various alternative means of satisfying the respective programs. Because at least one of those alternatives in each case was not an exaction, the courts upheld the ordinances. Marin's permit fee, as applied, offers no such unobjectionable alternatives. Those other cases do not answer the question of whether a mandatory permit fee, absent any alternative, violates the MFA or unconstitutional conditions doctrine. Further, the government's discussion of *CBIA* and *616 Croft* hastily lumps all "inclusionary housing programs" together, but the details matter: Marin County's ordinance, as applied to the Cherks, is materially different than the inclusionary housing ordinances involved in those other cases.

A. Neither *CBIA* nor *616 Croft* ruled on whether a mandatory affordable housing fee is an unlawful monetary exaction

1. *CBIA* does not apply to this case

According to the County, *CBIA* and *616 Croft* "held that inclusionary housing ordinances . . . are legitimate land use controls, and not exactions under the Mitigation Fee Act." Opp. Br. at 1. It further claims that *CBIA* "specifically rejected" the argument that in-lieu permit fees dedicated to affordable housing constitute unconstitutional conditions. *Id.* at 2. The

///

government paints with too broad a brush and glosses over the key facts supporting the holdings in those cases.

CBIA 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. The court noted that the San Jose ordinance "provides residential developers with a menu of options" to promote affordable housing. *CBIA*, 61 Cal. 4th at 449. Thus, while a basic feature of San Jose's law requires 15 percent of homes built in a residential development to be constructed on-site as "affordable" units, a developer may in the alternative elect to pay an in-lieu fee to the city to purchase affordable housing; dedicate land in equal value to the in-lieu fee; or acquire and rehabilitate units off-site to serve as affordable housing. *Id.* at 451-52.

The *CBIA* petitioner mounted a facial challenge to the ordinance on the grounds that it imposed an unconstitutional condition on development permits. The court held that a requirement to set aside 15 percent of the on-site for-sale units as affordable housing is "an example of a municipality's permissible regulation of the use of land under its broad police power" rather than an exaction. *Id.* at 492-93. The court explained that, "so long as a permitting authority offers a property owner at least one alternative means of satisfying a condition that does not violate the takings clause, the property owner has not been subjected to an unconstitutional condition." *Id.* at 469-70. That conclusion is uncontroversial since the U.S. Supreme Court has itself held that "so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition." *Koontz*, 133 S. Ct. at 2598.

But *CBIA*'s holding does not extend to the instant case, since, under the San Jose ordinance, "[n]o developer is required to pay the in lieu fee and may always opt to satisfy the ordinance by providing on-site affordable housing units." *CBIA*, 61 Cal. 4th at 476. Because the ordinance provided at least one permissible option, the alternative of paying a fee becomes unobjectionable. Unlike San Jose's ordinance, however, Marin County's law—as applied to the

///

Cherks—offers no alternatives: a small lot-split such as theirs is conditioned solely on the demand for a lump sum of money to satisfy the County's affordable housing mandate.

CBIA did not rule on and does not control the question presented by this case: whether the County's demand for money, as the exclusive means of satisfying its affordable housing mandate, is an unlawful exaction under the MFA and unconstitutional conditions doctrine. Notably, the petitioner in *CBIA* did not raise, and the Court did not consider, an MFA claim. *CBIA*, therefore, does not apply here.

2. *616 Croft* likewise fails to support the County's arguments

The holding in *616 Croft* depends on the same key fact as *CBIA*, and for the same reason it does not control this case. The West Hollywood ordinance at issue in *Croft* 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" affordable units. *616 Croft*, 3 Cal. App. at 625. The petitioner in *616 Croft* paid an in-lieu fee under protest and challenged it as a violation of the MFA and the unconstitutional conditions doctrine. The court of appeal rejected that challenge because, following *CBIA*'s rule concerning the availability of alternatives, "a set-aside requirement is not governed by *Nollan* or *Dolan*," and the in-lieu fee was paid by the petitioner "voluntarily as an *alternative*" to setting aside a number of units. *Id.* at 628 (emphasis in original). Again, since the developer had the option of complying with the ordinance by selling or renting affordable units, it could not be heard to protest its choice to pay the in-lieu fee instead as an unlawful exaction. As applied to the Cherks, Marin County's ordinance provides no such option. The Cherks were forced to either abandon their plans for a lot-split or make a payment of $39,960 to satisfy the ordinance. That fact alone places this case outside the holdings of *616 Croft* and *CBIA*.

The County thus seizes on an "assum[ption]" made by the court in the *616 Croft* decision. There, the court of appeal "[a]ssum[ed]" but did not decide that West Hollywood's "fee [wa]s 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" affordable housing. *Id.* at 629. According to the County, therefore, Marin County's ordinance is safe from scrutiny under the

MFA and the unconstitutional conditions doctrine. Opp. Br. at 6. But this dicta is superfluous to *616 Croft*'s actual holding, and those comments do not make any ruling binding this Court. The *616 Croft* court had no occasion to, and therefore did not, consider whether a bare demand for money, alone and apart from the alternative of constructing low-cost on-site housing, would constitute an exaction.

3. Marin's County's ordinance, as applied, is materially different than inclusionary housing ordinances involved in the other cases

The most significant difference between the County's ordinance and those adjudicated in *CBIA* and *616 Croft* is that, as applied to the Cherks, Marin County's ordinance is a blunt requirement for money in exchange for a permit—an exaction unalloyed by any permissible alternatives. There are also other distinguishing features of the County's ordinance, however, that are relevant but ignored by the County's opposition.

To begin, neither of the other ordinances applies to simple lot-splits—only to housing *development*. The differing potential adverse public impact of those two classes of projects is significant because the consequence of a lot-split is de minimis and the County retains the ability to impose appropriate exaction fees when the lots are ultimately developed.

More importantly, the other ordinances leave no discretion concerning the imposition of an in-lieu fee in the hands of government officials, whereas the County's ordinance does. In both San Jose and West Hollywood, the decision of whether to pay in-lieu fees or to set aside developed units as affordable housing is placed entirely in the developer's hands. *See* San Jose Mun. Code §§ 5.08.500 ("Developers' compliance options"), 5.08.520 ("In lieu fee"); West Hollywood Mun. Code § 19.22.040. No government official in those cities can demand that an in-lieu be paid as a condition of a permit; it is up to a developer to choose that option as an alternative to the kinds of housing set-asides that *CBIA* and *616 Croft* have approved. In contrast, the Marin County ordinances leave any discretion that may be exercised in applying a fee with county officials. *See* Marin County Code § 22.22.060 ("The review authority may grant a waiver to the requirements of this Chapter if an alternative affordable housing proposal demonstrates a better means of serving the County in achieving its affordable housing goals than the requirements."). This

discretion allows Marin County officials to impose fees on an *ad hoc* basis. As noted in the Cherks' opening brief, officials here did exercise their discretion to reduce the fee charged to the Cherks. AR000301-02.

The County refers to *CBIA* for the point that the "validity of [a broad inclusionary housing ordinance] does not depend on a showing that the restrictions are reasonably related to the impact of a particular development." Opp. Br. at 7 (citing *CBIA*, 61 Cal. 4th at 474). But unlike *CBIA*, this case is not a validation action that raises a facial challenge to a broad inclusionary housing ordinance—it is an as-applied case contesting the application of one element of the County's ordinance to the Cherks. Where county officials have discretion to apply an ordinance, but do so in a manner that violates the MFA or unconstitutional conditions doctrine, that application is wrong even if the ordinance may be legitimate in other applications.

III. THE COUNTY'S FEE IS A MONETARY EXACTION SUBJECT TO THE MITIGATION FEE ACT AND THE UNCONSTITUTIONAL CONDITIONS DOCTRINE

The force of the government's opposition depends entirely on its belief that the Mitigation Fee Act does not apply to the fees charged to the Cherks, and that those fees are not exactions. These objections fail.

Gov't Code § 66020 of the MFA states that any "party may protest the imposition of *any fees*, dedications, reservations, or *other exactions* imposed on a development project." (Emphasis added.) The related Gov't Code § 66021 states that any "party on whom a *fee*, tax, assessment, dedication, reservation, or *other exaction* has been imposed, the payment . . . of which is required to obtain government approval of a development . . . may protest." (Emphasis added.)

In *Sterling Park L.P. v. City of Palo Alto*, 57 Cal. 4th 1193 (2013), which the government ignores, the Supreme Court discussed the meaning of those statutes. The question in *Sterling Park* was whether Palo Alto's demand that a developer pay money into a city fund as a condition of receiving building permits were fees or exactions subject to challenge under the Mitigation Fee Act. If they were (as in this case), the petitioner's action was timely; if not, the case was outside

///

the statute of limitations. The Court, therefore, ruled on what kinds of fees or other exactions were subject to the MFA.

It held that the MFA "governs conditions on development a local agency imposes that divest the developer of money or a possessory interest in property, but not restrictions on the manner in which a developer may use its property." *Id.* at 1207. Demands for money, it concluded, were fees or "other exactions" contemplated by the statute. The fee charged to the Cherks, therefore, fits squarely within the MFA's scope.

Further, *Sterling Park* specifically disavowed the argument that the County makes in this case, that fees are not subject to the MFA if they are not intended to mitigate an adverse public impact of the burdened development but are instead intended to raise money for unrelated broader purposes of the public welfare. Opp. Br. at 5.

"As its legislative history evinces," the Court wrote, "the [MFA] was passed by the Legislature in response to concerns among developers that local agencies were imposing development fees *for purposes unrelated to development projects*." *Id.* at 1205 (citing *Ehrlich v. City of Culver City*, 12 Cal. 4th at 854, 864 (1996) (emphasis added)). It does no good to argue that the MFA "does not apply to fees imposed for purposes entirely unrelated to the project," because

> [u]nder that interpretation, if a fee or exaction is not merely excessive but truly arbitrary, the developer would have to pay it with no recourse, or delay the entire development to challenge the fee or exaction. In other words, the more unreasonable the fee or exaction, the less recourse the developer would have. This perverse interpretation is not only contrary to the legislative intent, it is contrary to the broad language—"any fees, dedications, reservations, or other exactions"—the legislature used in defining [the MFA's] reach.

Sterling Park, 57 Cal. 4th at 1205.

Sterling Park is dispositive on the question of whether the MFA applies to the fees at issue in this case and, therefore, the government's opposition fails.

The United States Supreme Court takes a similarly expansive view of the term "exactions" in the context of the unconstitutional conditions doctrine. In *Koontz*, the Court noted that in-lieu "fees are utterly commonplace and they are functionally equivalent to other types of land use

exactions. For that reason, and those that follow . . . [we] hold that so-called 'monetary exactions' must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*." *Koontz*, 133 S. Ct. at 2599 (internal citations omitted).

The reasons "that follow" in *Koontz* describe the hallmarks of a monetary exaction subject to the unconstitutional conditions doctrine:

> In this case , . . . the monetary obligation burdened petitioner's ownership of a specific parcel of land. Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.

Id. at 2600.

Thus, what makes a permit fee an exaction is *not* the purpose to which it will be put, but the circumstances that trigger the landowner's obligation to pay the fee. Here, it is indisputable that the Cherks paid the "affordable housing fee" only because it was tied to their permit to change the use of their specific piece of property. That is the hallmark of a fee subject to both the MFA and the unconstitutional condition doctrine's nexus and rough proportionality requirements.

IV. ADMINISTRATIVE EXHAUSTION CONCERNS DO NOT PRECLUDE ADJUDICATION OF THE CHERKS' CLAIMS NOW

Because the Mitigation Fee Act applies to this case, the County was required to provide the Cherks with notice of their administrative-protest rights. Gov't Code § 66020(d)(1).[1] The County never provided the required notice, and therefore, as the County implicitly concedes (Opp. Br. at 7-8), the Cherks' time to protest the fee or file suit has not even begun to run let alone has it lapsed. *Branciforte Heights, LLC v. City of Santa Cruz*, 138 Cal. App. 4th 914, 925 (2006).

Even if the MFA claims were not present, however, and only the unconstitutional conditions claims were pursued, the Court would be correct in relieving the Cherks of normal

---

[1] The Cherks paid the fee under protest to preserve their appellate rights. Gov't Code § 66020(a), (b).

administrative exhaustion requirements pertaining to those claims because of the statewide importance of the issues herein. The County itself notes that more than 170 California municipalities have enacted inclusionary-zoning programs. Opp. Br. at 1. And according to the County, these municipalities can and do impose significant fees on landowners without first proving that the fees meet the *Nollan/Dolan* test. As explained above, the County's argument cannot be correct, but if it is allowed to control, many municipalities are engaging in "out-and-out . . . extortion" forbidden by the U.S. Supreme Court. *Nollan v. Cal. Coast Comm'n*, 483 U.S. 825, 837 (1987). Therefore, the resolution of the Cherks' claim has the potential to widely impact municipal practice and landowners' property rights across the state; there is no reason to delay the Court's decision.

This is particularly so here because "the validity of the challenged regulations is a straightforward legal issue that needs little in the way of factual development[,]" and it "presents a dispositive question within judicial, not administrative, competence[.]" *Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, 94 Cal. App. 4th 587, 615 (2001); *see id.* at 614-15 (ruling that administrative exhaustion not required when immediate decision would resolve an important public policy issue). No benefit will be gained by requiring the Cherks to once again muddle through the administrative process. *See, e.g., Hull v. Cason*, 114 Cal. App. 3d 344, 358 (1981) (holding that claim not barred by failure to exhaust administrative remedies when the matter had been already litigated for several years, and when its "prompt determination [was] . . . in the public interest" and would resolve an important matter of public concern). Prudential concerns about administrative exhaustion "should not prevent courts from resolving concrete disputes if the consequence of a deferred decision will be lingering uncertainty in the law, especially when there is widespread public interest in the answer to a particular legal question." *Pacific Legal Foundation v. Cal. Coastal Comm'n,* 33 Cal. 3d 158, 170 (1982) (citations omitted).

///

///

///

///

V. CONCLUSION

For the reasons discussed above, and those presented in Petitioners' opening brief, the Cherks respectfully request that the Court grant their Motion for Writ of Mandate, ordering the County to refund the $39,960 fee, with interest.

DATED: November 16, 2017.

Respectfully submitted,

LAWRENCE G. SALZMAN
Pacific Legal Foundation

By _____
LAWRENCE G. SALZMAN

Attorney for Plaintiffs and Petitioners

DECLARATION OF SERVICE

I, Barbara A. Siebert, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On November 16, 2017, a true copy of REPLY BRIEF was placed in an envelope addressed to:

BRIAN E. WASHINGTON
TARISHA K. BAL
DAVID L. ZALTSMAN
Office of the County Counsel
3501 Civic Center Drive, Room 275
San Rafael, CA 94903-4257
Counsel for Defendant and Respondent
County of Marin

which envelope, with postage thereon fully prepaid, was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

On November 16, 2017, a true copy of REPLY BRIEF was sent via electronic mail addressed to:

BRIAN E. WASHINTON
E-Mail: bwashington@marincounty.org
TARISHA K. BAL
E-Mail: tbal@marincounty.org
DAVID L. ZALTSMAN
E-Mail: dzaltsman@marincounty.org
Counsel for Defendant and Respondent
County of Marin

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 16th day of November, 2017, at Sacramento, California.

Barbara A. Siebert
BARBARA A. SIEBERT