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March 17, 2009

Honorable Presiding Justice Steven M. Vartabedian
Associate Justice Betty L. Dawson
Associate Justice Dennis A. Cornell
California Court of Appeal
Fifth Appellate District
2424 Ventura Street
Fresno, CA 93721

Re: League Of California Cities' Support Of Petition For Rehearing
Building Industry Association of Central California v. City of Patterson
(Fifth Appellate District, No. F054785)

Dear Honorable Presiding Justice and Associate Justices:

The League of California Cities ("League") respectfully submits this *amicus curiae* letter in support of the Petition for Rehearing submitted by Defendant and Respondent City of Patterson ("City").

As we discuss below, the Opinion seriously misstates the law in two key respects. First, the Opinion, in its discussion and application of takings principles in connection with the City's affordable housing "in-lieu" fee, follows a means-ends "substantially advances" test that the United States Supreme Court explicitly rejected in *Lingle v. Chevron U. S. A. Inc.* (2005) 544 U.S. 528. This alone warrants rehearing because the Court's conclusion is premised solely on its assumption that the fee fails to satisfy this outdated test. [1]

Second, in derogation of constitutional separation of powers principles, the Opinion imposes a stringent test for the fee's validity that is at odds with the deferential "arbitrary and capricious" test repeatedly held to be applicable by the California Supreme Court. Under that test, embraced in cases such as *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, the City's fee, legislatively adopted by the City Council, is presumptively valid. It must be upheld unless the Plaintiff proves the fee is palpably arbitrary, namely, that the City Council could not rationally have believed the fee would address well-recognized affordable housing impacts created by market-rate development.

Interest of The League.

The League of California Cities is an association of 480 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

[1] The Court of course may rehear a case based on a mistake of law. (*In re Jessup's Estate* (1889) 81 Cal. 408, 471.)

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 are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

The Supreme Court's Decision In *Lingle v. Chevron* Expressly Rejects The Means-End/"Substantially Advances" Takings Test The Opinion Incorrectly Follows.

The Opinion concludes that the term "reasonably justified," as used in the Development Agreement provision governing the affordable housing fee at issue, must be read to incorporate legal standards generally applied to such fees, including "takings" principles under article I, § 19 of the California Constitution. (Opinion, at 19, *citing San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 663-664.) Although other conclusions are certainly possible, the League does not dispute that point here. What concerns the League is that the Opinion, in its reliance on *San Remo* and other earlier decisions, seriously misstates takings law by overlooking a sea change in the law articulated more recently by the United States Supreme Court.

The Opinion states at the outset of its takings analysis that the "general principle of takings analysis relevant to this case is the requirement that a land use regulation ***substantially advance*** a legitimate state interest." (Opinion, at 20, *citing Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1016.) As the Opinion notes, the "substantially advance" principle is sometimes referred to as a "means-end test" that requires the regulation in question to advance the purpose the government is seeking to achieve. (Opinion, at 20, *citing Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 975 [Kennard conc.].)

This is no longer the law. In *Lingle v. Chevron U. S. A. Inc., supra,* 544 U.S. 528, the Supreme Court considered whether the "substantially advances formula," included in the takings jurisprudence for the first time in *Agins* v. *City of Tiburon* (1980) 447 U.S. 255, should be used in reviewing a claim that a Hawaii statute controlling rents on gas stations constituted a taking. The lower courts had held that the statute did effect a taking because it did not substantially advance Hawaii's asserted interest in controlling gas prices. The Supreme Court reversed. It held, unanimously, that the "substantially advances" formula announced in *Agins* is ***not*** an appropriate test for determining whether a regulation effects a taking. (*See, e.g.*, 544 U.S. at 544 ("For the foregoing reasons, we conclude that the "substantially advances" formula ... is not a valid method of identifying regulatory takings ... We emphasize ... that the 'substantially advances' formula is not a valid takings test.").)

The Court instead recognized three classes of takings. The first class establishes a categorical taking that applies where government requires an owner to suffer a permanent physical invasion of her property, however minor. In such cases the government must provide just compensation. (544 U.S. at 538, citing *Loretto* v. *Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419.) The second class, represented by cases such as *Lucas v. South Carolina Coastal Council, supra*, establishes a similar categorical rule for regulations that completely deprive an owner of "*all* economically beneficial use" of her property. Under *Lucas,* the government must pay just compensation for such "total regulatory takings," except to the extent

that "background principles of nuisance and property law" independently restrict the owner's intended use of the property. (*Id.*, *citing Lucas v. South Carolina Coastal Council, supra,* 505 U.S. 1003, 1026-1032.)

The third class of taking recognized by the *Lingle* Court is for the remainder of cases that fall outside these two relatively narrow categories (and the special context of *ad hoc*, adjudicative land-use exactions discussed in *Nollan* v. *California Coastal Comm'n* (1987) 483 U.S. 825 and *Dolan* v. *City of Tigard* (1994) 512 U.S. 374). The Court held that this third class of regulatory takings challenges is governed by the standards set forth in *Penn Central Transp. Co.* v. *New York City* (1978) 438 U.S. 104, primary among which are "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations." (*Ibid.*)

Succinctly summing up the current state of regulatory takings law, the Court stressed that a regulatory taking is confined to instances where government regulation is tantamount to a direct physical appropriation of private property:

> [T]he[] three inquiries reflected in *Loretto*, *Lucas*, and *Penn Central* share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain. (*Id.* at 539).

A *Loretto* physical taking requires compensation because of its unique burden eviscerating the owner's right to exclude others the property. Likewise, under *Lucas*, it is the complete elimination of the property's value that is the determinative factor. And the *Penn Central* inquiry similarly turns "upon the magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests." (544 U.S. at 539-540.)

In other words, the test for a taking is focused on the regulation's impact, not its wisdom or effectiveness. Under *Lingle*, *Agins'* substantially advances test, derived from substantive due process principles (544 U.S. at 540-541), makes no sense in the impact-focused context of takings claims. The means-end test "tells us nothing about the actual burden imposed on property rights....the notion that ... a regulation ... 'takes' private property for public use merely by virtue of its ineffectiveness or foolishness is untenable." (544 U.S. at 543.)

In short, *Lingle* is clear that the means-end/substantially advances test is no longer valid in analyzing taking claims. Because the California Supreme Court and the United States Supreme Court "have construed [the California and federal Takings Clauses] congruently" (*San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th at 664), the lower California courts are duty-bound to follow the takings decisions of the United States Supreme Court. Accordingly, every California Court presented with the issue has recognized and followed this change in takings jurisprudence. (*Action Apartment Assn. v. City of Santa Monica* (2008) 166 Cal. App. 4th 456, 470-471; *Shaw v. County of Santa Cruz* (2009) 170 Cal. App. 4th 229, 261 fn. 37; *Stardust Mobile Estates, LLC v. City of San Buenaventura* (2007) 147 Cal. App. 4th 1170, 1186; *Borten v. Santa Monica Rent Control Bd.* (2006) 141 Cal. App. 4th 1485; *Los Altos El Granada*

Investors v. City of Capitola (2006) 139 Cal. App. 4th 629, 651; *Allegretti & Co. v. County of Imperial* (2006) 138 Cal. App. 4th 1261, 1280; *Bronco Wine Co. v. Jolly* (2005) 129 Cal. App. 4th 988, 1029 fn. 27.)

In light of the Supreme Court's decision in *Lingle*, which the Opinion does not mention, the Opinion is simply wrong in applying the means-end/substantially advances test as part of the general legal principles governing the validity of the City's fee. The Opinion's analysis of whether the fee imposed by the City was "reasonably justified" rests on the application of a test that is no longer valid. What is more, the Opinion provides none of the impact analysis *Lingle* instructs is necessary to any takings claim. The League urges the Court to grant the Petition for Rehearing, and evaluate the City's fee under the correct standard, which we discuss next.

Under Settled Separation Of Powers Principles, A Legislative Enactment Is To Be Upheld Unless The Plaintiff Proves It Is Arbitrary. It Is Presumed Valid, And Must Be Upheld If The City Council Could Have Conceived Any Rational Basis For It.

The review of the validity of any local legislative enactment is governed by the most deferential standard. The California Supreme Court has repeatedly held that the enactment must be upheld unless the challenger shows that it is arbitrary. (*San Remo Hotel, supra,* 27 Cal.4th 643, 674 fn. 16, *citing Santa Monica Beach v. Superior Court* (1999) 19 Cal. 4th 952, 966.) Several ancillary principles attend.

Some 60 years ago, the California Supreme Court recognized that constitutional challenges to cities' legislative judgments, and courts' review of such challenges, implicate important constitutional separation of powers principles. The Supreme Court has consistently accorded the broadest possible deference to the judgments of cities 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. ... [I]f 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.)

Courts thus presume legislative acts to be valid; every intendment is in favor of their validity. (*Lockard, supra, at* 460; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1152.) This presumption will not be overthrown unless the plaintiff produces evidence compelling the conclusion that the ordinance is, as a matter of law, "arbitrary" (*San Remo Hotel v. City and County of San Francisco*, 27 Cal.4th at 671), or unreasonable and invalid (*Lockard,*

supra, at p. 461; *Orinda Homeowners Committee v. Board of Supervisors* (1970) 11 Cal.App.3d 768, 775).

Courts also presume that the legislative body ascertained the existence of necessary facts to support its legislative determination, and that the "necessary facts" are those required by the applicable standards. This requires courts also to presume that a legislative act was enacted on the basis of any state of facts supporting it that reasonably can be conceived. (*Orinda, supra,* 11 Cal.App.3d 768, 775.)

Stated another way, if the validity of a statute depends on the existence of a certain state of facts, it will be presumed that the Legislature has investigated and ascertained the existence of that state of facts before passing the law. (*Alfaro v. Terhun* (2002) 98 Cal.App.4th 492, 510-511.) Because in enacting legislation the Legislature has already determined the facts necessary to support the legislation, courts cannot revisit the issue as a question of fact, but must defer to the Legislature's 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.) An enactment is valid if it is ***fairly debatable that the restriction in fact bears a reasonable relation to the general welfare***. So long as it remains a "question upon which reasonable minds might differ," there will be no judicial interference with the municipality's determination of policy." (*Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 300-301, citing *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 604–605.)[2]

The Supreme Court in *San Remo*, to be sure, held that "[a]s a matter of both statutory and constitutional law, ... [development impact] fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. (*San Remo Hotel, supra,* 27 Cal.4th 64 , 671.) In stating this principle, however, the *San Remo* Court in no manner undertook to erase the settled, deferential standard set forth above. Rather, in restating this point, the Supreme Court in *San Remo* relied upon its seminal decision in *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal. 3d 633, 640. There, in upholding park dedication requirements, the Court rejected the exacting, *Lochneresque* approach used in the Opinion here,[3] and held instead that only the most general and indirect relationship is required between an exaction and the developments on which it is imposed; i.e., that the exaction is not arbitrary. (4 Cal. 3d at

[2] We recognize that the Opinion (at fn. 13) disclaims any analysis of the fee under the Mitigation Fee Act. Nevertheless, we note that, the same arbitrary and capricious standard governs claims that a City has violated the Mitigation Fee Act. (*Warmington Old Town Assocs. v. Tustin Unified School Dist.* (2002)101 Cal.App.4th 840, 849-850; *Western/California, Ltd. v. Dry Creek Joint Elementary School Dist.* (1996) 50 Cal.App.4th 1461, 1491-1492; *Garrick Development Co. v. Hayward Unified School Dist.* (1992) 3 Cal.App.4th 320, 327-328.)

[3] See *Lochner v. New York* (1905) 198 U.S. 45, in which the Court invalidated on due process grounds a law limiting the maximum amount of hours bakers were permitted to work. The case has lent its name to the now bygone era in which courts improperly invalidated economic and social legislation if in the court's view the law lacked sufficient justification. (*Santa Monica Beach v. Superior Court*, *supra,* 19 Cal. 4th 952, 972 n. 3.)

637-640.)[4] Moreover, the *San Remo* Court imposed the burden of showing that the exaction is arbitrary on the party challenging the exaction. (27 Cal.4th at 666 (distinguishing *Nollan/Dolan* heightened scrutiny from the instant case, where "the burden properly rests on the party challenging the regulation . . . ."); see also, *id.* at 673 (finding that the party challenging the exaction "fail[s] to demonstrate" that the ordinance bears no reasonable relationship to a legitimate public purpose).)

The Opinion strays from this applicable, deferential standard. In concluding that *the City* failed to present any evidence that the developer's creation of market rate housing contributed to the City's need for new affordable housing, the Opinion not only ignores precedent, it stands the applicable standard on its head. The constitutional standard that applies here is whether *the Plaintiff* established that the City Council could not have conceived a rational basis for its fee. The Council plainly could have, as we discuss next.

In fact, the cases have recognized at least two ways in which new development creates the need for affordable housing. Specifically, new development:

- uses scarce vacant land that otherwise could be used for the development of affordable housing. (*Associated Home Builders, supra,* 4 Cal. 3d 633, 639-640.)[5]

- attracts new residents to the community who in turn use services that require lower-income workers requiring local housing. (*Commercial Builders of Northern California v. Sacramento* (9th Cir. 1991) 941 F.2d 872, 876.)[6]

Under the applicable arbitrary and capricious standard, articulated in *Associated Homebuilders* and approved in *San Remo*, the Court may not require the City to prove a direct connection between the need for affordable housing and new market rate development. Instead, the Court looks only at whether the City Council could rationally have believed that new development would create such need by, for example, depleting scarce available land and attracting new low-income residents to meet the needs of the market-rate residents. Because, as the cases above establish, the Council plainly could have believed that to be the case, the Court must presume that the Council so found, and must therefore uphold the fee.[7]

[4] *Associated Homebuilders* has also been cited with approval in *Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854, 865.

[5] The Fee Study at issue in this case apparently relied on the same finite supply of land available for residential development. (J.A. 0973.)

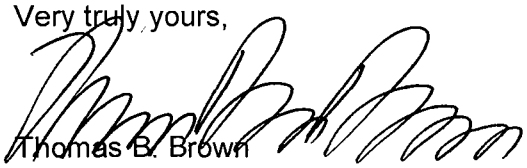
[6] What is more, even were this not the case, local legislative bodies are constitutionally free to impose affordable housing requirements "to solve problems caused by prior legislative decisions. . . ." (*Home Builders Ass'n v. City of Napa* (2001) 90 Cal. App. 4th 188, 198, *citing Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104.)

[7] This same standard applies to the review of the fee's validity under the Mitigation Fee Act. (*Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854, 866-867.)

Conclusion.

The League respectfully submits that the Opinion seriously misstates the applicable legal standard by which the constitutional and statutory validity of the fee are to be reviewed. The City's Petition for Rehearing should be granted accordingly.

Very truly yours,



Thomas B. Brown

PROOF OF SERVICE

Building Industry Association of Central California v. City of Patterson

Case No F054785

I, Theresa Hughes, 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 action entitled Building Industry Association of Central California v. City of Patterson ; that my business address is 425 Market Street, 26th Floor, San Francisco, California 94105. On March 17, 2009, I served a true and accurate copy of the document(s) entitled:

LEAGUE OF CALIFORNIA CITIES LETTER BRIEF IN SUPPORT OF PETITION FOR REHEARING

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 Hanson Bridgett'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 425 Market Street, 26th Floor, San Francisco, California 94105. 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.

☐ (By Express Mail pursuant to Code of Civil Procedure section 1013.) I deposited each sealed envelope, with the postage prepaid, to be delivered via _____ to the party(ies) so designated on the service list.

☐ (By Telecopy Fax pursuant to Code of Civil Procedure section 1013.) I am readily familiar with Hanson Bridgett's practice for processing of documents via Telefax. Following these ordinary business practices, I directed that the above referenced documents(s) be placed in the Telefax machine, with all costs of Telefaxing prepaid, directed to each of the party(ies) listed on the attached service list using the last Telefax numbers(s) given by the party(ies), and processed through the Telefax equipment, until a report is provided by that equipment indicating that the Telefax operation was successful. A copy of the Telefax report indicating successful transmission is attached hereto.

☒ (By Electronic Transmission based on a court order or an agreement of the parties to accept service by email or electronic transmission.) I am readily familiar with Hanson Bridgett's practices for transmitting documents by electronic mail via internet service provider. I caused the documents to be sent to the persons at the email addresses listed for each addressee on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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 17, 2009 at San Francisco, California.

Theresa Hughes