

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

BUILDING INDUSTRY ASSOCIATION OF
CENTRAL CALIFORNIA et al.,

Plaintiffs and Appellants,

v.

CITY OF PATTERSON,

Defendant and Respondent.

F054785

(Super. Ct. No. 610611)

OPINION

APPEAL from a judgment of the Superior Court of Stanislaus County. David G. Vander Wall, Judge.

Sheppard, Mullin, Richter & Hampton, David P. Lanferman and Margaret J. Pak for Plaintiffs and Appellants.

Law Office of George G. Logan and George G. Logan for Defendant and Respondent.

Morrison Homes, Inc. (Developer) obtained a development agreement and tentative subdivision maps for the construction of two residential subdivisions in Patterson, California. At the time those documents were approved, the City of Patterson (City)¹ allowed developers to pay a fee of \$734 per house in lieu of building affordable housing. About three years later, City increased this fee to \$20,946 per house and sought to apply the increased fee to Developer’s two residential projects among others.

Developer sued City claiming that the increased fee violated (1) its vested property rights, (2) its contractual rights under the development agreement, (3) various statutory provisions, and (4) constitutional provisions requiring voter approval of special taxes. The trial court found that the increased in-lieu fee was permitted under section 4.5(d)(ii) of the development agreement and the amount of the increase was reasonably justified. The court entered judgment accordingly, and Developer appealed.²

We will conclude that the meaning of the contractual term “reasonably justified” presents a question of law and that, under an objective test, the term is meant to incorporate the legal standards generally applied to such fees. Those legal standards require that the amount of a development fee be limited to the cost of that portion of a public program attributable to the development. City has failed to show that the increase in its in-lieu fee satisfies this standard and, therefore, has failed to show that the increase was “reasonably justified” as required by the development agreement.

The judgment is reversed and the matter remanded for further proceedings.

¹For purposes of this opinion, the term “City” refers to the governmental entity and the term “Patterson” refers to the geographical area governed by that entity.

²Developer is joined in the appeal by the Building Industry of Central California, a California nonprofit corporation with members that own property within Patterson and are affected by the in-lieu fee.

FACTS

Development Project

Developer owns two residential subdivisions, known as Magnolia and Bella Flora and consisting of 214 single family residential lots. The subdivisions are part of a larger development known as Patterson Gardens, which contains 305.3 acres that were divided into seven different areas or phases. Plans for Patterson Gardens included five areas of low density residential housing that covered 228.5 acres and contained a total of 985 dwelling units.

City conducted environmental and land use review in connection with its approval of the proposed development of Patterson Gardens. Also, pursuant to Government Code section 65864 et seq., City entered into a development agreement with Developer's predecessor-in-interest, dated January 21, 2003 (Development Agreement). That agreement provides for the development of Patterson Gardens and establishes certain development rights in that project.

The City Council approved the Development Agreement in January 2003, and that approval became ordinance No. 648.

Section 5.1 of the Development Agreement states that, except as the agreement provides otherwise, the developer shall pay only those fees in effect prior to the effective date of the Development Agreement and specifically listed in exhibits D-1 (residential development) and D-2 (retail/office development). Those exhibits list certain capital facility fees, connection fees, and use fees. Exhibit D-1 lists over 20 fees, including an affordable housing in-lieu fee at \$734 per unit. Exhibit D-1 also states that the affordable housing in-lieu fee is referenced in section 4.5 of the Development Agreement.

Section 4.5 of the Development Agreement addresses how the parties will satisfy City's affordable housing objectives. The developer has four alternatives: (1) build affordable housing units; (2) develop senior housing within the project; (3) obtain a sufficient number of affordable residential unit credits from other residential

developments within City; or (4) pay an in-lieu fee at the time the building permit is issued for a nonaffordable housing unit.

Section 4.5(d)(ii) of the Development Agreement, which is central to the contractual issues, provides in full:

“Developer shall pay an in-lieu fee in an as-yet undetermined amount per EDU [equivalent dwelling unit] for moderate-income housing and an as-yet undetermined amount per EDU for low and/or very low-income housing, but in no event less than the current fee of \$734.00 per EDU. Developer acknowledges that the City is currently preparing an updated analysis of its Affordable Housing fee and hereby agrees to be bound by the revised fee schedule, including indexing as provided by ordinance at the time of adoption of the fee, providing the same is reasonably justified. Said fee shall be paid at the time a building permit is issued for each Non-Affordable Unit.”

The City Council also adopted resolution No. 2003-05 in January 2003. The resolution approved “the combined preliminary/final development plan and vesting tentative subdivision map for the Patterson Gardens project ... subject to the conditions set forth in Exhibit E hereto.” Condition No. 1 provided: “Development of Patterson Gardens shall be in accordance with the approved Final Development Plan, as modified by these conditions and as may be modified by a development agreement between the City and developer.” Condition No. 1 also stated that “the terms of the development agreement will control” in the event of a conflict with the conditions.

In-Lieu Fee

City first adopted an “affordable housing in-lieu fee” in 1995. The fee originally was set at \$319 per new single family home, payable as a condition to the issuance of a building permit for such construction.

In May 2001, City received a study prepared by its consulting firm, Crawford Multari & Clark Associates, which addressed certain fees and recommended raising the affordable housing in-lieu fee. That study reviewed four different approaches to calculating the affordable housing in-lieu fee. One approach, the “leverage” analysis, considered the cost of providing an affordable single family house and assumed federal

or state funding would require the local government to provide only 9 percent of the total amount needed. It produced a fee of \$734 per unit.

In July 2001, the City Council adopted resolution No. 2001-53, which increased the affordable housing in-lieu fee to \$734 per new single family home.

In November 2005, the City Council adopted resolution No. 2005-114, which adjusted the fees allowed under certain development agreements, including the agreement for Patterson Gardens. The resolution stated that the fees assessed under the development agreements could be adjusted periodically to reflect increases in the current construction cost index.³ The resolution also stated that the index had experienced larger than normal increases and these increases warranted an adjustment to the fees allowed under the development agreements. The resolution adjusted certain fees, but not the affordable housing in-lieu fee.

A declaration of David Moran⁴ states that, by 2003, City's strategies for supplying affordable housing were falling short. He further states that in 2003 City investigated ways to improve the supply of affordable housing, including revisions to the development impact fee. An outcome of the investigation was a "Development Impact Fee Justification Study 2005/06 Update" prepared for City by Crawford Multari & Clark Associates (Fee Justification Study). Moran is listed as one of the authors of this study.

The Fee Justification Study recommended increasing the affordable housing in-lieu fee up to \$20,946 per market rate unit. This recommendation did not rely on the prior assumption (part of the "leverage" approach to calculating the fee) that the local fee could be used as leverage to obtain federal grants and loans. Instead, the

³Section 5.2 of the Development Agreement gives City the right to increase the fees set forth in exhibits D-1 and D-2 but prohibits any increase in excess of the increase in a construction cost index.

⁴Moran is a senior associate with Crawford Multari & Clark Associates, a planning and consulting firm. Moran was assigned as the principal planning consultant for City before 2000. His June 2007 declaration states that he is very familiar with the planning activities of City, including the calculation, imposition, and collection of development impact fees.

recommendation was based on bridging the so-called “affordability gap” between the cost of a new market rate unit⁵ and the cost of units affordable to very low, low, and moderate income households. The affordability gap analysis compared the cost of units to an estimate of what the three different income levels could afford. The difference was an estimate of the subsidy someone of that income level would need to be able to obtain housing. The analysis estimated a subsidy of \$55,280 was needed for each unit of moderate income housing, a subsidy of \$119,280 was needed for each unit of low income housing, and a subsidy of \$167,280 was needed for each unit of very low income housing.

The next step in the calculation involved multiplying the amount of the subsidy for each income level by the number of units needed for that income category. When the three products of this multiplication were added together, the sum was the total amount of the subsidy needed for affordable housing. The Fee Justification Study identified the number of units needed for each income level by referring to Addendum No. 1 to the 2001-2002 Regional Housing Needs Assessment for Stanislaus County prepared by the Stanislaus Council of Governments.⁶ That document allocated 642 units of affordable housing to Patterson, consisting of 235 units of very low income, 182 units of low income, and 225 units of moderate income housing.⁷

The Fee Justification Study treated the allocation as establishing City’s need for affordable housing at 642 units. The prior approach had defined the need for affordable housing by assuming that 5 percent of all new dwellings in a project should be affordable to low or very low income households and that another 5 percent should be affordable to moderate income households.

⁵The median price of a market rate single family dwelling in Patterson was \$157,000 in 2001 and \$247,280 in 2004.

⁶Patterson is located within Stanislaus County.

⁷The Fee Justification Study described the 642-unit figure as City’s “Regional Housing Needs Assessment target.”

The estimates of the subsidy required per unit of affordable housing multiplied by the number of units needed for each income level produced a total subsidy of \$73.5 million. The study spread this total subsidy over the 3,507 unentitled units in Patterson as of January 2005.⁸ The result was the per unit fee of \$20,946.

In March 2006, the City Council relied on the Fee Justification Study and adopted resolution No. 2006-19, which set the affordable housing in-lieu fee at \$20,946 per new single family home.

PROCEEDINGS

In October 2006, Developer filed a complaint and writ petition challenging City's imposition of the \$20,946 per unit exaction as well as City's characterization that it was an increase in the affordable housing in-lieu fee.

After an initial hearing in May 2007, the trial court allowed the parties to submit additional evidence. City submitted the declaration of Moran discussed above. (See fn. 4, *ante*.) Developer objected to the declaration on a number of grounds, all of which the trial court later overruled.

After another hearing, in August 2007, the trial court reopened the case and directed the parties to provide a stipulation that attached a copy of the Regional Housing Needs Assessment for Stanislaus County prepared by the Stanislaus Council of Governments during 2001-2002 and adopted in October 2002. The parties submitted the stipulation in October 2007.

The trial court issued its written decision on December 20, 2007. The court denied Developer's petition for writ of mandate, found for City on all causes of action, and

⁸The Fee Justification Study states that data available from City's Department of Finance suggest that about 5,940 dwelling units remained to be constructed in City's general plan area and 2,433 of those units previously have been entitled. This leaves an estimate of 3,507 units unentitled.

We note that if the 214 units in Developer's two subdivisions had been the only unentitled units in Patterson as of January 2005, this approach would have yielded a per unit affordable housing fee of \$343,458 (\$73.5 million/214 units).

overruled all objections. The court found that “the methodology used by [City] in determining the amount of the affordable housing fee at issue is reasonable [and] ... the absolute amount of the per-lot fee here is clearly reasonable compared to that charged in other localities, using the comparisons the parties agreed the Court could consider.”⁹

DISCUSSION

I. Standards of Review

When an appellate court reviews a decision issued after a court trial, the trial court’s findings on questions of fact are reviewed under the substantial evidence standard and its conclusions of law are subject to independent review. (*Brewer v. Murphy* (2008) 161 Cal.App.4th 928, 935-936; *Kelly v. County of Los Angeles* (2006) 141 Cal.App.4th 910, 918-919 [these standards are used when reviewing a decision on a traditional writ of mandate].)

II. Vested Rights Claim

Developer contends that the \$20,946 fee violates its rights under the vesting tentative map and under Government Code section 65961.

We recognize that vested rights protection extends to a property owner who has obtained a vesting tentative map. (*Toigo v. Town of Ross* (1998) 70 Cal.App.4th 309, 322, fn. 3.) We conclude, nonetheless, as discussed below, that in the circumstance presented by this appeal Developer’s contention about vested rights does not require a separate analysis.

⁹During oral argument, counsel indicated that the comparisons referenced were set forth in a table on page 7 of Moran’s declaration. Because Developer objected to the admissibility of Moran’s declaration, it does not appear from the record that the parties agreed the trial court could consider the comparisons. In this appeal, we do not reach Developer’s argument that the trial court erred by admitting Moran’s declaration and thus need not address whether the trial court’s consideration of the comparisons was error.

A. Rights Vested by Vesting Tentative Map

City’s approval of the vesting tentative map¹⁰ was subject to conditions, and those conditions explicitly state that in the event of a conflict between the Development Agreement and the vesting tentative map, the terms of the Development Agreement shall control. Therefore, if the increased fee is authorized by the Development Agreement, it will not offend the rights established by the approval of the vesting tentative map. In other words, the right that vested when the map was approved was the right to have any increase in the affordable housing in-lieu fee comply with the terms of the Development Agreement.¹¹

Consequently, the critical question in this appeal is whether the increased fee complied with the terms of the Development Agreement. If it did, then the increase will not violate any right vested under the vesting tentative map.

B. Government Code Section 65961

Government Code section 65961 prohibits local government from imposing any new condition on the issuance of a building permit when that condition could have been imposed when the vesting tentative map was approved.

In this case, if the increased fee complies with the Development Agreement, it will not be a new condition. Instead, the increased fee will have been imposed in accordance with the conditions under which the vesting tentative map was approved. As such, the increase would fall outside the scope of Government Code section 65961.

¹⁰The terms “tentative map” and “vesting tentative map” are defined in Government Code section 66424.5.

¹¹The fact that the tentative vesting map in this case is subject to the terms of the Development Agreement distinguishes this case from *Kaufman & Broad Central Valley, Inc. v. City of Modesto* (1994) 25 Cal.App.4th 1577. That case did not mention the existence of a development agreement, much less a development agreement that modified the vesting tentative map and addressed the fee being disputed.

Conversely, if the increased fee violates the Development Agreement, we will invalidate it on that ground and need not address whether it also violated Government Code section 65961.

III. Violation of the Terms of the Development Agreement

A. Contractual Language in Dispute

The Development Agreement clearly stated that (1) the amount of the affordable housing in-lieu fee was “as-yet undetermined” when the agreement was made, and that (2) the new amount would “in no event [be] less than” \$734 per unit. Whether the \$20,946 fee subsequently imposed by City violated the Development Agreement centers on the meaning of the following sentence from section 4.5(d)(ii):

“Developer acknowledges that the City is currently preparing an updated analysis of its Affordable Housing fee and hereby agrees to be bound by the revised fee schedule, including indexing as provided by ordinance at the time of adoption of the fee, providing the same is *reasonably justified*.” (Italics added.)

B. Meaning of Developer’s Acknowledgement

Developer contends its acknowledgement of the preparation of an updated analysis should be interpreted to mean that City was not allowed to change the method of analysis upon which it based the affordable housing fee. In Developer’s view, City was allowed only to update that method of analysis and, thus, was bound to continue to use the leverage approach when calculating revisions to the affordable housing fee.

We conclude that the language in section 4.5(d)(ii) of the Development Agreement cannot be interpreted as compelling City to use a particular methodology when calculating revisions to the in-lieu fee. The reference to an “updated analysis” is not accompanied by language indicating it is a binding requirement or condition imposed on City. Instead, it is stated merely as an acknowledgement by Developer. In contrast, when the parties intended to impose a requirement or condition on the revised fee, they expressed this intent clearly. Specifically, Developer agreed to be bound by the revised fee provided it was reasonably justified. Accordingly, we reject the view that the

Development Agreement required City to use the leverage approach when calculating the revised fee.

C. Meaning of “Reasonably Justified”

The parties dispute what the phrase “reasonably justified” means. City contends this standard effectively waived any legal requirements that otherwise might have applied to the fee increase. In contrast, Developer contends the standard incorporated the legal requirements applicable to the fee increase. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 752, pp. 842-843, and cases cited therein [generally, existing legal standards are implied by law into a contract].) Developer contends, in other words, that the terms cannot be interpreted as consenting to an increase that did not conform to otherwise applicable law.

“California courts have long recognized that the interpretation of a written instrument is a judicial function unless the interpretation turns upon the credibility of extrinsic evidence [citation].” (*The Lundin/Weber Co. v. Brea Oil Co., Inc.* (2004) 117 Cal.App.4th 427, 433.) In this case, the parties presented no conflicting extrinsic evidence regarding what was intended by the term “reasonably justified” at the time of contracting. Consequently, we conclude the meaning of the term “reasonably justified” presents a question of law subject to independent review on appeal. (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1502 [interpretation of a writing is a question of law where credibility of extrinsic evidence is not an issue].)

A court’s determination of the meaning of a contract is designed “to give effect to the mutual intention of the parties as it existed at the time of contracting ...” (Civ. Code, § 1636.) When contractual language is clear and explicit, it governs. (*Id.*, § 1638.) Alternatively, where uncertainty or ambiguity exists, the language “must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.” (*Id.*, § 1649.) This rule is designed to protect the objectively reasonable expectations of the promisee. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254,

1265; see generally Wonnell, *Expectation, Reliance, and the Two Contractual Wrongs* (2001) 38 San Diego L.Rev. 53.)

Here, we conclude that an objectively reasonable person would expect the term “reasonably justified” to mean that any increase in the affordable housing in-lieu fee would conform to existing law. In other words, part of the way one would show a fee is reasonably justified is to show that it does not violate established legal principles. The contrary interpretation, which would conclude that the term did away with applicable legal requirements, would create much greater change in the relationship between the parties. An objectively reasonable person would expect more explicit language to implement such a change. Thus, it is too great a leap to infer that the term “reasonably justified” demonstrates an intention to waive applicable legal requirements.

Based on this interpretation, we next consider what legal requirements were incorporated into the Development Agreement. We have not far to look.

D. Established Legal Principles

In *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643 (*San Remo*), the court considered the validity of a San Francisco ordinance addressing and limiting the conversion of residential hotel rooms (usually occupied by low-income tenants) to tourist hotel rooms. The ordinance was enacted in response to a perceived need to preserve the availability of residential hotel rooms for the city’s low-income residents who, otherwise, would have no viable housing choices. Permission to make such conversions was conditioned upon either a one-to-one replacement of the residential units converted or, among other alternatives, payment of a replacement in-lieu fee. Such an in-lieu fee thus is similar to the affordable housing in-lieu fee involved here.

Rejecting the plaintiff’s argument that a form of stricter scrutiny applied to its review of the replacement in-lieu fee, the *San Remo* court said that “legislatively imposed development mitigation fees ... must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. (Gov. Code, § 66001; *Ehrlich*[v. *City of Culver City* (1996)] 12 Cal.4th [854,] 865, 867 (plur. opn. of Arabian,

J.); *id.* at p. 897 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640.)” (*San Remo, supra*, 27 Cal.4th at p. 671.)

Similarly, in *Sinclair Paint Co. v. State Bd. of Equalization* (1997) 15 Cal.4th 866, where the court was called upon to distinguish a fee from a special tax, the latter of which would have required two-thirds voter approval, the court said “*development fees* exacted in return for building permits or other governmental privileges are not special taxes if the amount of the fees bears a reasonable relation to the development’s probable costs to the community and benefits to the developer.” (*Id.* at p. 875.)

Government Code section 66001, subdivision (b) states the test this way:

“In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall 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.”¹²

Based on these authorities, we conclude that the increase in the fee is not “reasonably justified” as required by the Development Agreement unless there is a reasonable relationship between the amount of the fee, as increased, and “the deleterious public impact of the development.” (*San Remo, supra*, 27 Cal.4th at p. 671.) In short, the Development Agreement precluded City from imposing a fee that bears no reasonable relationship to the need for affordable housing generated by Developer’s project.

City, we note, argues for no different test. Instead, without being more specific or explaining the point in any way, City merely states that the Fee Justification Study “clearly shows the need for affordable housing generated by the new construction.” Though we are by no means required to do so,¹³ we have examined the cited Fee

¹²The version of subdivision (b) of Government Code section 66001 in effect when the Development Agreement was approved was the same, except that it contained the phrase “on or after January 1, 1989.” (Stats. 1996, ch. 569, § 1.)

¹³Rule 8.204(a)(1)(C) of the California Rules of Court provides that each appellate brief must “[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears.” (See *Brewer v. Murphy, supra*, 161 Cal.App.4th at p. 936, fn. 4 [defendant’s assertion of fact not supported by citation to record];

Justification Study in detail. Having done so, we cannot agree that it supplies the reasonable relation between the increased fee and the need for affordable housing generated by the project.

The evidence presented in this case reveals that the amount of the fee was not calculated based on the cost of City's affordable housing need attributable to the 214 residential lots that constitute the two subdivisions owned by Developer. Neither was it based on the affordable housing need attributable to the 3,507 unentitled lots on which it was imposed. Instead, the Fee Justification Study shows that the affordable housing in-lieu fee of \$20,946 per market rate unit was calculated based on an estimate of City's need for 642 units of affordable housing. No connection is shown, by the Fee Justification Study or by anything else in the record, between this 642-unit figure and the need for affordable housing generated by new market rate development. Accordingly, the fee calculations described in the Fee Justification Study and Moran's declaration do not support a finding that the fees to be borne by Developer's project reflected the costs attributable to it.

We conclude, therefore, that the increased fee of \$20,946 violated section 4.5(d)(ii) of the Development Agreement because it was not "reasonably justified" within the meaning of that provision.

Based on this conclusion, we need not address (1) Developer's claim that the trial court erred by overruling its evidentiary objections to Moran's declaration or (2) Developer's arguments regarding constitutional violations.¹⁴

Bernard v. Hartford Fire Ins. Co. (1991) 226 Cal.App.3d 1203, 1205 [references to exact pages required; reference to block of pages violated rule.]

¹⁴Because we have not reached the constitutional questions, we do not discuss the California Supreme Court case decided after the appellate briefing in this case was completed. (See *Silicon Valley Taxpayers' Assn., Inc. v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431 [countywide assessment to fund open space program invalidated because it failed to meet the special benefit and proportionality requirements of art. XIII D of the Cal. Const.])

IV. Remedy

The appellate briefing did not address the appropriate remedy in this case. During oral argument, counsel for Developer contended that there were three possible remedies this court could direct the trial court to implement. Because the bases relevant to choosing among these and other remedies have not been developed before this court, we conclude the superior court should decide the issue of the appropriate remedy in the first instance.

DISPOSITION

The judgment is reversed and the matter is remanded to the trial court for further proceedings. The trial court is directed to (1) vacate its decision of December 20, 2007, (2) enter a new decision that invalidates the \$20,946 per unit fee because it violates the terms of the Development Agreement and (3) determine the remedy after conducting any proceedings it deems necessary or appropriate.¹⁵ Costs on appeal are awarded to appellants.

DAWSON, J.

WE CONCUR:

VARTABEDIAN, Acting P.J.

CORNELL, J.

¹⁵These directions should not be interpreted to preclude the parties from agreeing on the appropriate remedy and presenting that agreement to the trial court for approval.

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

BUILDING INDUSTRY ASSOCIATION OF
CENTRAL CALIFORNIA et al.,

Plaintiffs and Appellants,

v.

CITY OF PATTERSON,

Defendant and Respondent.

F054785

(Super. Ct. No. 610611)

**ORDER MODIFYING OPINION,
CERTIFYING OPINION FOR
PARTIAL PUBLICATION
[NO CHANGE IN JUDGMENT]**

THE COURT:

It is ordered that the opinion filed herein on January 30, 2009, be modified as follows:

1. On page 3, the first paragraph beginning “Developer owns” is modified to read as follows:

Developer owns two residential subdivisions, known as Magnolia and Bella Flora and consisting of 214 single family residential lots. The subdivisions are part of a larger development known as Patterson Gardens, which contains 305.3 acres that are divided into seven different areas or phases. Plans for Patterson Gardens include five areas of low density residential housing that cover 228.5 acres and contain a total of 985 dwelling units.

2. At the top of page 4, the clause beginning “(4) pay an in-lieu fee” is modified to read:

(4) pay an in-lieu fee at the time the building permit is issued for a market rate housing unit.

3. On page 7, the first sentence of the first paragraph of footnote 8 is modified to read:

The Fee Justification Study states that data available from City's Department of Finance suggest that about 5,940 dwelling units remained to be constructed in City's general plan area and 2,433 of those units previously had been entitled.

4. On page 9, the fourth full paragraph beginning "In this case" is deleted and the following paragraph inserted in its place:

In this case, if the increased fee complies with the Development Agreement, it will have been imposed in accordance with the conditions under which the vesting tentative map was approved. Thus, the increased fee would not be a new condition, but simply would reflect the removal of uncertainty inherent in a prior condition. As such, the increase would fall outside the scope of Government Code section 65961.

5. On page 10, the first sentence of the third paragraph beginning "Developer contends" is modified to read as follows:

Developer contends its acknowledgement of the preparation of an updated analysis should not be interpreted to mean that City was allowed to change the method of analysis upon which it based the affordable housing fee.

6. On page 11, after the first full paragraph ending "otherwise applicable law" insert the following paragraph:

To resolve this dispute over the meaning of the Development Agreement, we assume that the ordinary rules of contract interpretation apply. No party has argued otherwise.

7. Beginning on page 12 and continuing to page 17, delete the subheading, paragraphs and footnotes of part III.D. and insert the following subheading, paragraphs and footnotes:

D. Applicable Legal Requirements

The authority of local governments to impose exactions as a condition of developing land is limited by various rules of law, including

the takings clause of the California Constitution (art. I, § 19) and the federal takings clause (U.S. Const., 5th Amend.). (See *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 663-664 [state and federal takings clauses construed congruently] (*San Remo*).

The general principle of takings analysis relevant to this case is the requirement that a land use regulation substantially advance a legitimate state interest. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1016.) This principle is sometimes referred to as a means-end test—that is, it requires the property regulation in question (the means) to advance the purpose the government is seeking to achieve (the end). (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 975 [conc. opn. of Kennard, J.].) The “substantially advance” principle is implemented by using different levels of scrutiny depending upon the circumstances. (*San Remo, supra*, 27 Cal.4th at p. 665.) Therefore, to apply the “substantially advance” principle in this case, we must decide which level of scrutiny applies to City’s increase in its affordable housing in-lieu fee. *San Remo* provides guidance on this question.

In *San Remo*, owners of a hotel sued to invalidate a San Francisco ordinance limiting the conversion of residential hotel rooms (usually occupied by low-income tenants) to tourist hotel rooms. The purpose of the ordinance was to preserve the availability of residential hotel rooms for the city’s low-income residents who, otherwise, would have had no viable housing options. To achieve that goal, the ordinance required a hotel converting a residential hotel unit into a tourist unit to replace the residential unit elsewhere, pay a fee in-lieu of providing the replacement unit, or take other action that would further replacement. Pursuant to the ordinance, the city issued the hotel owners a conditional use permit authorizing the conversion of hotel rooms only upon compliance with one of those alternatives.

The hotel owners filed suit, alleging the ordinance was unconstitutional because it violated the state takings clause. They argued that *Nollan/Dolan/Erhlich*¹² scrutiny applied to the court’s review of the replacement in-lieu fee. The *Nollan/Dolan/Erhlich* heightened level of constitutional scrutiny inquires whether an “essential nexus” and “rough proportionality” are shown between an ad hoc exaction, imposed as a condition of development, and the impact of that development. (*San Remo, supra*, 27 Cal.4th at pp. 665-667, 671.) The *San Remo* court refused to

¹²*Dolan v. City of Tigard* (1994) 512 U.S. 374, 391; *Nollan v. California Coastal Com.* (1987) 483 U.S. 825, 837; *Erhlich v. City of Culver City* (1996) 12 Cal.4th 854.

apply this heightened level of scrutiny to the San Francisco ordinance, stating:

“Nor are plaintiffs correct that, without *Nollan/Dolan/Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. (Gov. Code, § 66001; *Ehrlich, supra*, 12 Cal.4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640.) ... 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 subject to *Ehrlich*, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster.” (*San Remo, supra*, 27 Cal.4th at p. 671.)¹³

Similarly, the court in *Action Apartment Assn. v. City of Santa Monica* (2008) 166 Cal.App.4th 456, refused to apply the *Nollan/Dolan/Ehrlich* test when analyzing the facial validity of an ordinance of general application that required construction of affordable multifamily housing as a condition to development of multifamily ownership projects. (*Action Apartment Assn. v. City of Santa Monica*, at pp. 469-471.)¹⁴

¹³The statutory provision referenced in this quote states its test this way: “In any action imposing a fee as a condition of approval of a development project by a local agency, the local agency shall 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.” (Gov. Code, § 66001, subd. (b).) We note that section 66001 expressly applies to fees imposed to mitigate the effects of development on “public facilit[ies].” We express no opinion on the question whether section 66001, or the Mitigation Fee Act in general (see Gov. Code, § 66000.5), applies to affordable housing in-lieu fees.

¹⁴We note that the court in *Home Builders Association v. City of Napa* (2001) 90 Cal.App.4th 188 (*Home Builders*) considered a takings clause challenge to the facial validity of an inclusionary zoning ordinance and upheld its validity. In this appeal, Developer has attempted to distinguish *Home Builders* by arguing that case did not involve a development agreement, vested rights or judicial review in an “as applied” context. Because Developer has not argued that the affordable housing in-lieu fee is facially invalid, we do not decide the question of facial invalidity here. We also note that *Home Builders* was decided about nine months before the California Supreme Court decided *San Remo*.

Upon examination, it appears that the affordable housing in-lieu fee challenged here is not substantively different from the replacement in-lieu fee considered in *San Remo*. Both are formulaic, legislatively mandated fees imposed as conditions to developing property, not discretionary ad hoc exactions. (*San Remo, supra*, 27 Cal.4th at p. 671.) We conclude, for this reason, that the level of constitutional scrutiny applied by the court in *San Remo* must be applied to City’s affordable housing in-lieu fee and is one of the legal requirements incorporated into the Development Agreement.

Accordingly, we conclude that the increase in the fee is not “reasonably justified” as required by the Development Agreement unless there is a reasonable relationship between the amount of the fee, as increased, and “the deleterious public impact of the development.” (*San Remo, supra*, 27 Cal.4th at p. 671.)

City, we note, argues for no different test. Instead, without being more specific or explaining the point in any way, City merely states that the Fee Justification Study “clearly shows the need for affordable housing generated by the new construction.” Despite the lack of an argument from City addressed to the reasonable relationship test, we have examined the cited Fee Justification Study in detail, as well as Moran’s declaration and other documents, to determine whether the test is satisfied by the information provided. In the process, we have located nothing that demonstrates or implies the increased fee was reasonably related to the need for affordable housing associated with the project.

The record in this matter reveals no reasonable relationship between the extent of City’s affordable housing need and development of either (1) the 214 residential lots that constitute the two subdivisions owned by Developer or (2) the 3,507 unentitled lots identified in the Fee Justification Study. Instead, the Fee Justification Study reveals that the in-lieu fee of \$20,946 per market rate unit was calculated based on an allocation to City of 642 affordable housing units, out of the total regional need for affordable housing identified in the 2001-2002 Regional Housing Needs Assessment for Stanislaus County. No connection is shown, by the Fee Justification Study or by anything else in the record, between this 642-unit figure and the need for affordable housing associated with new market rate development. Accordingly, the fee calculations described in the Fee

Also, we note that the takings clause requirements are more restrictive than the requirement that a land use regulation promote a legitimate public purpose to be an authorized exercise of the police power. (See *City of Hanford v. Hernandez* (2007) 41 Cal.4th 279 [zoning ordinance regulating economic competition was a legitimate exercise of municipality’s police power].)

Justification Study and Moran’s declaration do not support a finding that the fees to be borne by Developer’s project bore any reasonable relationship to any deleterious impact associated with the project.

For this reason, we conclude that the increased fee of \$20,946 violated section 4.5(d)(ii) of the Development Agreement because it was not “reasonably justified” within the meaning of that provision.

There is no change in the judgment.

The opinion in the above-entitled matter filed on January 30, 2009, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports with the exception of parts I. and II.B., and it is so ordered.

DAWSON, J.

WE CONCUR:

VARTABEDIAN, Acting P.J.

CORNELL, J.