



Ehrlich Resurrected: Public Art Ordinances Once Again Under Attack

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Thomas B. Brown, City Attorney, St. Helena, Partner, Burke, Williams & Sorensen LLP

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***Ehrlich Resurrected: Do
Nollan/Dolan/Koontz And The First
Amendment Apply To Public Art
Ordinances. . . And Other
Ordinances?***

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Presentation By:

**Thomas B. Brown, Partner
Burke, Williams & Sorensen, LLP**
1901 Harrison Street, Suite 900
Oakland, California 94612-3501
T: 510.903.8840; TBrown@bwslaw.com

***Ehrlich* Resurrected: Do *Nollan/Dolan/Koontz* And The First Amendment Apply To Public Art Ordinances. . . And Other Ordinances?**

1. Introduction.

In 1996, in *Ehrlich v. City of Culver City* (“*Ehrlich*”),¹ the California Supreme Court rejected a takings challenge to Culver City's "art in public places" ordinance, which required that developers spend a specified and modest percentage of a project's construction costs on art that is to be accessible at the project to the public. In so doing, the Court rejected the argument that such a challenge was subject to "heightened scrutiny" for exactions, such as dedications of property or installation of a public improvement, under the Supreme Court's *Nollan* and *Dolan* decisions.² California cities have relied on *Ehrlich* ever since, and today many cities have adopted similar ordinances.³

23 years later, the Building Industry Association (Bay Area) (“BIABA”) has brought a new challenge to the City of Oakland's newly-enacted public art ordinance. BIABA resurrects the *Nollan/Dolan* challenge, arguing that the issue is again “in play” post *Lingle* and *Koontz*.⁴

In addition, BIABA now brings a new argument. Premised on the uncontroversial fact that art constitutes protected speech, BIABA contends that art in public places ordinances constitute "compelled speech" in violation of the First Amendment because they force developers to purchase, display and maintain art. The District Court rejected BIABA's claims,⁵ and upheld the ordinance, and BIABA has appealed to the Ninth Circuit.

This paper will address the applicable takings and First Amendment legal issues that could have widespread implications for California cities, perhaps beyond public art ordinances.

¹ *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 886 (1996), *cert. denied*, 117 S.Ct. 299.

² *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). See generally Municipal Law Handbook, Sections VIII and XIII for more background on these cases and dedications, exactions and fees.

³ Some 18 other California cities have adopted similar ordinances, including Beverly Hills, Culver City, Los Angeles, Mountain View, Pomona, San Diego, San Francisco, San Pablo, Santa Monica, West Hollywood, Emeryville, Albany, Richmond, San Luis Obispo, Berkeley, Fremont, Palm Desert, and Oakland. In addition, as of 2015, 35 of the 50 most populous cities in the country had such programs. Asmara M. Tekle, *Rectifying These Mean Streets: Percent-for-Art Ordinances, Street Furniture, and the New Streetscape*, 104 KENTUCKY L.J. 409, 428 (2015).

⁴ *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 546 (2005); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 605 (2013)

⁵ *Building Industry Association-Bay Area v. City of Oakland*, 289 F.Supp.3d 1056 (N.D. Cal. 2018)

2. Background: *Ehrlich v. City of Culver City* Establishes That Public Art Ordinances Do Not Impose Exactions Subject To *Nollan/Dolan* Heightened Scrutiny.

Ehrlich involved two requirements imposed by the City of Culver City: (1) a \$280,000 recreational mitigation fee and (2) a \$33,200 “art in public places” fee. The recreational mitigation fee was to be used “for additional recreational facilities” to replace the facilities “lost” when Ehrlich ceased using his property for commercial recreational purposes. The amount of this fee was based on Culver City’s estimate of the cost of building public recreational facilities. The “art in public places” fee was imposed under Culver City’s ordinance that required commercial projects with a value in excess of \$500,000 to either provide art work for the project in an amount equal to one percent (1%) of the total value of the building or pay an equal amount to the City art fund. 12 Cal.4th 854, 862.

With respect to the \$280,000 recreational fee, the California Supreme Court first rejected the argument that *Nollan/Dolan* heightened scrutiny only applies in the context of land use permit conditions requiring the conveyance of interests in real property. Presaging *Koontz*, the Court ruled to the contrary that *Nollan/Dolan* heightened scrutiny applies with equal force to permit conditions requiring the payment of monetary exactions as well. 12 Cal.4th at 874-75.

Having ruled that *Nollan/Dolan* heightened scrutiny applies to monetary exactions, the *Ehrlich* Court then ruled that the \$280,000 recreational fee did **not** satisfy *Nollan/Dolan* scrutiny. However, the Court remanded the matter to the city to determine whether a fee in **some** amount might satisfy *Nollan/Dolan* scrutiny. 12 Cal.4th at 884-885.

Finally, after spending the first 30 or so pages of its opinion addressing the \$280,000 recreational fees, the *Ehrlich* Court devoted less than one page to upholding Culver City’s art in public places requirement. The Court first held that the art requirement “**is not a development exaction of the kind subject to the *Nollan–Dolan* takings analysis.**” 12 Cal.4th at 886; emphasis added. Rather, the Court concluded that the ordinance constituted regulation on the use of property, i.e. zoning:

[T]he requirement to provide either art or a cash equivalent thereof is more akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions such as color schemes, building materials and architectural amenities. Such aesthetic conditions have long been held to be valid exercises of the city’s traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property.

12 Cal.4th at 886.⁶

⁶ The Supreme Court applied the same reasoning 2015 in rejecting BIA’s argument that inclusionary housing requirements constitute exactions subject to *Nollan/Dolan/Koontz*. *California Bldg. Indus. Assn. v. City of San Jose*, 61 Cal.4th 435, 460-61 (2015), *cert. denied* 136 S. Ct. 928.

3. The City of Oakland Relies On Ehrlich In Adopting Its “Public Art Requirements for Private Development” Ordinance.

In 2017, relying on *Ehrlich*, the City of Oakland City Council adopted a “Public Art Requirements for Private Development” ordinance (“Ordinance;” OMC chapter 15.78). In the Ordinance’s recitals, the City offers findings outlining the need for, and purpose of, the Ordinance. Among other things, City found:

- “public art enhances the quality of life for Oakland’s citizens, residents, visitors and businesses”
- “the legislative requirement to provide either art or an in lieu [that] generally applies to all developers ... is a permissible land use regulation and a valid exercise of the City’s traditional police powers.”
- “the City has broad authority, under its general police power, to regulate the development and use of real property ... to promote the public welfare.”
- “through the inclusion of public art or payment of an in lieu fee, developers of benefitting land uses will address at least a portion of the impact of their developments on aesthetics.”

PRACTICE TIP: *California Bldg. Indus. Assn. v. City of San Jose, supra*, 61 Cal.4th 435, 460-61 explicitly holds that similar regulations need only advance the community’s general welfare, and need not mitigate specific impacts created by projects. Public art ordinances should recognize that constitutional standard. Nevertheless, some communities also adopt findings that explain how the ordinance does mitigate project-related impacts.

The Ordinance thus establishes a policy requiring owners and developers of specified private developments that are subject to the City’s design review process “to use a portion of building development costs for the acquisition and installation of freely accessible works of art for placement on the development site or on the right of way adjacent to the development site ... as a condition of project approval.”

The Ordinance provides for (1) nonresidential developments involving 2,000 or more square feet of new floor area to devote 1% of building development costs to publicly-accessible art, and (2) residential projects involving 20 or more dwellings to devote 0.5% of building development costs to publicly-accessible art. § 15.78.070(A). Developers may opt to pay an in-lieu fee. § 15.78.070(B).

PRACTICE TIP: To avoid a claim that the ordinance authorizes third persons onto otherwise private property in violation of *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435 (1982), public art ordinances should be clear that the art need only be visible from areas that the property owner otherwise keeps open to the public.

The Ordinance includes an appeal procedure, through which the City Administrator may reduce or eliminate the contribution requirement. § 15.78.080.

PRACTICE TIP: Providing a meaningful administrative appeal can make it difficult to state a viable facial claim. *Home Builders Association of Northern California v. City of Napa*, 90 Cal.App.4th 188, 194 (2001); *San Mateo County Coastal Landowners Assn. v. County of San Mateo*, 38 Cal.App.4th 523, 547 (1995).

4. BIABA's New Challenge To Public Art Requirements: *Building Industry Association-Bay Area v. City of Oakland*.

BIABA sued to challenge the Ordinance. BIABA's lawsuit alleges two claims:

First, it contends the Ordinance constitutes a taking in violation of the unconstitutional conditions doctrine described in the "*Nollan/Dolan/Koontz*" line of cases.

Second, it contends the Ordinance, by requiring developers and property owners to install art (which is protected speech) visible in publicly accessible areas, constitutes "compelled speech," in violation of the First Amendment under cases such as *Wooley v. Maynard*, 430 U.S. 705 (1977).

The District Court granted the City's motion to dismiss, and BIABA's appeal is pending before the Ninth Circuit. We explain below why the District Court's decision was correct.

A. The City's Public Art Ordinance Does Not Constitute A Taking Or An Unconstitutional Condition Because It Does Not Impose An Exaction.

As was the argument 20 years earlier in *Ehrlich*, BIA--Bay Area's ("BIABA") challenge to Oakland's public art ordinance again asserts a *Nollan/Dolan* taking claim. This claim is premised on the assumption, required for liability under *Nollan/Dolan*, that public art requirements impose an exaction. BIABA has framed its appeal as follows:

Whether BIABA states a valid claim that a City of Oakland (City) ordinance (Ordinance) imposes an **unconstitutional exaction** on property owners, in violation of the principles set out in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), by requiring them to purchase and display art, or pay an in-lieu fee, in order to obtain development permits?

(Emphasis added.)

BIABA subsequently doubles down on that point as follows:

The Ordinance is specifically designed and intended to **exact** public art (in the amount of .5% or 1% of development costs) from developers before they can obtain permits.

(Emphasis added.)

Later, BIABA continues:

Contrary to the City's position, **the Ordinance's public art requirements qualify as exactions** subject to review under *Nollan* and *Dolan*. The Ordinance is not a standard land use restriction, like a zoning ordinance. Cf. *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999) (*Nollan/Dolan* not designed to apply when "the landowner's challenge is based not on excessive exactions but on denial of

development”). It is expressly **designed to extract property** from developers to mitigate an alleged development impact. ER 85. As such, the Ordinance is constrained by *Nollan* and *Dolan*, despite its legislated and broad character. *Koontz*, 570 U.S. at 606; *Del Monte Dunes*, 526 U.S. at 703; *Commercial Builders of Northern California v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991).

(Emphasis added.)

BIABA explains its theory that the ordinance imposes an exaction as follows:

The City’s public art mandate is an exaction because it demands that developers install and perpetually maintain City-approved art on a publicly accessible portion of their properties, which is a textbook physical-occupation taking. See *Nollan*, 438 U.S. at 831–32 (granting the public a right in private property extinguishes fundamental rights therein and cannot be characterized as “a mere restriction on its use”); see also *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426, 435 (1982) (A regulation requiring owners of apartment buildings to allow cable company to install a 4" cable box and wires on their properties constituted a categorical physical taking.); *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979) (government taking by declaring the public has a right to access private lagoon). The fact that the Ordinance vests ownership of the City-approved art in the property owner does not change the fact that the public access is a taking. Art is property. *Altmann v. Republic of Austria*, 142 F. Supp. 2d 1187, 1202–03 (C.D. Cal. 2001), *aff’d Republic of Austria v. Altmann*, 541 U.S. 677 (2004) (recognizing property interest in art). The owner of art has a right to exclude the public from his or her private holdings. *Nollan*, 438 U.S. at 831–32. Simply put, the Ordinance exacts property because it takes a part of a wall, a courtyard, or a foyer for public art, which constitutes an easement for public use. Since such an easement is a recognized and protected property interest, its compelled dedication under the Ordinance qualifies as an exaction of property.

Thus, BIABA’s argument is that the public art requirement imposes an exaction simply because it is required to allow the public to view art that is privately owned by the developer or property owner from otherwise publicly accessible places. In addition, BIABA argues that the requirement constitutes a form of physical occupation taking under *Loretto*, simply because it allows the public to view the art that the developer or property owner always owns.

The City and *amici* have responded by pointing out that an exaction by definition, and in every case in which heightened scrutiny has been applied, is a requirement that that a project applicant convey or dedicate land or money to the government or to someone else. *Nollan* and *Dolan* are designed to address development **exactions**, i.e., demands for a transfer of property interests or money in exchange for development approvals. (*Koontz*, 570 U.S. at 604; *Lingle*, 544 U.S. at 546-547; *City of Monterey v. Del Monte Dunes at Monterey, LTD*, 526 U.S. 687, 702-703 (1999); *Dolan*, 512 U.S. at 385; *Ehrlich*, 12 Cal.4th at 886; *McClung v. City of Sumner* (“*McClung*”), 548 F.3d 1219, 1226-1228 (9th Cir. 2008).)

BIABA never explains, however, how the public art requirement satisfies the accepted and intuitive definition and concept of an exaction. Nor does it explain how the public art

requirement is anything other than a zoning regulation. For example, it is well-accepted that cities may require a developer to obtain, install and maintain landscaping so that the public may see it, in order to enhance the project's aesthetics. Similarly, projects may be required to purchase, install and maintain lighting and building materials for similar design/aesthetic reasons. Again, the California Supreme Court explained the point clearly in *Ehrlich*:

[T]he requirement to provide either art or a cash equivalent thereof is more akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions such as color schemes, building materials and architectural amenities. Such aesthetic conditions have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property.

Ehrlich, 12 Cal.4th at 886.

As to BIABA's physical occupation argument, BIABA's reliance on *Loretto* is misplaced. In *Loretto*, the property owner was required to allow a third party to access and permanently use the owner's private property. Public art requirements do no such thing, and instead require only that property owners install and maintain art that they at all times own, for viewing by the public from areas that are otherwise designated by the owners as publicly accessible. In other words, *Loretto* does not apply because the ordinance does not require owners to allow third party artists to access the owners' property and install their art, nor does the ordinance require the owners to create additional areas for public access to view the owners' art.

In short, most public art ordinances act as run-of-the-mill zoning regulations that do nothing more than require developers to spend money to make (and keep) their projects more attractive. They are not exactions because they take nothing and do not require a conveyance. And they are not physical occupations because they do not require or allow the public onto or into any areas that are not otherwise accessible to the public.

B. Heightened Scrutiny Under *Nollan/Dolan/Koontz* Applies Only To Ad Hoc, Adjudicative Decisions, Not To Facial Claims To Legislation.

Even if the Ordinance imposed an exaction (it does not, as discussed above), heightened scrutiny under *Nollan/Dolan/Koontz* is limited to situations involving the imposition of exactions through ad hoc, adjudicative land use decisions. It does not apply to exactions imposed legislatively across the board to all projects.

The District Court ruled explicitly on this point:

But the Supreme Court has only applied this exactions doctrine in cases involving a particular individual property, where government officials exercised their discretion to require something of the property owner in exchange for approval of a project. And the Court has consistently spoken of the doctrine in terms suggesting it was intended to apply only to discretionary decisions regarding individual properties. See, e.g., *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546–47 ... Moreover, the Ninth Circuit and the

California Supreme Court have expressly stated that a development condition need only meet the requirements of *Nollan* and *Dolan* if that condition is imposed as an “individual, adjudicative decision.” *McClung v. City of Sumner*, 548 F.3d 1219, 1227 (9th Cir. 2008)...

What is the basis for the distinction between exactions imposed legislatively and on an ad hoc basis? In *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal.4th 643 (2002), the California Supreme Court provided the following explanation:

A city council that charged extortionate fees for all property development ...would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.

San Remo Hotel, 27 Cal.4th at 671. The Court reiterated this rationale in 2015 in *CBIA v. San Jose*, 61 Cal.4th at 460-61.

Indeed, as the District Court pointed out, the majority and concurring opinions in *Ehrlich*, 12 Cal. 4th 854, 876–81; 899–900 make the same point:

[W]hen the fee is ad hoc, enacted at the time the development application was approved, there is a greater likelihood that it is motivated by the desire to extract the maximum revenue from the property owner seeking the development permit, rather than on a legislative policy of mitigating the public impacts of development or of otherwise reasonably distributing the burdens of achieving legitimate government objectives.

The Supreme Court in *Penn Central* says the same thing: In contrast to cases of individualized, ad hoc exactions, when an ordinance applies to “a large number of parcels,” there are “assurances against arbitrariness.” *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 135 n. 2 (1978).⁷

Presaging possible future Supreme Court input on the issue, the District Court stated:

Perhaps reasonable arguments could be made for expanding the reach of the exactions doctrine so that it can be invoked in facial challenges to a generally applicable regulations, rather than merely discretionary decisions regarding an individual property by land-use officials. *See Calif. Building Industry Association v. City of San Jose*, — U.S. —, 136 S.Ct. 928, 928–29, 194 L.Ed.2d 239 (2016) (Thomas, J., concurring in cert. denial). But the point, for purposes of this motion, is that it would be an expansion

⁷ The District Court also rejected BIABA’s argument that *Levin v. City and County of San Francisco*, 71 F.Supp.3d 1072, 1083 n. 4 (N.D. Cal. 2014) required it to apply the exactions doctrine in a facial challenge, essentially holding that *Levin* had misconstrued *Koontz*. 289 F.Supp.3d at 1058-59. At the hearing on the City’s motion to dismiss, in discussing *Levin*, Judge Chhabria noted that he had written the ordinance that Judge Breyer had invalidated in *Levin*. In his subsequent written opinion, Judge Chhabria, tongue well in cheek, characterized the ordinance as “**well-drafted**.” 71 F.Supp.3d at 1058 (emphasis added).

of the doctrine. If that occurs, it should be in the Supreme Court, not the Northern District of California.

Having ruled out the applicability of heightened scrutiny under *Nollan/Dolan/Koontz*, the District Court ruled that the Ordinance was subject to, and easily satisfied the takings review standard applicable to all generally-applicable zoning regulations under the *Penn Central* decision:

Since the ordinance applies generally to a broad swath of nonresidential and multifamily developments, whether the ordinance facially violates the Takings Clause should be evaluated under the regulatory takings framework. But the Association has not (and cannot) plead a viable facial regulatory takings challenge to the ordinance, because—at a minimum—the fee required by the ordinance is no more than one percent of building development costs. *See Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 ... (1978). This cost, which is only triggered if a developer chooses to build certain types of nonresidential and multifamily construction, does not cause a large enough loss of value to amount to a facial regulatory taking. *See Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470, 495 ... (1987); *Penn Central*, 438 U.S. at 124–26.

289 F.Supp.3d at 1059.

As a corollary to the rule that *Nollan/Dolan/Koontz* do not apply to exactions that are imposed on all projects through generally-applicable legislation, the Ninth Circuit has similarly ruled that a plaintiff simply cannot present a facial claim under the *Nollan/Dolan/Koontz*. For example, in *Garneau v. City of Seattle*, 147 F.3d 802, 811, 812 (“*Dolan* applies only to as-applied takings challenges, not to facial takings challenges,” because whether any exaction is roughly proportionate to the impacts of development necessarily requires consideration of particular facts regarding a project, and because a take by an exaction can only occur when the legislation is applied); *Mead v. City of Cotati*, 389 F.App’x 637, 638–39 (9th Cir. 2010) (facial takings challenge to an inclusionary zoning ordinance that requires developers to incorporate affordable housing into projects or pay an in-lieu fee is not permitted under the *Nollan/Dolan* doctrine; whether the ordinance could violate the Takings Clause requires a fact-specific inquiry that may only be made in an as-applied challenge); *Tahoe-Sierra Pres. Council* 216 F.3d 764, 772 n.11 (9th Cir. 2000), *aff’d* 535 U.S. 302 (2002), overruled on other grounds in *Gonzalez v. Arizona*, 677 F.3d 383, 388 (9th Cir. 2012) (*Nollan/Dolan* framework only applies to regulatory takings claims predicated on approval conditions requiring dedication of property to public use).⁸

⁸ The Tenth Circuit concurs, as does the California Supreme Court. *Alto Eldorado Partnership v. City of Santa Fe*, 634 F.3d 1170, 1178–79 (10th Cir. 2011) (plaintiff could not present a facial challenge under *Nollan/Dolan* to ordinance requiring developers to include affordable housing in new subdivisions or to pay an in-lieu fee, including because (i) regulating the manner in which developers use land, even if costly, is not the equivalent of a per se take subject to *Nollan/Dolan*, (ii) the *Nollan/Dolan* doctrine protects the right to just compensation and does not provide for a facial claim to invalidate legislation, and (iii) plaintiffs’ theory is an improper attempt “to turn *Nollan* and *Dolan* into loopholes in the *Lingle* rule that challenges to regulation as not substantially advancing a legitimate governmental interest are not appropriate under the Takings Clause); *CBIA v. San Jose*, 61 Cal.4th at 460–61 (plaintiffs could not present facial challenge under *Nollan/Dolan* to ordinance that requires developers to incorporate affordable housing into projects or to pay an in-lieu fee); accord *Ehrlich*, 12 Cal.4th at 868–69, 885–86 (rejecting application of *Nollan/Dolan* to legislatively imposed requirement to incorporate art into project or pay in-lieu fee).

Indeed, in *Nollan*, *Dolan* and *Koontz* themselves, the Supreme Court held that a fact-specific inquiry is necessary to determine if the nexus and rough proportionality test is met. *Nollan*, 483 U.S. at 825; *Dolan*, 512 U.S. at 374; *Koontz*, 570 U.S. at 618; *Garneau*, 147 F.3d at 807, 811; *Mead*, 389 F.Appx. at 638-39 (“[T]he proper framework for analyzing whether such a fee constitutes a taking is the fact-specific inquiry developed by the Supreme Court in *Penn Central Transportation Co. v. City of New York* ...”); see also *Koontz Coalition v. City of Seattle*, 2014 WL 5384434 at *4 (W.D. Wa. 2014) (“this ‘inquiry cannot be made in a vacuum’”).

In sum, the City argued, and the District Court agreed, that under Ninth Circuit precedents and persuasive authority, a facial challenge to legislation may not be brought under the *Nollan/Dolan/Koontz*. Such a fact-intensive inquiry can only take place in the context of an as-applied challenge.

BIABA contends on appeal that the Ninth Circuit ruled in *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2d 872 (9th Cir. 1991), that a facial *Nollan/Dolan* challenge may be made to legislation. That argument lacks merit.

In *Commercial Builders*, the Ninth Circuit assumed without deciding that a facial *Nollan/Dolan* case could be made (and, in any event rejected the takings challenge). Thus, the case is of no precedential value for BIA’s proposition that it may present a facial challenge, and it yields to the on-point authority discussed above. *Hart v. Massanari*, 266 F.3d 1155, 1171 (9th Cir. 2001) (“Once a panel resolves an issue in a precedential opinion, the matter is deemed resolved, unless overruled by the court itself sitting en banc, or by the Supreme Court”).

In sum, in many cases since *Commercial Builders*, the Ninth Circuit has unequivocally held, as have other courts, that *Nollan/Dolan* does not apply to facial challenges.

C. BIABA’s New Theory: Public Art Requirements Constitute Compelled Speech In Violation of the First Amendment.

(1) The Protections of the First Amendment Do Not Apply to the Ordinance Because It Does Not Regulate Speech or Implicate “Expressive Conduct.”

As noted above, BIABA argues that because all art is protected speech, the Ordinance’s requirement that developers purchase, display and maintain art compels developers’ speech in violation of the First Amendment. As we discuss below, that is not the case. But BIABA’s First Amendment claim fails for a preliminary, more fundamental reason.

The first step in the analysis is whether the Ordinance regulates conduct or speech at all. The City argues that where, as here, the Ordinance does not regulate speech, and only regulates conduct, First Amendment protection does not apply to conduct that is not “inherently expressive.” *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 62 (2006) (“FAIR”); *Interpipe Contracting, Inc. v. Becerra*, 898 F.3d 879, 896 (9th Cir. 2018).

Conduct is inherently expressive if it “is intended to be communicative and ... in context, would reasonably be understood by the viewer to be communicative.” *Feldman v. Arizona Secretary of State’s Office*, 843 F.3d 366, 386-387 (9th Cir. 2016) (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984)). For instance, burning the American flag and wearing an unauthorized military medal are expressive conduct within the scope of the First Amendment. *Feldman*, 843 F.3d 366, 386-387 (citing *Texas v. Johnson*, 491 U.S. 397, 406 (1989), and *United States v. Swisher*, 811 F.3d 299, 314 (9th Cir. 2016) (*en banc*)). Regulations on non-expressive conduct will not implicate the First Amendment even if the conduct was in part initiated, evidenced, or carried out by means of language, whether spoken, written, or printed. *National Assn. for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1053 (9th Cir. 2000).

Thus, “Congress . . . can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading “White Applicants Only” hardly means that the law should be analyzed as one regulating the employer’s speech rather than conduct.” *FAIR*, 547 U.S. at 62. Stated another way, not every regulation of conduct that indirectly affects protected speech gives rise to a First Amendment claim. See, e.g., *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986) (“One liable for a civil damages award has less money to spend on paid political announcements or to contribute to political causes, yet no one would suggest that such liability gives rise to a valid First Amendment claim”).

The Ordinance is wholly focused on conduct, not speech. It simply requires project developers to include some form of art in the publicly-accessible areas of their projects, or at some off-site location, or to pay an in-lieu fee so the City can choose and display art elsewhere. It does not prohibit anyone from speaking about any issue. To the extent the Ordinance requires projects to include some speech, in the form of art, it reserves that choice solely and exclusively to the project developer. It also gives applicants the ability to install no art by choosing the in-lieu fee.

The fact that the Ordinance incidentally “involves” art as protected speech is of no First Amendment significance. Subjecting every incidental impact on speech to First Amendment scrutiny “would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment.” *Arcara*, 478 U.S. at 708 (O’Connor, J., concurring). BIA cites no case suggesting that legislation like the Ordinance that is focused on conduct, not speech, warrants First Amendment protection, and we have found none.

BIABA thus must, but cannot, establish that the act of developing real property is inherently expressive. However, BIABA makes no such argument, nor has it ever cited any case that supports such a notion.

Moreover, the decision in *Committee for Responsible Regulation of Lake Tahoe v. Tahoe Regional Planning Agency*, 311 F.Supp.2d 972 (D. Nev. 2004) (“*CFRR*”) strongly suggests otherwise. There, in a facial First Amendment challenge to building design regulations, the Court held that in the absence of allegations that BIA’s members intend to convey some message in their projects’ architecture and design, the Court would assume the contrary is true. The Court thus concluded:

Typically, a person remodeling her house has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it. Although some residential remodels or rebuilds may involve an intent to convey an artistic, political, or self-expressive message, the great majority of remodeling or rebuilding projects involving residential housing are functional in nature and are not commonly associated with expression. Since plaintiff brings a facial challenge, we find that the ordinance does not on its face implicate patently expressive or communicative conduct.

Id. at 1004-05.

As in *CFRR*, BIABA neither alleges nor argues that its members' development projects are inherently expressive. Rather, as in *CFRR*, BIABA's members' projects are functional in nature and not associated with expression.

In short, the Ordinance does not regulate speech, and the conduct at issue is not inherently expressive. Under *FAIR* and its progeny, BIA's First Amendment claim fails for this reason alone.⁹

(2) If BIABA's First Amendment Challenge Warrants Some First Amendment Scrutiny, the Relaxed Rational Basis Standard Applies.

The District Court disagreed with the foregoing argument, that under *FAIR*, the Ordinance does not implicate the First Amendment at all. Instead, because the Ordinance requires project developers to purchase and display art, which is protected by the First Amendment, the Ordinance is subject to some level of First Amendment protection. However, the District Court concluded that because the Ordinance regulates neither speech nor expressive conduct, deferential rational basis review applies. 289 F.Supp.3d at 1059-60 (quoting Justice Breyer's concurring opinion in *Expressions Hair Design v. Schneiderman*, __ U.S. __, 137 S.Ct. 1144, 1152 (2017), for the proposition that "virtually all government regulation affects speech"); see also *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985); *Beeman v. Anthem Prescription Mgmt., LLC*, 58 Cal.4th 329, 363-64 (2013). The District Court then correctly concluded that the Ordinance easily satisfies that relaxed standard because it serves to advance the City's interest in aesthetics and increasing property values, and to mitigate the adverse effects development can have on both. *Id.*, citing *Berman v. Parker*, 348 U.S. 26, 33 (1954), and *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926); see also *CFRR*, 311 F.Supp.2d at 1006.

Thus, the City's position is that under *FAIR* the Ordinance does not implicate the First Amendment at all, but that if any degree of First Amendment scrutiny is warranted, it is rational basis, as the District Court concluded, based on the cases it cited.

Without discussing the District Court's decision with respect to the standard of review, or the cases cited, BIABA argues that the Ordinance should be subjected to "exacting" scrutiny. BIABA cites but one case, the Supreme Court decision in *Janus v. AFSCME*, 138 S.Ct. 2448,

⁹ The District Court rejected the City's argument that the ordinance was not entitled to any First Amendment protection, and instead upheld the ordinance based on what it concluded was a deferential rational basis review standard. 289 F.Supp.3d at 1059-60.

2464-65 (2018).¹⁰ The City’s view is that *Janus* does not support BIA. *Janus* was a compelled subsidy case in which non-union public employees objected to a requirement that they pay an “agency fee” to the union whose political positions they opposed. *Janus* applied exacting scrutiny specifically and explicitly because the required agency fee subsidy constituted a “significant impingement” on the non-union employees’ First Amendment right not to subsidize political views with which they disagree. *Id.* at 2464. Because BIABA can show no such significant impingement with respect to the Ordinance here, which reserves to developers to exclusive discretion to choose their art and its content, or if they choose, to display no art and instead pay an in-lieu fee, rational basis is the applicable review standard.

(3) The Oakland Ordinance Does Not Compel Speech.

BIABA argues that the Ordinance compels speech, citing *Wooley v. Maynard*, 430 U.S. 705 (1977) and other decisions. But compelled speech principles under *Wooley* have no application here. The Ordinance’s requirement to incorporate art into development projects over a certain size, or pay an in-lieu fee, is a well-settled form of land use regulation on the design of development, and on its face compels neither speech nor expression.

The “right of freedom of thought protected by the First Amendment against state action includes both the right to speak freely and the right to refrain from speaking at all.” *Wooley*, 430 U.S. at 714; see also *FAIR*, 547 U.S. at 61 (“freedom of speech prohibits the government from telling people what they must say”). The government may not select a factual or ideological message and force a person or entity to speak or host it. *FAIR*, 547 U.S. at 62; *Riley v. Nat’l Fed’n of the Blind*, 487 U.S. 781, 796 (1988). Thus, for example, when a person is ordered to say the pledge of allegiance or is criminally punished for refusing to disseminate a government-approved ideological slogan, the State “invades the sphere of intellect and spirit” that is “reserve[d] from all official control.” *Wooley*, 430 U.S. at 715. The government may not compel people or entities “to profess a specific belief.” *Agency for Int’l Dev. v. All. for Open Soc’y Int’l, Inc.*, 133 S.Ct. 2321, 2330 (2013); see also *Riley*, 487 U.S. at 795-96 (invalidating statute that required charitable fundraisers to deliver specific, government-favored factual information in the course of their “fully protected speech”). The test “is whether the individual is forced to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable.” *Frudden v. Pilling*, 742 F.3d 1199, 1205 (9th Cir. 2014) (invalidating a public school regulation that required students to wear a uniform bearing the mandatory message “Tomorrow’s Leaders,” quoting *Wooley*).

The Ordinance in no manner compels any particular message. It simply requires BIABA’s members to either provide some art on or off their project sites or pay an in-lieu fee. That is no different from requiring BIABA’s members to adhere to design and other zoning standards. See *Ehrlich*, 12 Cal.4th at 885-886 (public art requirements are “akin to traditional land use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping

¹⁰ In *Janus*, the Supreme Court recounted past cases that had applied an intermediate “exacting” scrutiny short of strict scrutiny to compelled speech, and that under such “exacting” scrutiny, a compelled subsidy must “serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms.” 138 S.Ct. at 2464-65. The *Janus* Court expressed skepticism whether that standard is correct, but did not resolve the issue, deciding instead that the Illinois agency shop “scheme” did not even satisfy the most relaxed scrutiny. *Id.*

requirements, and other design conditions such as color schemes, building materials and architectural amenities”); see also *CFRR*, 311 F.Supp.2d at 1005. The Ordinance on its face does not dictate what art is required or acceptable, or might be approved or rejected during design review.

The decision in *FAIR* is instructive again, to illustrate that the Supreme Court finds a compelled speech violation only where, unlike the case here, speech is actually compelled in a manner that offends the principles above. In *FAIR*, several law schools brought a compelled speech challenge against a federal statute (the Solomon Amendment) requiring them to give military recruiters the same access to students as all other civilian recruiters. In rejecting that argument, the Supreme Court observed that “[t]he compelled speech to which the law schools point is plainly incidental to the Solomon Amendment’s regulation of conduct ...” and explained that “[c]ompelling a law school that sends scheduling e-mails for other recruiters to send one for a military recruiter is simply not the same as forcing a student to pledge allegiance, or forcing a Jehovah’s Witness to display the motto ‘Live Free or Die,’ and it trivializes the freedom protected in [*Board of Education v. Barnette*] (1943) 319 U.S. 624] and *Wooley v. Maynard* (1977) 430 U.S. 705] to suggest that it is.” *FAIR*, 547 U.S. at 62 (emphasis added).

By its use of the verb “trivialize,” the Court affirmed what eludes BIA here—that not every law that implicates speech in some way violates the Constitution. Rather, *FAIR* establishes that while many laws implicate speech in some manner, only those laws that actually force someone to support, profess, or adhere to a specific belief, will violate compelled speech principles. The Ordinance does no such thing.

To the extent BIABA argues the Ordinance compels its members’ speech by requiring them to allow artists’ work to occupy their property, that argument fails under settled law. A regulation does not violate the compelled speech doctrine simply by requiring a property owner to allow another person or organization onto the owner’s property to express their speech, because the owner remains free to disassociate himself from those views and is “not ... being compelled to affirm [a] belief in any governmentally prescribed position or view.” *FAIR*, 547 U.S. at 64-65 (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980)); see also *Environmental Defense Center v. E.P.A.*, 344 F.3d 832, 849-50 (9th Cir. 2003) (rejecting *Wooley* compelled speech claim where regulation did not compel specific speech, and the regulated bodies were not prohibited from expressing their own views). Here, the Ordinance does not even go that far, in that it reserves to developers the sole discretion to choose their art, and thus the content of the speech.

BIABA cites *Constr. & Gen. Laborers’ Local Union No. 330 v. Town of Grand Chute*, 834 F.3d 745, 754 (7th Cir. 2016), for the proposition that there “are negative reactions even to great art.” The City does not dispute this general point, even though it was dictum and was not raised in anything even remotely resembling the factual context of this case. But the point is of no relevance, as both the *FAIR* and *PruneYard* decisions found no compelled speech violation even though the plaintiffs held negative views of the speech they were required to host. The Ordinance compels no speech at all, much less any specific speech. To the extent any of BIABA’s members may be concerned that they may somehow be associated with a “negative” message that the on-site art they themselves chose is important or even good, they have full

power to post or otherwise spread their own message disassociating themselves from art generally or as installed on site.

Further, through the in-lieu fee option, the Ordinance allows property owners to choose not to provide any art at all, allowing them to opt out of speech.

BIABA also cites several cases for the similarly uncontroversial proposition that the First Amendment protects art, *citing White v. City of Sparks*, 500 F.3d 953, 954, 956 (9th Cir. 2007) and other cases. BIABA's point, apparently, is that because the First Amendment protects art, BIABA and its members have the First Amendment right not to buy or display it. No case supports this argument, and BIABA offers none. As established above, the mere fact that the Ordinance concerns art does not mean it compels speech or otherwise gives rise to a First Amendment claim. *FAIR*, 547 U.S. at 62; *Arcara*, 478 U.S. 697, 706-707.

The Ordinance does not limit or regulate art, as was the situation in BIABA's cases. It promotes it. While the First Amendment would preclude the City from requiring BIABA's members to purchase and install the art work of the City's preferred artists, it is not implicated by the Ordinance's requirement that project applicants either buy and show art of their own unilateral choice, or pay an in-lieu fee.

To the extent BIABA also argues that the Ordinance's in-lieu fee forces them to subsidize a message with which they disagree, that argument fails. First, BIABA incorrectly characterizes the in lieu fee as compulsory. It is not, but instead is available as an alternative project which applicants may in their total and unilateral discretion select if they would prefer not to acquire and display art at their projects or at another location. Even if the fee were compulsory, under the government speech doctrine, compelled subsidies are permissible when they are used to fund government speech. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 562 (2005) (assessment on beef sales/importation used to support government beef promotional campaigns). Individuals cannot object to compelled subsidies where the government exercises "effective control" over the challenged speech. *See Delano Farms Co. v. Cal. Table Grape Comm'n*, 586 F.3d 1219, 1223 (9th Cir. 2009) (assessments on shipments of grapes used to fund generic grape promotional activities by state commission). As BIABA must concede, under the Ordinance the City exercises not just "effective control," but complete control over the in lieu fees and the art it funds.

While BIABA suggests the City may in its application of the Ordinance dictate the selection of either the art or the artists, that worry is not before the Court in this facial challenge. BIABA may not predicate a facial claim on speculation how the Ordinance might be applied in the future. *Koontz Coalition*, 2014 WL 5384434 at *5; *cf. Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134 (9th Cir. 2000) (facial free speech challenge to legislation prohibiting advertising referencing a marital status preference not justiciable); *Hallandale Professional Fire Fighters Local 2238 v. City of Hallandale*, 922 F.2d 756, 760-61 (11th Cir. 1991) (no justiciable controversy where plaintiff has not demonstrated present injury caused by guidelines governing criticism of public officials).

In short, no case has suggested that the imposition of art and design requirements as a part of a city's regulation of land use development applications constitutes compelled speech. Indeed, as in *FAIR*, the very argument "trivializes" those decisions which did involve actual compelled speech.

5. Conclusion.

For 23 years, cities nationwide have relied on the decision in *Ehrlich* not only with specific respect to art in public places ordinances, but also more broadly with respect to all land use regulations that impose costs on developers that advance the public's interest in ensuring that development satisfies a community's aesthetic standards. In *BIABA v. City of Oakland*, BIABA would undermine that reliance, and set back the constitutional assumption on which *Ehrlich* was based. Moreover, BIABA would introduce a new First Amendment compelled speech threat.