IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CLAUDE LAMBERT, et al.,	)	**Supreme Court**
	)	**No. S065446**
Appellants,	)	
	)	**(Court of Appeal**
v.	)	**No. A076116)**
	)	
CITY AND COUNTY OF SAN FRANCISCO et al.,	)	**(San Francisco County Superior Court No.963368)**
	)	
	)	
Respondents.	)	
	)	

After a Decision by the Court of Appeal,
First Appellate District, Division One

(On Appeal from the Judgment of
the San Francisco Superior Court,
Honorable William Cahill, Presiding)

APPLICATION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

AND

BRIEF OF *AMICI CURIAE* WESTERN CENTER ON LAW AND POVERTY, INC., THE COUNCIL OF COMMUNITY HOUSING ORGANIZATIONS, AND THE SOUTHERN CALIFORNIA ASSOCIATION OF NON-PROFIT HOUSING

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APPLICATION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to Rule 14(b) of the California Rules of Court, the Western Center on Law and Policy, Inc., the Council of Community Housing Organizations, and the Southern California Association of Non-Profit Housing respectfully request leave to file the attached brief *amici curiae* in support of the position of Respondents City and County of San Francisco *et al*. in the above-titled action.

The Western Center on Law and Poverty, Inc. ("Western Center") is a non-profit organization specializing in litigation and other support services to California legal services programs representing low income and

underprivileged families in the areas of housing, welfare and health. Founded in 1967, Western Center coordinates a statewide housing task force and has participated in the past as *amicus curiae* in significant litigation involving California's low-income population.

The Council of Community Housing Organizations (CCHO) is a coalition of community and church-based non-profit affordable housing development corporations and low-income tenant service organizations in the City and County of San Francisco. Created in 1978, CCHO is composed of approximately 20 member organizations. Over the last several decades, working committees of CCHO, made up of staff of CCHO member organizations, have commented frequently on regulations and policies of the City and County of San Francisco affecting the supply of housing for families and individuals with low incomes.

The Southern California Association of Non-Profit Housing (SCANHP) is a membership organization dedicated to the production, preservation, and management of permanently affordable housing for low-income people. SCANHP represents over 500 organizations interested in and concerned about housing for low-income people in the greater Los Angeles area. SCANHP conducts policy research, provides technical assistance and training to low-income housing providers, and conducts public education on housing and development issues.

All of the *amici* have substantial knowledge and expertise in low-income housing issues generally, and are knowledgeable about the housing preservation efforts of the City and County of San Francisco in particular. This knowledge and expertise should be of assistance to the Court is resolving this case.

Amici have an interest in this case because they strongly support reasonable government regulations designed to preserve the supply of low-income housing. More specifically, *amici* have an interest in defending the authority of local governments in California to regulate conversion of residential properties when it threatens the community with the loss of low-income housing, particularly the loss of single room occupancy (SRO) housing. SRO housing is often the housing of last resort for individuals living on General Relief subsidies or re-entering the workforce after being homeless. *Amici* believe that local governments have the right and the responsibility to impose reasonable mitigation fees when necessary to avoid the loss of low-income housing as a result of building demolitions or use conversions.

Amici submit the attached proposed brief focusing on two arguments advanced by the City and County of San Francisco, each of which provides a straightforward basis for resolving this case that is both fair and consistent with the precedents of this Court and the U.S. Supreme Court. *Amici*

respectfully submit that the attached brief will provide valuable assistance to the Court in resolving this case.

Respectfully submitted,

Dated:
May 1, 1998

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INTRODUCTION AND SUMMARY OF ARGUMENT

The Western Center on Law and Poverty, Inc., the Council of Community Housing Organizations, and the Southern California Association of Non-Profit Housing submit this brief amici curiae in support of the City and County of San Francisco *et al.* ("City") and urge the Court to affirm the decision of the Court of Appeal.[1] *Amici* submit this brief to address in greater detail two arguments advanced by the City, each of which provides a straightforward basis for resolving this case that is both fair and consistent with the decisions of this Court and the U. S. Supreme Court.

First, the Court of Appeal's decision should be affirmed because the asserted condition at issue in this case is not subject to the heightened standard of review announced in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825; *Dolan v. City of Tigard* (1994) 512 U.S. 374; and *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854. *Nollan*, *Dolan* and *Ehrlich* established a heightened standard of review for regulatory takings challenges to conditions arrived at in *ad hoc*, adjudicative proceedings; this heightened standard of review does not apply to conditions based on general legislative

[1] Simultaneously with the filing of this proposed brief, *amici* are filing with the Court an application for leave to file brief *amicus curiae*.

requirements. The alleged $600,000 condition appellants challenge in this case is the product of general legislation applicable to residential hotel properties throughout the City. Because the heightened standard of review established in *Nollan*, *Dolan*, and *Ehrlich* does not apply to this type of legislative condition, the Court of Appeal properly rejected this takings claim.

The basic premise of appellants' argument is that, if the City had actually required appellants to deposit $600,000 as a condition of converting their residential hotel units, that condition would have been an adjudicative condition subject to heightened scrutiny under *Nollan*, *Dolan*, and *Ehrlich*. However, appellants' premise is incorrect because the condition at issue in this case is the product of general legislation. If this condition would not be subject to heightened scrutiny if the City had imposed it, the City's mere consideration of this condition obviously cannot trigger heightened scrutiny either.

Second, the Court should affirm the Court of Appeal's decision because applying heightened scrutiny to mere consideration of potential conditions which are never imposed would represent an unnecessary and harmful departure from existing precedent. The United States Supreme Court in *Nollan* and *Dolan* established a heightened standard of review for a special, narrow category of cases -- those involving conditions established in adjudicative proceedings which result in actual physical intrusions on private property. The Court in *Ehrlich* adopted a narrow

extension of those rulings -- to cases involving adjudicative conditions requiring the payment of money. Appellants now ask the Court to further extend the principle announced in *Nollan* and *Dolan* to cases in which a condition was considered but never actually imposed. This modification of existing law is necessary, appellants contend, to preserve the heightened standard of review established by *Nollan*, *Dolan*, and *Ehrlich*. Absent a rule applying this standard when a municipality considers a condition that would be subject to heightened scrutiny, they contend, a municipal defendant could evade heightened scrutiny either by granting the developer's application with the understanding that the developer waive the right to challenge any conditions attached to the permit, or by simply denying the application outright. Thus, here appellants contend that because the City considered imposing a $600,000 condition, the Court should treat this case as essentially identical to a case where a municipality actually imposed such a condition.

This proposed departure from existing precedent is unwarranted because any owner who wishes to challenge a condition proposed by a municipality already has a clear and effective right to pursue such a challenge under California statutory and common law. In this case, appellants voluntarily aborted the process whereby the condition could have been imposed and then reviewed. Thus, there is simply no logical basis for appellants' proposed departure from existing law, and the

circumstances of this case provide no support for the proposal. Furthermore, appellants' proposal is unworkable because it would require courts to conduct speculative reviews of hypothetical conditions which do not actually exist, and it would subject local governments to unreasonably intrusive review of local land use decisions.

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The *amici* adopt the Statement of the Case and Procedural History of the City and County of San Francisco, *et al.*

ARGUMENT

I. THE $600,000 PAYMENT CONDITION THE CITY CONSIDERED IN THIS CASE IS NOT SUBJECT TO HEIGHTENED SCRUTINY BECAUSE IT IS BASED ON A GENERAL LEGISLATIVE FORMULA AND LEGISLATIVE CONDITIONS ARE NOT SUBJECT TO HEIGHTENED SCRUTINY.

Contrary to appellants' contention, *Nollan*, *Dolan*, and *Ehrlich* do not supply the appropriate standard of review in this case. The heightened standard of review announced in those decisions applies to conditions established in *ad hoc*, adjudicative proceedings, and it does not apply to conditions established through general legislation. The asserted condition at issue in this case, that appellants deposit $600,000 in the Residential Hotel Preservation Fund to help pay for replacement housing, is a legislative condition applicable to every residential hotel

property in the City, and therefore heightened scrutiny does not apply.

Had the City granted appellants' application to convert their residential hotel units, and had the City imposed the $600,000 housing replacement fee mandated by the Hotel Conversion Ordinance, *Nollan/Dolan/Ehrlich* would not supply the standard for reviewing such a *legislatively* determined condition. It logically follows that the City's mere consideration of such a legislative condition cannot be subject to heightened scrutiny. If a "successful" effort to impose a particular condition is not subject to heightened scrutiny, then an "unsuccessful" effort to impose the same condition should not trigger heightened scrutiny either.

A. Heightened Scrutiny Does Not Apply to Requirements Established by General Legislation.

Nollan and *Dolan* established a special rule for a narrow category of takings cases involving challenges to specific types of regulatory conditions. Drawing a distinction directly relevant to the resolution of this case, the U.S. Supreme Court contrasted a taking challenge to "an adjudicative decision to condition [an owner's] application for" a land use permit with a challenge to a condition based on an "essentially legislative determination." (*Dolan*, *supra*, 512 U.S. at p. 385.) *Nollan*/*Dolan* established a heightened standard of review for conditions established in "adjudicative decisions," emphasizing that the same relatively strict standard does not apply to conditions based on

"legislative determinations." (*Id.* at p. 385.)

This Court in *Ehrlich,* though sharply divided on a variety of issues, affirmed the critical importance of the adjudicative/legislative distinction by ruling *unanimously* that the "art fee" condition in that case was legislative in nature and therefore not subject to heightened scrutiny. (*See Ehrlich*, *supra*, 12 Cal.4th at p. 876 (plurality opinion) [heightened scrutiny inappropriate for "legislatively formulated development assessments imposed on a broad class of property owners"]; *id.* at p. 901 (Mosk., J., concurring) ["when ... the local government exacts a type of development fee which is imposed on no one else, *and which is based on no preexisting legislative guidelines*, a more searching constitutional inquiry into the basis of the fee is required."] (emphasis added); *id.* at p. 907 (Kennard, J., concurring and dissenting) ["The art in public places fee was imposed under a municipal ordinance of general applicability."]; *id.* at p. 912 (Werdegar, J., concurring and dissenting).)[2]

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[2] While the Court in Ehrlich reaffirmed the legislative/adjudicative distinction announced in Nollan/Dolan, the Court extended Nollan/Dolan, which involved conditions effecting physical invasions of private property, to monetary exactions. It is noteworthy that the Court's decision on this point conflicts with the view of most other courts that heightened scrutiny under Nollan/Dolan must be confined to the physical invasion context. (See, e.g., Commercial Builders of Northern California v. City of Sacramento (9th Cir. 1991) 941 F.2d 872, 874 [declining to apply heightened scrutiny to development fee to support low income housing]; McCarthy v. City of Leawood (Kan. 1995) 894 P.2d 836 [holding Dolan inapplicable to fee exactions, and noting the lack of "authority for the

The distinction between adjudicative and legislative conditions is based on sound and logical policy considerations. The distinction reflects the particular concern that government agencies could improperly use their regulatory authority as unfair leverage in setting conditions on individual permits (*Dolan*, 512 at p. 385-86; *Nollan*, 483 U.S. at p. 837) -- a risk that does not exist when a condition is based on general legislation. This distinction also reflects the fact that a condition established by an administrative agency is entitled to less judicial deference than a condition established through general legislation adopted by the people's elected representatives.

Following the Court's decision in *Ehrlich*, the legislative/ adjudicative distinction has been reaffirmed repeatedly by the California courts. (*See, e.g., Kavanau v. Santa Monica Rent Control Board* (1997) 16 Cal.4th 761, 787 n.1 (Mosk, J., concurring) ["We have rejected [in *Ehrlich*] the contention that *Nollan* and the related case of *Dolan* ... represent a new standard of scrutiny of government regulation other than those regulations that require either a physical dedication of property, or a development fee levied on an 'individual and discretionary basis.'"] (internal citations omitted); *Loyola Marymount University v. Los Angeles Unified School District* (1996) 45 Cal. App. 4th 1256, 1271

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critical leap which must be made from a fee to a taking of property"]; cf. United States v. Perry (1989) 493 U.S. 52, 62 [distinguishing monetary user fees from physical occupations).)

[following *Ehrlich*'s distinction between *ad hoc* decisions applicable to a single landowner and "legislatively formulated development assessments imposed on a broad class of property owners"].)

The overwhelming majority of courts in other States across the country also have stressed the distinction between conditions established by legislation and those established in adjudicative proceedings. (*See, e.g., Home Builders Assoc. of Central Arizona v. City of Scottsdale* (Ariz. 1997) 930 P.2d 993, 1000 (en banc) [rejecting heightened scrutiny of "a generally applicable legislative decision" by the City of Scottsdale to impose a fee on new development to support construction of water transportation facilities]; *Arcadia Development Corp. v. City of Bloomington* (Minn.Ct.App. 1996) 552 N.W.2d 281, 286 [rejecting heightened scrutiny under *Dolan* of "a citywide legislative land-use regulation"]; *Southeast Cass Water Resource District v. Burlington Northern Railroad Company* (N.D. 1995) 527 N.W.2d 884, 896 [rejecting heightened scrutiny of "an express and general legislated duty under a constitutional reservation of police power over a corporation"]; *Waters Landing Limited Partnership v. Montgomery County* (Md.1994) 650 A.2d 712, 724 [noting that heightened scrutiny under *Dolan* not applicable where city imposed a development impact tax legislatively]*; Parking Assn. of Georgia, Inc. v. City of Atlanta* (Ga. 1994) 450 S.E.2d 200, 203 n.3 [noting that reliance on *Dolan* is misplaced where the City of Atlanta "made a legislative determination with regard to many

landowners"].)[3]

Thus, it is clear that *Nollan*, *Dolan*, and *Ehrlich* do not apply to conditions established by general legislation. Indeed, appellants do not appear to contend otherwise. The crux of their case, instead, is that the asserted condition in this case is allegedly adjudicative in nature. It is not.

B. The Housing Replacement Fee in this Case is a Legislatively Mandated Condition.

The asserted condition at issue in this case -- a $600,000 housing replacement fee under the City's Residential Hotel Unit Conversion and Demolition Ordinance (HCO) -- is plainly legislative in character. Therefore, under the precedents of this Court and the U.S. Supreme Court, heightened scrutiny does not apply in this case and the decision of the Court of Appeal must be affirmed.[4]

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[3] In Parking Assn. of Georgia, Justices Thomas and O'Connor filed a dissenting opinion from the denial of certiorari. 515 U.S. 1116. They contended that the issue whether a municipality effected a taking should not turn "on the type of governmental entity," i.e. legislative or adjudicative, which adopted the measure being challenged. Id. at p.1116. Justices Thomas and O'Connor failed to persuade other Justices to join in voting to grant certiorari, apparently because the majority recognized the important practical and policy differences between adjudicative and legislative conditions. See pp.7-8, supra). It is obvious that a clear majority of the U.S. Supreme Court is firmly committed to retaining the legislative/adjudicative distinction established in Dolan and Nollan.

[4] Appellants apparently concede that, if the Court rejects the contention that heightened scrutiny applies in this case, the decision of the

The City enacted the HCO in 1979 to combat the loss of low-income housing from conversion of residential hotel units to tourist use. The HCO provides that applicants for a permit to convert residential hotel units to tourist use "shall provide one-for-one replacement" of the units lost through conversion. (S.F. Admin. Code §41.13(a).) During the relevant period, an applicant could comply with this mandate either by physically replacing the converted units (§41.13(a)(1)-(3)), or by paying 40% of the cost of building comparable replacement units plus site acquisition costs into the Residential Hotel Preservation Fund. (§41.13(a)(4).)

The Department of Building Inspection determined that the in-lieu replacement fee in this case would be $600,000, and that ruling was affirmed on appeal to the Board of Permit Appeals.[5] This determination is clearly based on general legislation. It reflects the HCO's "one-to-one" housing replacement mandate, and is based on the 40% of housing

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Court of Appeal should be affirmed.

[5]Appellants exaggerate the role of the City Planning Commission in this case, apparently in an attempt to create the impression that the City was exercising unbridled discretion in setting the replacement fee. This case arises from the decision of the Board of Permit Appeals affirming the Department of Building Inspection's implementation of the nondiscretionary terms of the HCO. (See Appellants' Appendix, Vol. II at 342.) No administrative appeal from the Planning Commission decision was ever perfected. Further, to the extent the Planning Commission mentioned the HCO, it simply referenced the fact that the formula in the HCO mandated a housing replacement fee of $600,000. (See id., Vol. I at 100.)

cost plus land costs formula included in the HCO. Under *Nollan*, *Dolan*, and *Ehrlich*, this condition based on general legislation is not subject to heightened scrutiny.

This conclusion is not undermined by the fact that one of the figures used in the HCO formula -- the cost of housing -- is not determined by the legislature. Had the HCO simply mandated a flat fee for every owner converting hotel rooms to tourist use, that monetary condition would indisputably have been a legislative measure not subject to heightened scrutiny. (*See, e.g., Parking Ass'n of Georgia, Inv v. City of Atlanta, supra.*) Given that some residential units may be less expensive to replace than others, however, it was more equitable for the City to provide for a variable replacement fee based upon the actual cost of replacing the units being lost to conversion. The variability of the results yielded by the HCO formula depending upon different housing replacement costs in each particular case does not alter the fundamentally legislative character of this fee.

In accordance with the ordinance, the Department of Building Inspection directed the Department of Real Estate to seek two independent appraisals to determine the value of the residential housing which would need to be replaced under the ordinance. Given that the two appraisals of appellants' property "used slightly different methods to reach their value conclusions," the figures submitted to the Department of Real Estate "indicated a range of value, $488,584 ... and

$612,887." (Appellants' Appendix, Vol. I at 090-91.) The Department of Real Estate determined that "the most appropriate estimate of the 40% replacement cost of existing residential rooms at the Cornell Hotel and the value of the required land on which to construct them is $600,000." (*Id.* at 091.) Appellants have not challenged the accuracy of the replacement fee arrived at by the Department based on the data before it and the HCO formula. Thus, contrary to appellants' characterization, the City set the proposed housing replacement fee in this case by narrowly following the HCO formula, not through a free-wheeling adjudicative process.

The legislative housing replacement fee in this case is indistinguishable from the legislative art fee the Court addressed in *Ehrlich*. In *Ehrlich*, a municipal art ordinance provided that:

> new residential development projects of more than four units, as well as all commercial, industrial, and public building projects with a building valuation exceeding $500,000, are required to provide "art work" (as defined by the ordinance) for the project *in an amount equal to 1 percent of the total building valuation*, or to pay an equal amount in cash to the city art fund. *The city valued plaintiff's project at $3.2 million.*

(*Ehrlich*, *supra,* 12 Cal.4th at p.862. (emphasis added)). As discussed, the Court unanimously held that the legislative "art in public places fee is not a development exaction of the kind subject to the *Nollan-Dolan* takings analysis." (*Id.* at p.876; *see also id*. at pp.901, 907, 912). Like the HCO replacement fee, the art fee in *Ehrlich* was based on a

legislative formula (1% of property value), which required a minimal amount of arithmetical calculation to fix the exact amount of money owed. Also like the HCO replacement fee, the art fee in *Ehrlich* reflected the fact that the legislature, not an administrative agency, made the fundamental policy choice about the nature and magnitude of the condition. Accordingly, like the art fee in *Ehrlich*, the HCO replacement housing fee is properly viewed as a type of legislative condition.

Appellants attempt to distinguish this Court's holding in *Ehrlich* by pointing to the fact that the Board of Permit Appeals asked the appellants, in response to the appellants' objection to the housing replacement valuation made by the City, "to brief whether the amount of the one-for-one replacement fee was appropriate and to submit evidence on the appropriate fee." (Appellants' Appendix at 34). However, the City's willingness to consider an owner's evidence concerning the value of the housing proposed for conversion does not convert the City's application of the non-discretionary HCO formula into an adjudicative "invitation to haggle over the amount of the" fee itself. (Appellants' Brief at 8.)[6] The Board of Permit Appeals was

[6] In charging that the Board of Permit Appeals issued an "invitation to haggle," Appellants' Brief at 8 n.27, appellants argue that "[o]nly when it became clear that the Lamberts would not budge from their $100,000 counteroffer did the City stop haggling over the price of the permits and deny the Lamberts' application altogether." (*Id.* at 8.) Appellants misstate the facts. The Board of Permit Appeals' review of the Department of Real

merely trying to apply the HCO legislative formula as fairly and accurately as possible. The Court in *Ehrlich* concluded that the need for an administrative agency to plug one figure into the art fee formula did not affect the legislative character of that condition. It is anomalous to suggest that this conclusion should change simply because the regulated party was permitted to provide information to assist the agency in determining that figure.

Indeed, if the City had failed to offer appellants an opportunity to submit evidence relating to the one figure that had to be inserted in the HCO formula, the City almost certainly would have denied appellants the due process to which they were entitled. (*Compare Universal Consolidated Oil Co. v. Byram* (1944) 25 Cal.2d 353, 360-63 [recognizing taxpayer's due process right to challenge property valuations to which legislative tax formula is applied]; *People v. Skinner* (1941) 18 Cal.2d 349, 360 [due process requires "an opportunity for mistakes to be rectified" in tax assessments].) The City's respect for appellants' due process rights in this case does not alter the legislative

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Estate's application of the HCO occurred in March 1995, a full year *after* the Planning Commission denied the conditional use permit. (*Compare* Appellants' Appendix, Vol. II, at 345 *with id*. At 343.) The Board of Permit Appeals proceeding concerned only the 7 units that were ultimately permitted to convert. The sole issue before the Board of Permit Appeals was the accuracy of the Department of Real Estate's valuation under the HCO formula, based on the original conversion application, that 40% of the replacement cost for appellants' units amounted to $600,000.

character of the HCO formula.[7]

II. THE PROPOSED EXPANSION OF *NOLLAN*, *DOLAN* AND *EHRLICH* IS UNNECESSARY AND WOULD REQUIRE THE COURTS TO ENGAGE IN UNWORKABLE AND INTRUSIVE REVIEW OF LOCAL LAND USE DECISIONS.

The Court also should affirm the decision of the Court of Appeal for a second, independent reason: appellants' proposal to extend heightened scrutiny under *Nollan*, *Dolan*, and *Ehrlich* to the situation where no condition was actually imposed is completely unecessary. Under California Government Code §§66020 *et seq*. and California common law, a land use applicant can effectively challenge a permit condition proposed by a municipality to which the applicant objects. Appellants' novel "unsuccessful exactions" theory is simply unnecessary to achieve the purpose it ostensibly is designed to serve.

Furthermore, appellants' proposal would create an unworkable judicial review process. As discussed, *Nollan*, *Dolan*, and *Ehrlich* establish a relatively stringent standard of review for a narrow category of cases involving permit conditions requiring applicants to pay money

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[7] Justice Strankman, in dissent, argued that the Planning Commission was somehow engaged in an administrative negotiation over the amount of the housing replacement fee. But the only specific fee at issue in this case is the $600,000 housing replacement fee established by the Department of Real Estate under the HCO. There is no suggestion in the HCO, the Planning Code, or the record below that the Planning Commission had authority to "bargain away" the fee mandated by the HCO.

or to authorize a physical intrusion on their property as a condition of the permit. Appellants propose to extend this heightened standard of review to conditions that a municipality merely considered but never actually adopted. This step would require courts to conduct speculative reviews of potential agency decisions that an agency never actually makes, and in practice is completely unworkable. Furthermore, this proposal would entangle the courts in inappropriately intrusive review of local regulatory issues.

A. Appellants' Proposal is Unnecessary.

Appellants' proposal that the Court expand upon *Nollan*, *Dolan*, and *Ehrlich* is unnecessary. Appellants argue that the standard of review established by these decisions for certain types of regulatory conditions should be extended to cases in which one or more possible conditions were considered, yet no condition was actually imposed. Absent a rule applying *Nollan/Dolan* heightened scrutiny to "unsuccessful" attempts to impose a particular condition, appellants contend, a municipality could evade such scrutiny either by granting the developer's application on the condition that the developer waive the right to challenge any conditions attached to the permit, or by denying the application outright.

Appellants' argument ignores the options actually available to a developer or other property owner seeking to challenge a condition attached to a development permit. Under Gov't Code §§66020 *et seq*. a

property owner who objects to a condition proposed by a municipality, and who wishes to mount a takings challenge to the condition, can pursue such a challenge in a straightforward fashion without sacrificing his or her rights. The owner needs only to complete the administrative process, obtain a definitive statement of the condition proposed by the municipality, file a written protest with the municipality of the condition, and then (if necessary) file suit in court to challenge the condition. Gov't Code §66020 guarantees an applicant the right to object to a condition without jeopardizing the applicant's right to the permit itself; the section states that the filing of a protest "shall not be the basis for a local agency to withhold approval of any map, plan, permit, zone change, license, or other form of permission, or concurrence, whether discretionary, ministerial or otherwise, incident to, or necessary for, the development project." (Gov't Code §66020(b).)

While Gov't Code §66020 apparently does not cover all local land use decision-making, the common law in California is to the same effect. So long as the owner does not seek to commence development or other activity under the permit while simultaneously mounting a legal challenge to conditions attached to the permit (*see County of Imperial v. McDougal* (1977) 19 Cal.3d 505), *appeal dismissed*, (1977) 434 U.S. 944), an owner is entitled to challenge a condition while preserving his rights under the permit. While an applicant is barred from acting on the granted permit while appealing the attached conditions, the common law

preserves both the applicant's rights under the permit and the applicant's right to challenge any condition to which he objects.

Accordingly, appellants' proposed "unsuccessful exactions" theory is simply unnecessary to guarantee applicants the opportunity to challenge land use conditions to which they object. In this case, if appellants believed that they had a legitimate objection to the $600,000 housing replacement fee under the takings clause they should have proceeded with the application process and obtained a conversion permit with the housing replacement fee attached as a condition. Instead, appellants simply abandoned the process. Because appellants had a full and effective opportunity to directly challenge the condition to which they now object, it is is unecessary to adopt appellants' "unsuccessful exactions" theory to provide them, and similarly situated future applicants, the opportunity to challenge regulatory conditions merely considered or proposed by a municipality.

B. Appellants' Proposal is Unworkable.

Furthermore, the Court should reject appellants' novel theory because it is unworkable. The very first sentence of appellants' opening brief submitted to this Court confirms the unworkability of this proposal: "When a City *attempts* to exact a cash payment as a condition for granting a discretionary land use permit, is heightened judicial scrutiny of *the permit condition* triggered under" *Nollan*, *Dolan*, and

Ehrlich, "*regardless of whether the permit is ultimately granted or denied*?" (Appelants' Brief on the Merits, at p.1) [emphasis added.] If a city "attempts" to establish a condition, but does not proceed to actually establish a condition, what permit condition is the court supposed to review in order to determine whether the standards of *Nollan*, *Dolan*, and *Ehrlich* have been met? If the city considered various different potential conditions, is a court supposed to assess each condition considered, or is the court supposed to develop some rule for divining the condition the city most likely would have imposed if it had proceeded to impose any condition at all? These speculative, nonsensical inquiries mandated by appellants' proposed "unsuccessful exactions" theory make appellants' proposal completely unworkable.

Significantly, the impracticality of appellants' proposal is not fully revealed by this case because this case is atypical. Here, the challenge of identifying the "unsuccessful" condition -- the $600,000 mandated under the HCO formula -- is obviously modest because the condition was legislatively defined. In the more typical case, involving a challenge to a municipality's consideration of a potential condition in an adjudicative proceeding, it would be far more uncertain what, if any, condition, or which of several potential conditions, the municipality might actually have considered. This type of speculative review -- which would be the norm, not the exception, under appellants' proposal -- would create a completely unmanageable judicial task.

Rejection of appellants' proposal is supported by the long line of decisions counseling against judicial resolution of takings claims which are not "ripe" for resolution because of the lack of a final, definitive administrative decision. As the U.S. Supreme Court has repeatedly emphasized in reviewing regulatory takings actions, "a court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." (*MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 348; see also *Williamson County Regional Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 186; *Hodel v. Virginia Surface Mining & Reclamation Ass'n* (1981) 452 U.S. 264, 293-97 (1981). Just as courts decline to review takings claims if the posture of the case would require the courts to speculate as to the actual impact of a regulation on the claimant, so too courts should decline to speculate about what type of condition a municipality might or might not have attempted to impose and whether that potential condition (or conditions) might or might not have satisfied the standard of heightened scrutiny.

C. Appellants' Proposal Would Invite Judicial Intrusion into Local Government Decision-Making

Finally, adoption of appellants' proposal would lead to intrusive judicial entanglement in local land use and development decisions. As discussed, *Nollan*, *Dolan* and *Ehrlich* establish a uniquely stringent standard of review for a narrow category of cases. In establishing this

standard, the U.S. Supreme Court and this Court recognized that heightened scrutiny does not appropriately apply to ordinary regulatory decisions which do not involve an actual exercise of conditioning authority, which do not involve an actual physical invasion or a monetary exaction, or which do not arise from an adjudicative decision-making process. Appellants in this case seek to expand dramatically the category of cases to which this specialized standard of review would apply. If this proposal were adopted, the result would be burdensome -- and inappropriate -- judicial entanglement in ordinary land use and development decisions properly committed, subject to ordinary constitutional restraints, to elected local officials and their appointees. Appellants' position represents an invitation to judicial activism which the Court should reject.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision of the Court of Appeal.

Respectfully submitted,

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