IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S212072

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE,

Respondent.

AFFORDABLE HOUSING NETWORK OF SANTA CLARA COUNTY, ET AL.,

Intervenors.

After an Opinion by the Court of Appeal,
Sixth Appellate District
(Case No. H038563)

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF and AMICI CURIAE BRIEF of LEAGUE OF CALIFORNIA CITIES and CALIFORNIA STATE ASSOCIATION OF COUNTIES

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APPLICATION TO FILE *AMICI CURIAE* BRIEF

I. INTRODUCTION

Pursuant to California Rules of Court, Rule 8.520(f), *amici curiae* the League of California Cities and the California State Association of Counties respectfully request leave to file the accompanying brief of *amici curiae* in support of the City of San Jose. This application is timely made within 30 days after the filing of the reply brief on the merits.

II. INTEREST OF THE *AMICI CURIAE*

The League of California Cities is an association of 470 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

This case implicates important constitutional separation of powers principles. For over 85 years, this Court has recognized the constitutional duty to defer to the legislative judgments made by local elected legislative bodies – here the San Jose City Council – about the wisdom of local planning and zoning regulations. The Court has avoided questioning such legislative judgments, and thereby deterring local legislative bodies from addressing the kinds of local land use concerns they were elected to address. Moreover, the Court has long recognized that in carrying out their legislative prerogative to establish local land use requirements, local elected City Councils and Boards of Supervisors enjoy broad latitude to address new and evolving local issues and concerns.

By its arguments to this Court, however, Petitioner would have this Court ignore those settled principles. Petitioner invokes non-specific, changing and incorrect constitutional theories to invalidate the San Jose City Council's legislative effort (and similar efforts of hundreds of other California cities and counties) to address what the State Legislature has repeatedly and emphatically stated is one of California's most pressing problems: the shortage of housing affordable to Californians at all income levels. As the Intervenors have pointed out, over one third of California cities and counties have adopted inclusionary ordinances. (See Continuing Education of the Bar ("CEB"), California Land Use Practice, Housing, § 6.2, p. 6-2.)

The League and CSAC, and their members, have a substantial interest in this case as they will be directly impacted by its outcome. Accordingly, *Amici*'s perspective on this matter is worthy of the Court's consideration and will assist the Court in reaching its decision.

Amici's counsel has examined the briefs on file in this case, are familiar with the issues involved and the scope of their presentation, and do not seek to duplicate that briefing. Proposed *Amici* confirm, pursuant to California Rule of Court 8.520(f)(4), that no one and no party other than Proposed *Amici*, and their counsel of record, made any contribution of any kind to assist in preparation of this brief or made any monetary contribution to fund the preparation of the brief.

III. CONCLUSION

The League and CSAC respectfully request that the Court accept the accompanying brief for filing in this case.

DATED: March 12, 2014

BURKE, WILLIAMS & SORENSEN, LLP

By: _____
THOMAS B. BROWN
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AMICI CURIAE BRIEF
IN SUPPORT OF THE CITY OF SAN JOSE

I. INTRODUCTION

Although Petitioner argues that "affordable housing is not on trial in this case" (Reply Brief at p. 1), its appeal broadly attacks inclusionary zoning as it is currently applied statewide. Because inclusionary zoning has become a widely used, significant and singularly successful means for local governments to meet their share of desperately needed affordable housing, the League of California Cities and the California State Association of Counties (collectively "*Amici*") are uniquely situated to address the issues presented in this case. As a result, Amici file this *amici curiae* brief in support of the City of San Jose.

The issues in this case are of concern to all California cities and counties whose City Councils and Boards of Supervisors are elected to enact legislation – planning and zoning ordinances -- to address local land use concerns, including a concern (indeed crisis) the State Legislature has repeatedly and emphatically described as one of California's most important: the provision of affordable housing. Under settled constitutional separation of powers principles, courts defer to the legislative judgments of elected City Councils and Boards of Supervisors on local land use policies such as San Jose's inclusionary zoning ordinance.

Amici wish to emphasize the following four points:

1. Constitutional separation of powers principles require this Court to defer to the elected San Jose City Council's legislative judgment establishing the City's land use policies, including how best to address the

statewide affordable housing crisis identified by the State Legislature and to satisfy the affordable housing mandates imposed upon it by the State.

2. The most deferential standard applies to courts' review of inclusionary zoning ordinances. Under that standard, the ordinance is to be upheld if it reasonably relates to a legitimate governmental interest. The so-called "intermediate standard" for development impact fees (whether the ordinance reasonably relates to a specific project's deleterious impacts), established under *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643 ("*San Remo Hotel*"), applies only in takings cases and only to fees imposed to mitigate a project's impacts.

3. Even if the *San Remo Hotel* "intermediate scrutiny" applied to San Jose's inclusionary ordinance, the ordinance nevertheless passes muster as a matter of law because, as was the case for the ordinance at issue in *San Remo Hotel* and similar ordinances adopted by many California cities and counties, San Jose's inclusionary ordinance was enacted on the basis of express legislative findings that its requirements are necessary to mitigate two specific adverse impacts resulting from development: (a) the loss of scarce available land that otherwise might be used for the development of affordable housing, and (b) the influx of new, low-income workers needed to provide services to new market-rate development. Those legislative findings are entitled to the presumption that they are factually supported. In *San Remo Hotel*, this Court required nothing more in upholding the Hotel Conversion Ordinance ("HCO") ordinance at issue there as a matter of law on demurrer.

4. Petitioner's facial challenge to San Jose's inclusionary zoning ordinance should be rejected as unripe in light of the ordinance's

administrative waiver provision by which individual project applicants are entitled to seek, and the City may grant, relief from the ordinance's requirements.

II. ARGUMENT

A. Constitutional Separation of Powers Principles Limit the Court's Review of Cities' And Counties' Legislative Judgments.

Nearly 65 years ago, this Court recognized that constitutional challenges to cities' legislative judgments, and courts' review of such challenges, implicate important constitutional separation of powers principles. As a result, this Court has accorded the broadest possible deference to the legislative judgments of cities and counties as a coordinate branch of government:

> [W]e must keep in mind the fact that the courts are examining the act of a coordinate branch of the government -- the legislative -- in a field in which it has paramount authority, and not reviewing the decision of a lower tribunal or of a fact-finding body. Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties.... [U]nder the doctrine of separation of powers neither the trial nor appellate courts are authorized to "review" legislative determinations. The only function of the courts is to determine whether the exercise of legislative power has exceeded constitutional limitations. As applied to the case at hand, the function of this court is to determine whether the record shows a reasonable basis for the action of the zoning authorities, and, if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed.

(*Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 461-462 ("*Lockard*"); see also *Santa Monica Beach v. Superior Court* (1999) 19 Cal.4th 952 ("*Santa Monica Beach*").)

Accordingly, courts presume a challenged legislative act to be valid; "every intendment is in favor of [its] validity." (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1152 ("*Big Creek*"); *Lockard, supra*, 33 Cal.2d at p. 460; *Ensign Bickford Realty v. City Council* (1977) 68 Cal.App.3d 467, 473.) There is also a presumption that the local agency ascertained the existence of necessary facts to support its legislative determination, and that the "necessary facts" are those required by the applicable standards which guided the board. (*Orinda, supra*, 11 Cal.App.3d 768, 775, citing *City & County of S.F. v. Superior Court* (1959) 53 Cal.2d 236, 251; *Chas. L. Harney, Inc. v. Board of Permit Appeals* (1961) 195 Cal.App.2d 442, 445.)

A legislative act is deemed to have been enacted on the basis of any set of facts supporting it that reasonably can be conceived. It is not the judiciary's function to reweigh the legislative facts underlying a legislative enactment. (*Santa Monica Beach, supra*, 19 Cal.4th at 970, 973.) Rather, if the validity of a statute depends on the existence of a certain set of facts, it is presumed that the Legislature has investigated and ascertained the existence of those underlying facts before passing the law. (*Alfaro v. Terhune* (2002) 98 Cal.App.4th 492, 510-511, citing, *inter alia, Higgins v. City of Santa Monica* (1964) 62 Cal.2d 24, 30.) Courts may not revisit the issue as a question of fact, but must defer to the Legislature's fact determination unless it is palpably arbitrary. Courts are bound to uphold the challenged legislation so long as the Legislature could rationally have determined a set of facts that support it. (*Vo v. City of Garden Grove*

(2004) 115 Cal.App.4th 425, 442-443; *Alfaro v. Terhune*, *supra*, 98 Cal.App.4th 492, 510-11; *Hall v. Butte Home Health, Inc.* (1997) 60 Cal.App.4th 308, 322 .)

To be sure, reasonable minds can and do disagree with San Jose as to whether its inclusionary ordinance represents sound policy. But such disagreement does not allow reviewing courts to invalidate the City Council's legislative judgment. Because San Jose rationally could and did conclude, like literally hundreds of other cities and counties in California and across the country, that its inclusionary ordinance would help it to address the State Legislature's mandate to promote the development of new affordable housing and economic diversity in the City's neighborhoods, the fact that a reasonable person might disagree with the wisdom of this conclusion is of no legal significance. Under the separation of powers principles set forth above, San Jose's legislative judgment is entitled to deference.

B. Cities Have Broad Constitutional Police Power To Regulate Land Use And Zoning.

The principles set forth above apply equally to land use and zoning ordinances. The California Constitution vests cities and counties with broad "police power" to adopt planning, subdivision and zoning ordinances. (Cal. Const., art. XI, § 7; *Big Creek*, *supra*, 38 Cal.4th 1139, 1151; *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89; *Delta Wetlands Properties v. County of San Joaquin* (2004) 121 Cal.App.4th 128, 148; *Leavenworth Properties v. City and County of San Francisco* (1987) 189 Cal.App.3d 986 ("*Leavenworth*").)

When a City Council or a Board of Supervisors enacts a zoning ordinance, it acts in a legislative capacity, and every intendment is in favor of such ordinances. (*Big Creek, supra*, 38 Cal.4th 1139, 1152, citing *Lockard, supra,* 33 Cal.2d 453, 460; *Orinda Homeowners Committee v. Board of Supervisors* (1970) 11 Cal.App.3d 768, 775 ("*Orinda*").) A land use ordinance adopted by a City Council has the same force and effect within that city's jurisdictional limits as does a statute adopted by the State Legislature. (*City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 492.)

"More than a half-century ago, ... this court explained that '[i]t is well settled that a municipality may divide land into districts and prescribe regulations governing the uses permitted therein, and that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power.'" (*Hernandez v. City of Hanford* (2007) 41 Cal. 4th 279, 296.) This authority is not a "circumscribed prerogative," but is "plenary" and "elastic" in order that local officials can creatively address the evolving needs and concerns of their communities. (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 882 ("*Candid*"); *Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 676 ("*Fisher*"); *Miller v. Board of Public Works* (1925) 195 Cal. 477, 484-485 ("*Miller*").)

Though Petitioner urges a constrained constitutional view of what constitutes land use regulation, this Court has never so limited local legislative bodies. Nearly 90 years ago, this Court made clear in *Miller*, one of its earliest zoning cases, that the scope of what local legislators may address by land use and zoning regulations is not set in stone. Rather, as their communities and their local challenges and problems evolve and

change, local legislators are not tied forever to approaches that have in the past been validated by courts. Rather, they are free to try to solve new social problems by experimenting with new and different land use and zoning solutions:

> In short, the police power, as such, is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present-day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public. That is to say, as a commonwealth develops politically, economically, and socially, the police power likewise develops, within reason, to meet the changed and changing conditions. What was at one time regarded as an improper exercise of the police power may now, because of changed living conditions, be recognized as a legitimate exercise of that power. This is so because: "What was a reasonable exercise of this power, in the days of our fathers may today seem so utterly unreasonable as to make it difficult for us to comprehend the existence of conditions that would justify same; what would by our fathers have been rejected as unthinkable is today accepted as a most proper and reasonable exercise thereof." [Citation omitted.]
>
> In its inception the police power was closely concerned with the preservation of the public peace, safety, morals, and health without specific regard for "the general welfare." The increasing complexity of our civilization and institutions later gave rise to cases wherein the promotion of the public welfare was held by the courts to be a legitimate object for the exercise of the police power. As our civic life has developed so has the definition of "public welfare" until it has been held to embrace regulations "to promote the economic welfare, public convenience and general prosperity of the community." [Citation omitted.] Thus it is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and

> thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.

(*Miller v. Board of Public Works* (1925) 195 Cal. 477, 484-485; accord *Candid, supra*, 39 Cal.3d 878, 882; *Fisher, supra*, 37 Cal. 3d 644, 676.)

Thus, contrary to Petitioner's argument, the concept of zoning and land use regulation is in no manner limited to what Petitioner may view as "traditional" or "classic" forms such as regulations of side yards and setbacks, height restrictions, imposition of riparian buffers and commercial use limits. (See Government Code § 65850, describing these and other examples of zoning.) Just as the need for "traditional" zoning district regulation gave rise to classic "Euclidian" zoning throughout much of the early and middle twentieth century,[1] changing demographics, rapid population growth and the loss (or lack) of financial and racial integration led many communities to recognize that without new land use and zoning approaches such as inclusionary ordinances, their communities would forever be economically and racially segregated and without any homes for low-income families and workers who provide services to the residents of new market rate housing.[2]

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[1] This term derives from the United States Supreme Court's seminal decision in *Village of Euclid v. Amber Realty Co.* (1926) 272 U.S. 365, upholding one community's early comprehensive zoning ordinance. (See CEB, California Land Use Practice, Zoning, § 4.7, p. 4-7.)

[2] As we discuss below, San Jose's ordinance, like many inclusionary ordinances, contains express findings that it was enacted to address this very problem, namely, the loss of available land that otherwise might be used for the development of affordable housing, and the fact that new market rate residential development creates an influx of new low-income workers providing services to the residents of new market rate housing.

While such inclusionary requirements impose financial burdens on residential developers, so too do other zoning restrictions and requirements adopted pursuant to a local government's police power.[3] These include limits on side yards and setbacks (*Town of Atherton v. Templeton* (1961) 198 Cal.App.2d 146), condominium conversion restrictions based solely on change of form of ownership (*Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256 ("*Griffin Dev.*")), buffers (*Big Creek*, *supra*, 38 Cal.4th 1139), and limits on commercial activities in residential districts (*County of Butte v. Bach* (1989) 172 Cal.App.3d 848). State and federal courts have long recognized that the exercise of a local jurisdiction's police power often results in limits on property rights. (*Queenside Hills Realty Co., Inc. v. Saxl* (1946) 328 U.S. 80, 83 ["The police power is one of the least limitable of governmental powers, and in its operation often cuts down property rights."]; *Griffin Dev.*, *supra*, 39 Cal.3d at p. 267.) Nonetheless, this Court has refused to reject land use regulations on the ground that such regulation limits the value of private property. Rather, the Court has recognized that "[i]t is of the essence of the police power to impose reasonable regulations upon private property rights to serve the larger public good." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 146.)

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[3] On the other hand, inclusionary ordinances such as San Jose's grant a variety of generous benefits and privileges to offset or eliminate such financial burdens. (See, e.g., *Home Builders Ass'n of Northern California v. City of Napa (2001)* 90 Cal.App.4th 188, 194 ("*Napa*").) San Jose's ordinance similarly allows for density bonuses, flexible parking standards, reduced setback requirements, alternate use types, alternate interior design standards, processing assistance, and assistance with financial subsidies. (See San Jose Mun. Code § 5.08.450.)

C. The State Legislature Has Repeatedly Emphasized That California Cities Are Obligated To Address The State's Affordable Housing Crisis.

The California Legislature has found that there currently is a "severe shortage of affordable housing," creating a housing "crisis" that is a "critical problem" in the State. (Government Code §§ 65009, 65589.5, 65913.) The Legislature hardly could have been more explicit or urgent in this regard, as many courts have noted. (*Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066, 1074; *Haro v. City of Solana Beach* (2011) 195 Cal.App.4th 542, 549 ("*Haro*"); *Urban Habitat Program v. City of Pleasanton* (2008) 164 Cal.App.4th 1561, 1581; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 823; *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1208 ("*Fonseca*"); *Honig v. San Francisco Planning Department* (2005) 127 Cal.App.4th 520, 528; *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1260; *Napa, supra*, 90 Cal.App.4th 188, 191; *Sounhein v. City of San Dimas* (1996) 47 Cal.App.4th 1181, 1188; *Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1564; *Hernandez v. City of Encinitas* (1994) 28 Cal.App.4th 1048, 1072; *Building Industry Assn. v. City of Oceanside* (1994) 27 Cal.App.4th 744, 770.) As of 1996, the Legislature had enacted "no less than 19 different sets of laws and programs ... to both increase the housing available to Californians and help make it affordable." (*Sounhein v. City of San Dimas, supra*, 47 Cal.App.4th 1181, 1188.) That number has since continued to expand.

The Legislature has further declared affordable housing to be "a priority of the highest order (Government Code § 6580(a); *Haro, supra,* at p. 549; *Fonseca, supra*, 148 Cal.App.4th at p. 1182); and has stated that the availability of decent housing and a suitable living environment for every

Californian is a matter of statewide importance, and that local governments are responsible for "facilitat(ing) the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community." (Gov. Code § 65580(d).) In enacting the Housing Element Law, the Legislature thus required "counties and cities (to) recognize their responsibilities in contributing to the attainment of the state housing goal" and to adopt and implement housing elements in order to meet that goal. (Gov. Code § 65581.) Local governments have a responsibility to use the powers vested in them to facilitate the development of housing that will meet the housing needs of all economic segments of the community. To that end, each local government must adopt a housing element that identifies its share of the regional housing need and makes "adequate provision" for the housing needs of very low, low, and moderate income levels. (Gov. Code §§ 65580, 65583(c), 65584; see also *Napa*, *supra*, 90 Cal.App.4th 188, 194.)

Rather than prescribe the particular means to secure adequate housing to meet regional needs, the Legislature has acknowledged that each local government is "best capable of determining what efforts are required by it to contribute to the attainment of the state housing goal," by addressing housing needs through the implementation of "housing elements" adopted as part of the community's general plan. (Gov. Code §§ 65581, 65582.) Each housing element must include an assessment of housing needs for all income levels, the identification of adequate housing sites, and a program that assists in the development of such housing "to meet the needs of extremely low, very low, low-, and moderate-income households." (Gov. Code § 65583, subd. (c)(2).) Each local jurisdiction's

housing element is then subject to a presumption of validity. (Gov. Code § 65589.3.)

San Jose's Housing Element expressly supports the City's adoption of its inclusionary ordinance. Specifically, the Housing Element "anticipate[s] that the Citywide inclusionary ordinance will assist in the production of housing [units] across income categories ...." (AA 2564-2565 [SDI 1928-28].) San Jose's inclusionary ordinance (SJMC section 5.08.020) was adopted in furtherance of this goal. In particular, the express purposes of the ordinance are: to enhance the public welfare by requiring the development of housing affordable to households of very low, lower, and moderate incomes, meet the City's regional share of housing needs, and implement the goals and objectives of the general plan and housing element (AA 659); to provide incentives for affordable units to be located on the same sites as market rate developments in order to provide for the integration of very low, lower and moderate income households with households in market rate developments and to disperse inclusionary units throughout the City (AA 659); and to provide developers with alternatives to construction of inclusionary units on the same site as market rate development (AA 660).

D. Cities And Counties Have Responded To The State's Emphatic Mandate By Adopting Inclusionary Ordinances As Quintessential Land Use And Zoning Regulations.

Petitioner argues that inclusionary ordinances should be subject to a different standard because they are not really land use or zoning ordinances. (Pet. Op. Br., pp. 25-26.) Its argument reflects a misunderstanding of the

history of zoning and land use generally, and of the development of such inclusionary requirements.[4]

In the late 1960s and early 1970s, local governments began to use land use and zoning legislation to limit growth. Examples of such local legislation included limitations on building permits in the absence of infrastructure to support it, and the imposition of large minimum lot sizes. Challengers argued that the effect of such growth limitations was to exclude new (often minority and poor) residents from moving into such communities. This approach was referred to as "exclusionary" zoning. (See *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 601-02 ("*Associated Home Builders*"), citing *Construction Ind. Ass'n., Sonoma Cty. v. City of Petaluma* (9th Cir. 1975) 522 F.2d 897, 909; *Town of Los Altos Hills v. Adobe Creek Properties, Inc.* (1973) 32 Cal.App.3d 488; *Ybarra v. City of Town of Los Altos Hills* (9th Cir. 1974) 503 F.2d 250.)

Against that background, and seeking creative new means of satisfying the State's mandate that they provide for new affordable housing,

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[4] Petitioner's reliance on the Court's recent decision in *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193 ("*Sterling*"), and the U.S. Supreme Court's decision in *Koontz v. St. Johns River Water Management District* (2013) 133 S.Ct. 2586 ("*Koontz*"), is misplaced. The sole issue in *Sterling* was whether Palo Alto's inclusionary ordinance constituted a fee or other exaction within the meaning ascribed to those terms by the Mitigation Fee Act, Government Code section 66000 et seq. The Court did not undertake to decide the broader constitutional question presented here. The *Koontz* case is likewise distinguishable. It involved an *ad hoc* requirement, clearly subject to *Nollan/Dolan* heightened scrutiny. However, this Court has repeatedly held (e.g. *San Remo*, *Ehrlich*, *Santa Monica Beach*) that such scrutiny is inapplicable to generally applicable, legislatively imposed requirements such as San Jose's inclusionary ordinance.

cities (such as San Jose here) and counties have amended their planning, zoning and subdivision codes and general plans to require residential development projects to include a percentage of subsidized "affordable" units among the market rate units. This approach is referred to as "inclusionary zoning." (*Action Apartment Assn. v. City of Santa Monica* (2008) 166 Cal.App. 4th 456, 468 ("*Action Apartment*"); *Napa, supra*, 90 Cal.App.4th 188, 194.)

Although inclusionary programs vary from one jurisdiction to another, these programs typically mandate or encourage developers of new residential projects to set aside a certain percentage of a project's residential units for households of low or moderate incomes. Inclusionary housing programs take many forms. They may be implemented by local subdivision or zoning ordinance; alternatively, they may be included in a local jurisdiction's housing element or fair share plan. Most programs specify what percentage of affordable units the developer must provide as part of a project, and require that affordable housing units created through these programs be integrated with market-rate development to prevent low income households from being isolated, maintain or encourage economically diverse communities, and reduce pollution and other side-effects of commuting long distances by car. And again, many, including San Jose's (See San Jose Mun. Code § 5.08.450), provide generous financial incentives and concessions to encourage the provision of affordable units, or permit alternative means to satisfy the program's requirements such as dedication of land and payment of in-lieu fees. (See generally California's Response To The Affordable Housing Crisis, SN005 ALI-ABA 1491, 1518-19; see also *Napa, supra*, 90 Cal.App.4th 188, 194.)

According to the Non-Profit Housing Association of Northern California, 170 California jurisdictions--nearly one-third of all jurisdictions reporting--had adopted some form of inclusionary housing program. ("Affordable By Choice: Trends in California Inclusionary Housing Programs," www.nonprofithousing.org; see also "California's Response To The Affordable Housing Crisis," *supra*, SN005 ALI-ABA 1491, 1519; see also CEB, California Land Use Practice, *supra*, Housing, § 6.2, p. 6-2.) By 2006, these programs had created an estimated 29,281 affordable units statewide, housing over 80,000 Californians. ("Affordable By Choice, *supra* at p. 5.) Nearly half of the housing produced through inclusionary housing programs is affordable to people with low and very low incomes. ("Affordable By Choice," *supra*, at p. 14.) Inclusionary housing programs are thus a critical tool for cities and counties to build housing that meets the needs of all Californians as required by state law.

As the Court of Appeal made clear in the *Napa* case, inclusionary zoning programs should be analyzed as exercises of the police power subject to the deferential standard applicable to legislative enactments of broad application, rather than under the higher level of scrutiny applied to individualized development exactions. (See *Napa, supra*, 90 Cal.App.4th 188, 196-97.) Applying similar principles to another set of land use policy decisions, this Court, in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 ("*Ehrlich*"), provided guidance relevant here.

In *Ehrlich,* the Court considered two "non-traditional," innovative zoning requirements resulting in fees imposed on a developer. First, the Court examined the city's *ad hoc* imposition of a $280,000 recreation fee intended to address the loss of tennis courts and other recreational facilities related to the proposed development. Relying on both the constitutional

takings clause and the Mitigation Fee Act, the Court held that a regulatory authority must demonstrate a "reasonable relationship" between the monetary exaction and the public impact of the development. Applying that standard to the case before it, the Court held that the city had met its burden of demonstrating the required connection or nexus between the rezoning to permit a residential use of a parcel of land zoned for private recreational use and the imposition of a monetary exaction to be expended in support of recreational purposes as a means of mitigating that loss, but had failed to support the amount of the fee imposed. (*Id.* at p. 854.)

Next, the Court considered Culver City's application of its "art in public places" ordinance to the proposed project. That ordinance required the developers to either pay $ 32,200 to the city art fund (one percent of the total building valuation) or contribute an approved work of art of an equivalent value. Under the latter option, the ordinance allowed the art to either be placed on site, in which case it remained the property of the applicant, or donated to the city for placement elsewhere. (12 Cal.4th at 885.)

This Court upheld the public art set aside ordinance as a valid exercise of the city's land use authority, and in so doing held that analytically it was no different from other, more traditional forms of zoning regulation:

> [W]e agree with the city that the art in public places fee is not a development exaction of the kind subject to the *Nollan-Dolan* takings analysis. ... [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. (See, e.g., *Metromedia Inc. v. San Diego* (1980) 453 U.S. 490, 508, fn. 13 [69 L. Ed. 2d 800, 815, 101 S. Ct. 2882] [approving prohibition against outdoor advertising]; *Penn Central Transp. Co. v. New York City*, *supra*, 438 U.S. 104 [upholding municipal power to preserve landmark structures]; *Agins v. Tiburon*, *supra*, 447 U.S. 255 [upholding condition to preserve scenic views].) The requirement of providing art in an area of the project reasonably accessible to the public is, like other design and landscaping requirements, a kind of aesthetic control well within the authority of the city to impose. (12 Cal.4th at 886.)

Thus, this Court in *Ehrlich* distinguished "generally applicable development fee[s] or assessment[s]," as to which "the courts have deferred to legislative and political processes," from "special, discretionary permit conditions" like the one at issue there. (*Id.* at p. 881.) Rather than an adjudicative obligation imposed on a project on an *ad hoc* basis by the city, the art in public places ordinance upheld in *Ehrlich* was a legislatively imposed obligation imposed without discretion on all developers, requiring that they set aside a portion of their property to satisfy a community purpose (aesthetics), or otherwise pay an in lieu fee to enable the City to do so for them.

Inclusionary ordinances are no different analytically. They require developers of market rate residential projects to set aside a percentage of their new units for the community purpose of providing housing for lower income families. These requirements may, but do not always, result in costs to the property owners just as more traditional zoning restrictions

have the potential to diminish the value of a particular parcel due to set back, rear yard, height or bulk limitations.[5]

California courts have upheld a variety of municipal ordinances intended to create or preserve affordable housing as valid exercises of the local entity's police power, despite the costs these ordinances impose on property owners. (See, e.g., *Leavenworth , supra,* 189 Cal.App.3d at p. 992; *Griffin Dev., supra,* 39 Cal.3d 256, 264, 266 [maintaining " '... a healthy rental housing inventory' " is a legitimate governmental purpose]; *Santa Monica Pines, Ltd. v. Rent Control Bd.* (1984) 35 Cal.3d 858, 869 [restrictions on removing housing from the rental market through condominium conversion have a legitimate purpose and do not constitute a taking]; *Kalaydjian v. City of Los Angeles* (1983) 149 Cal.App.3d 690, 693 [tenant relocation assistance fee imposed on condominium converter to ameliorate the adverse effects upon the community's rental stock reflects a proper legislative purpose].)

Just as all of the above examples of more "traditional" zoning either limit or completely prohibit some use of property, so too do inclusionary zoning ordinances. The fact that the limitation is based on the user rather than a more traditional zoning characteristic such as building height or side yard setback is of no legal significance under this Court's decisions in cases such as *Griffin Dev., supra.*

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[5] It is not a given that inclusionary requirements result in projects that are less financially attractive to property owners. Rather, as noted above, they often provide many financial benefits to offset their impacts, such as expedited processing, fee deferrals, loans or grants, and density bonuses. (*Napa, supra,* 188 Cal.App.4th at 194.) San Jose's ordinance is no exception. (San Jose Mun. Code § 5.08.450.)

Moreover, in some ways inclusionary ordinances are *less* restrictive than other forms of zoning. For example, height restrictions, setbacks, buffers and minimum lot size zoning completely prohibit any and all use of property within the restricted areas. Inclusionary ordinances, by contrast, allow the full residential development, but simply restrict its cost to end users. While this restriction might (but need not necessarily) reduce a developer's profits on an overall development, this Court and others have repeatedly held that such profit and price reductions do not create takings liability.[6] In any event, these limitations are offset by density bonuses and a variety of other financial incentives and benefits allowed the developer.[7]

In short, inclusionary ordinances are properly deemed land use/zoning regulations subject to deferential review by the courts. To conclude otherwise, this Court would have to abandon 85 years of settled precedent. *Amici* urge the Court to decline Petitioner's invitation to do so.

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[6] *Griffin Dev., supra*, 39 Cal.3d at p. 267; *Fisher, supra,* 37 Cal.3d at p. 686; see also *Concrete Pipe and Products of California, Inc. v. Construction Laborers Pension Trust for Southern Cal.* (1993) 508 U.S. 602, 645, citing *Village of Euclid v. Ambler Realty Co., supra*, 272 U.S. 365, [approximately 75 percent diminution in property value not a taking]; *Hadacheck v. Sebastian* (1915) 239 U.S. 394, 405 [92.5 percent diminution]; *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 413 ["[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law"]; *see also Long Beach Equities, Inc. v. County of Ventura* (1991) 231 Cal. App. 3d 1016, 1036; *Terminals Equipment Co. v. City and County of San Francisco* (1990) 221 Cal.App.3d 234, 242-243; *Terminal Plaza Corp. v. City and County of San Francisco* (1986) 177 Cal. App. 3d 892, 912.)

[7] Alternatively, if the Court views inclusionary requirements as a form of price control, the identical, deferential standard of review applies. (*Santa Monica Beach, supra*, 19 Cl.4th at p. 967.)

E. Under *Associated Home Builders*, Inclusionary Zoning Is Valid Because It Bears A Reasonable Relationship To The Public Welfare.

Citing *Associated Home Builders*, the Court of Appeal below got it exactly right in reiterating the applicable standard by which courts are bound to review zoning ordinances:

> A land use ordinance is a valid exercise of the police power if it bears a substantial and reasonable relationship to the public welfare. [Citation.] It is invalid only if it is arbitrary, discriminatory, and [without a] reasonable relationship to a legitimate public interest." ([Citation omitted].) "The core issue is whether there is any rational reason related to the public welfare for the restriction imposed." (*Id.* at p. 1537; *see Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 607....) "In deciding whether a challenged ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor. (*Associated Home Builders etc., Inc. v. City of Livermore*, *supra*, 18 Cal.3d at pp. 604–605.) Accordingly, a land use ordinance that is asserted to exceed a municipality's police power will withstand constitutional attack "if it is fairly debatable" that the ordinance "reasonably relates to the welfare of those whom it significantly affects," including the surrounding region if affected. (*Id.* at pp. 606–607; *see Arnel Development Co. v. City of Costa Mesa* (1981) 126 Cal.App.3d 330, 339 ... [applying *Associated Home Builders* to rezoning ordinance].)

(*CBIA v. City of San Jose*, 157 Cal.Rptr.3d 813, 824.)

The Court of Appeal's decision was based solidly on this Court's previous rulings. (*Associated Home Builders v. City of Walnut Creek* (1971) 4 Cal.3d 633; *Ayres v. City Council of Los Angeles* (1949) 34 Cal.2d 31; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854.)

Moreover, in both *Associated Home Builders* and *Ayres*, this Court expressly rejected the notion, advanced again by Petitioner here, that land use ordinances must in all instances mitigate impacts from specific developments, rather than impacts from development generally, in order to pass constitutional muster. (4 Cal.3d at 639-640.)[8] The Court also stated the principle as follows in *Hamer v. Ross* (1963) 59 Cal.2d 776 ("*Hamer*"):

> The courts do not require proof of specificity of injury to the municipality or to those in the area of the involved property. ... The fact that there is no showing by the city that any harm would result to the zoning plan does not render a denial of the extension unreasonable. Courts do not require that the proscribed use of each individual lot in an area zoned will have this effect if the zoning plan, as a whole, promotes these objectives of the police power. (59 Cal.2d at 788.)

Amici urge this Court to adhere to its settled precedents in *Associated Home Builders*, *Ayres*, *Hamer* and *Ehrlich*, and to uphold San Jose's ordinance under the deferential standard established in those decisions. *Amici's* member cities and counties have relied on those decisions for decades, and Petitioner has presented no cogent argument to abandon them. *Amici* agree with San Jose and Intervenors that the so-called "intermediate scrutiny" articulated by this Court's decision in *San Remo Hotel* applies solely in the takings context, or to ordinances that expressly undertake to mitigate specific adverse impacts.

Amici also urge the Court to reject Petitioner's cynical argument that, unless *San Remo Hotel* is broadly applied to all zoning ordinances that offer an in lieu fee alternative to their basic requirement, and not merely to impact fees imposed to mitigate specific development project impacts,

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[8] This Court also recently cited *Associated Home Builders* with approval in *Hernandez v. City of Hanford, supra*, 41 Cal.4th at 296.

cities and counties will engage in clever, manipulative draftsmanship to "game" the system. (Pet. Op. Br., p. 32.) Under the principles set forth above, courts are bound to presume the best, not the worst of these elected officials, acting as a coordinate, legislative branch of our government. In discharging this obligation, courts look only to the laws themselves, which are presumed valid and which all intendments favor, and may not consider whether legislators acted with "impure" motives. (*McCarthy v. City of Manhattan Beach* (1953) 41 Cal.2d 879, 894-895.)[9] Moreover, this Court recognized in *San Remo Hotel* that the democratic political process affords protection from the kind of manipulation Petitioner imagines; where local elected officials act in a legislative capacity, they do so under the microscope of public scrutiny, with attendant political consequences. (27 Cal.4th at 671 (noting that generally applicable legislation is subject to "the ordinary restraints of the democratic political process").)[10]

F. Even If *San Remo*'s "Intermediate" Scrutiny Standard Applies, San Jose's Inclusionary Ordinance Satisfies It.

Even if this Court accepts that the "intermediate scrutiny" standard under *San Remo Hotel* applies, San Jose's ordinance easily satisfies it. In *San Remo Hotel*, this Court upheld San Francisco's HCO as a matter of law

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[9] Consistent with these constitutional principles, the Legislature has established the presumption that official duty is regularly performed. (Evidence Code section 664.)

[10] In the same portion of the decision, *San Remo Hotel* dismisses the argument, resurrected by Petitioner here, that a zoning ordinance that sets a standard or requirement, but then allows that requirement to be satisfied by payment of an in lieu fee, risks putting zoning "up for sale." Years earlier, *Ehrlich* validated the ability of cities and counties to offer developers an in lieu fee alternative to satisfy the underlying zoning requirement. (12 Cal.4th at 886.)

on demurrer, based solely on its review of the findings contained in the HCO. (27 Cal.4th 643.)

This Court in *San Remo Hotel*, relying on its earlier decision in *Ehrlich*, first described the significant deference given to generally applicable legislative determinations. Justice Mosk, concurring, explained that "'general governmental fees' are 'judged under a standard of scrutiny closer to the rational basis review of the equal protection clause than the heightened scrutiny of *Nollan* and *Dolan*.'" (27 Cal. 4th at p. 667 [citing *Ehrlich, supra*, at p. 897 (conc. opn. of Mosk, J.].) Citing *Santa Monica Beach, supra*, 19 Cal.4th at p. 966, the Court acknowledged that "[t]he most deferential review of land use decisions appears to be for those that pertain to 'essentially legislative determinations' that do not require any physical conveyance of property." (*Id.* at p. 668.) Because the HCO provided the city of San Francisco with no discretion regarding the imposition or size of a housing replacement fee, the Court concluded that the HCO was entitled to broad deference. (*Ibid.*) Like the ordinance at issue in *San Remo*, San Jose's inclusionary ordinance does not constitute an *ad hoc* condition, or require physical conveyance of property. As such, *San Remo Hotel* provides that San Jose's ordinance is subject to the "most deferential" standard of review.

Having concluded that the HCO was subject to deferential review, the Court made clear that such deference did not translate to an absence of review. Rather, "[a]s 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." (*Id.* at p. 671.) The Court then relied on San Francisco's legislative findings to support its conclusion that the HCO bears a reasonable relationship to the impact of

the proposed development. The Court did so as a matter of law, on the City's demurrer, on the basis of the HCO ordinance and its findings alone.

As with the HCO in *San Remo Hotel*, San Jose's inclusionary ordinance under review here contains two legislative findings that the development of market rate housing has two adverse impacts requiring mitigation. Specifically, the City Council, in adopting the ordinance, expressly found that the development of market rate housing (1) depletes the City's limited supply of available land that otherwise might be used for affordable residential development, and (2) exacerbates the City's affordable housing shortage (and attendant service and civic problems) by creating an influx of new low-income workers needed to provide services for the new market rate houses, while such workers themselves require affordable housing. (San Jose Mun. Code § 5.08.010 F. 1, 2.)[11] These legislative findings, which are entitled to judicial deference and a presumption of their validity and factual basis, satisfy *San Remo Hotel.*

This Court also made it clear in *San Remo Hotel* that it was not San Francisco's burden to make a showing of the requisite connection. Rather, it was the plaintiffs' burden to show that the challenged fee provision was not reasonably related to housing loss through conversion of the hotel units from residential to tourist use. The plaintiffs failed to meet that burden.

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[11] Such findings have been upheld as the basis for similar affordable housing requirements, commonly known as "linkage" fees, imposed on new commercial development. (See *Commercial Builders Of Northern California v. City of Sacramento* (9th Cir. 1991) 941 F.2d 872 ("*Commercial Builders*").) This Court acknowledged the findings in *Commercial Builders* in its decision in *Ehrlich*, and stated (as in other cases including *San Remo Hotel*) that *Nollan*'s and *Dolan*'s heightened scrutiny does not apply to legislatively imposed requirements which lack any risk of an extortionate use of the police power. (12 Cal.4th at 875-876.)

(*San Remo Hotel, supra*, 27 Cal.4th at p. 673; see *Building Industry Assn. of Central California v. County of Stanislaus* (2010) 190 Cal.App.4th 582, 591 [trial court improperly placed burden on county and farm bureau to show facial validity of program designed to mitigate the loss of farmland resulting from residential development].) Here too, Petitioner CBIA has made no argument, let alone an adequate factual showing, to overcome the City Council's legislative findings of "deleterious" impacts requiring mitigation.

Petitioner's argument (Pet. Reply, pp. 15-16) that no evidence was submitted below to support the conclusion that San Jose's ordinance satisfies *San Remo Hotel* ignores that no such evidence was or is required under the applicable constitutional standard. The San Jose City Council made legislative findings that the ordinance would mitigate the two identified adverse impacts. As noted above, this Court held in *San Remo Hotel* that such findings alone were sufficient to uphold San Francisco's HCO. That decision, of course, is consistent with settled law. Courts are bound to presume that the Council ascertained the existence of necessary facts to support its legislative determination, and that the "necessary facts" are those required by the applicable standards which guided the board. (*Orinda, supra*, 11 Cal.App.3d 768, 775, citing *City & County of S.F. v. Superior Court, supra*, 53 Cal.2d 236, 251; *Chas. L. Harney, Inc. v. Board of Permit Appeals, supra*, 195 Cal.App.2d 442, 445.) Legislative bodies are not required to prove the factual bases for their laws at trials. Rather, ordinances are deemed to have been enacted on the basis of any set of facts supporting them that reasonably can be conceived, and courts may not reweigh those legislative facts. (See, e.g., *Santa Monica Beach, supra.*) Consistent with these principles, this Court upheld San Francisco's HCO in

San Remo Hotel as a matter of law on demurrer, based solely on similar legislative findings, without any evidentiary showing.

G. CBIA'S Facial Claim Fails Because The Ordinance's Administrative Waiver Provision Makes It Impossible To Predict That The Inclusionary Requirement Will Be Applied Unconstitutionally.

Appellant does not assert an as-applied claim, namely, that the City has applied San Jose's inclusionary ordinance unconstitutionally (or at all). Rather, it now contends only that the ordinance is unconstitutional on its face as a taking. As the United States Supreme Court has repeatedly held, a claimant who advances a facial challenge faces an "uphill battle." (*Suitum v. Tahoe Regional Planning Agency* (1997) 520 U.S. 725, 736, fn. 10; *Pennell v. City of San Jose* (1988) 485 U.S. 1, 17; *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 495.) California's appellate courts have also stated that rule in the specific context of facial takings challenges to inclusionary ordinances. (*Action Apartment Assn. v. City of Santa Monica* (2008) 166 Cal.App.4th 456, 468; *Napa, supra*, 90 Cal.App.4th 188, 194.)

In reviewing CBIA's purely facial challenge, this Court addresses only the text of the measure itself, not its application to the particular circumstances of an individual. (*Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 ("*Tobe*").) This Court has articulated two different tests for facial invalidity. Under the more lenient of the two (for claimants), CBIA cannot succeed without a "minimum showing" that the ordinance is invalid "in the generality or great majority of cases." (*San Remo Hotel, supra*, 27 Cal.4th at p. 673.)

That burden is a heavy one: "A claim that a regulation is facially invalid is [tenable only] if the terms of the regulation will not permit those who administer it to avoid an unconstitutional application to the complaining parties." (*Napa, supra*, 90 Cal.App.4th 188, 194; *San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 547 ("*San Mateo County*"), quoting *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1442.) This is because a facial challenge is predicated on the theory that "the mere enactment of the . . . ordinance worked a taking of plaintiff's property . . . ." (*Hensler v. City of Glendale* (1994) 8 Cal. 4th 1, 24.)

"To support a determination of facial unconstitutionality, voiding the statute as a whole, petitioners cannot prevail by suggesting that in some future hypothetical situation constitutional problems may possibly arise as to the particular application of the statute. (*Zuckerman v. State Bd. of Chiropractic Examiners* (2002) 29 Cal.4th 32, 39.) Rather, petitioners must demonstrate that the act's provisions inevitably pose a present total and fatal conflict with applicable constitutional prohibitions." (*California Teachers Assn. v. State of California* (1999) 20 Cal.4th 327, 338; accord, *Tobe, supra*, 9 Cal.4th at p. 1084.) Moreover, the challenger must establish that no set of circumstances exists under which the legislation would be valid. (*California Redevelopment Assn. v. Matosantos* (2011) 53 Cal.4th 231, 278 (conc. & dis. opn. of Cantil-Sakauye, C. J.), quoting *United States v. Salerno* (1987) 481 U.S. 739, 745.) In the context of a facial takings claim, a party attacking a statute must demonstrate that its mere enactment constitutes a taking and deprives the owner of all viable use of the property at issue. (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional*

Planning Agency (2002) 535 U.S. 302, 318; *Suitum, supra,* 520 U.S. 725, 736, fn. 10.)

Against this exacting standard applicable to facial challenges, courts have consistently rejected facial takings challenges to ordinances containing administrative relief and appeal provisions. (*San Mateo County, supra*, 38 Cal.App.4th at p. 547; *Del Oro Hills v. City of Oceanside* (1995) 31 Cal.App.4th 1060, 1076; *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421,1442.)

In *Napa*, the inclusionary ordinance at issue contained the following waiver language:

> A developer of any project subject to the requirements of this chapter may appeal to the city council for a reduction, adjustment, or waiver of the requirements based upon the absence of any reasonable relationship or nexus between the impact of the development and either the amount of the fee charged or the inclusionary requirement.

As in *San Mateo County*, the *Napa* court held that the waiver provision doomed the facial takings challenge to the inclusionary ordinance:

> Here, City's inclusionary zoning ordinance imposes significant burdens on those who wish to develop their property. However the ordinance also provides significant benefits to those who comply with its terms. Developments that include affordable housing are eligible for expedited processing, fee deferrals, loans or grants, and density bonuses. More critically, the ordinance permits a developer to appeal for a reduction, adjustment, or complete waiver of the ordinance's requirements. Since City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking.

(188 Cal.App.4th at 194.)

The *Napa* and *San Mateo County* decisions are premised on the same settled principle that courts must presume the best of the cities and counties with such provisions, not the worst. Thus, when an ordinance contains provisions allowing for administrative relief, courts must presume that the agency will exercise its powers to apply the regulation in conformity with the Constitution. (*Napa*, *supra*, 188 Cal.App.4th at 199, citing *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 684.)

San Jose's Ordinance contains virtually identical administrative appeal provisions to prevent its unconstitutional application. The Ordinance provides that its requirements may be waived, adjusted or reduced if an applicant can demonstrate that there is no reasonable relationship between the impact of a proposed development and the requirements of the Ordinance, or that applying those requirements would take property in violation of the United States or California Constitutions. (AA 706-707 [San Jose Mun. Code § 5.08.720].) In addition, the Ordinance allows developers to choose alternative means of compliance, including the payment of a fee, off-site development and dedication of land (AA 686-700 [San Jose Mun. Code, §§ 5.08.500-5.08.580]); offers incentives for the production of on-site affordable housing (AA 679-682 [San Jose Mun. Code, § 5.08.450]); allows for the grant of a density bonus entitling the developer to build and sell a greater number of units than the zoning would otherwise permit, a reduction in parking requirements, a reduction in minimum setback requirements, and the permitting of alternative unit type and interior design standards. (AA 679- 681 [San Jose Mun. Code, § 5.08.450(A)(1-5)].)

Given these administrative relief provisions, *Amici* urge this Court to reject Petitioner's facial takings challenge, and instead presume, as it must,

that San Jose will act constitutionally to reduce or eliminate the inclusionary requirement where an actual project applicant invokes the ordinance's administrative waiver provisions and makes the required showing. Cities and counties statewide have adopted, and regularly apply, such administrative relief provisions, and are entitled to courts' respect for that legislatively adopted means of avoiding unnecessary constitutional challenges.

H. Invalidating San Jose's Inclusionary Requirements Would Improperly Deter Cities and Counties From Exercising Their Constitutional Authority to Make Legislative Judgments in Response to Ever-Changing Local Needs and Concerns, And State Housing Mandates.

Amici respectfully submit that the issues in this case are fundamental to California's constitutional system of independent, coordinate branches of government. Elected officials acting as City Councils and Boards of Supervisors, not the courts, are exclusively charged with the task of making legislative zoning and land use judgments. This broad constitutional authority reserved to local legislative bodies will be frustrated if courts, responding to their own judgments of what is wise or appropriate, can invalidate local zoning laws. City Councils and Boards of Supervisors will be advised by their City Attorneys and County Counsels to be more cautious, and to only legislate in those ways previous courts have allowed; they will be reluctant to exercise their constitutional legislative authority in creative, flexible ways to respond to evolving and new local challenges and State housing mandates. And those Councils and Boards that do attempt to use what had been thought a "plenary" prerogative will face uncertainty and attendant litigation over whether a court will usurp their legislative role. *Amici* thus urge the Court to decline the invitation to assume to itself the

legislative authority over local zoning matters vested exclusively in the City of San Jose City Council.

III. CONCLUSION

For the foregoing reasons, *amici* League and CSAC respectfully request this Court uphold the validity of San Jose's inclusionary zoning.

DATED: March 12, 2014

BURKE, WILLIAMS & SORENSEN, LLP

By: _____
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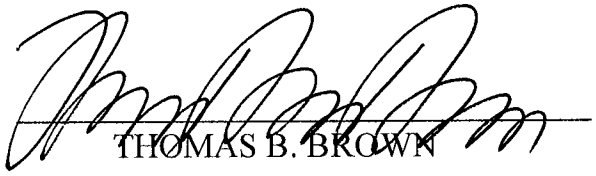
CERTIFICATE OF COMPLIANCE

California Rules of Court 8.204(c)

Pursuant to California Rules of Court 8.204(c), I certify that the foregoing **APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF and AMICI CURIAE BRIEF of LEAGUE OF CALIFORNIA CITIES and CALIFORNIA STATE ASSOCIATION OF COUNTIES** was produced on a computer and contains 11,348 words, including footnotes, according to the word count of the computer program used to prepare the Answer.

Executed on March 12, 2014 at Oakland, California



THOMAS B. BROWN

PROOF OF SERVICE

I, Teresa L. Beardsley, declare that I am a resident of the State of California. I am over the age of 18 years and not a party to the within action; that my business address is 1901 Harrison Street, Suite 900, Oakland, CA 94612. On March 12, 2014, I served a true and accurate copy of the document(s) entitled:

APPLICATION FOR LEAVE TO FILE AMICI CURIAE BRIEF and AMICI CURIAE BRIEF of LEAGUE OF CALIFORNIA CITIES and CALIFORNIA STATE ASSOCIATION OF COUNTIES

on the party(ies) in this action by placing said copy(ies) in a sealed envelope, each addressed to the last address(es) given by the party(ies) as follows:

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(By First Class Mail pursuant to Code of Civil Procedure section 1013.) I am readily familiar with the firm's practices for collecting and processing documents for mailing with United States Postal Service. Following these ordinary business practices, I placed the above referenced sealed envelope(s) for collection and mailing with the United States Postal Service on the date listed herein at 1901 Harrison Street, Suite 900, Oakland, CA 94612. The above referenced sealed envelope(s) will be deposited with the United States Postal Service on the date listed herein in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and was executed on March 12, 2014, at Oakland, California.

Teresa L. Beardsley