THOMAS B. BROWN
PARTNER
DIRECT DIAL 415 995 5857
DIRECT FAX 415 995 3496
E-MAIL tbrown@hansonbridgett.com

HansonBridgett

September 15, 2009

The Honorable Chief Justice
Ronald M. George
The Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Palmer v. City of Los Angeles*
Court of Appeal Case No. B206102
Letter Brief In Support of Petition For Review

Dear Chief Justice George and Associate Justices of the California Supreme Court:

Pursuant to Rule 8.1125 of the California Rules of Court, the League of California Cities ("League")[1] and the American Planning Association California Chapter ("APA California")[2] respectfully submit this letter brief in support of the City of Los Angeles' petition to review the Opinion of the Court of Appeal for the Second Appellate District in *Palmer v. City of Los Angeles* (July 22, 2009) 175 Cal.App.4th 1396 (the "Opinion"). (Cal. Rules of Court, Rule 8.500(g).) The case merits review to settle important questions of law and secure uniformity of decision. (Rule 8.500(b)(1).) Alternatively, the League and APA California request that the Court order the Opinion to be depublished.

The Opinion holds that Los Angeles' application of its affordable housing—"inclusionary"—requirements to a proposal to develop a new mixed-use land use project conflicts with, and is preempted by, the Costa Hawkins Act, Civil Code section 1954.50 et seq. This ruling ignores

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[1] 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 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.

[2] APA California is the largest of the 46 chapters of the American Planning Association and is a network of 6,500 professional planners, citizen planners who serve on planning commissions, and elected officials committed to urban, suburban, regional and rural planning in the state of California. Its mission is to create great communities in California by providing vision and leadership that fosters better planning. APA California has a strong interest in ensuring that the housing needs of the State's citizens are met through housing and land use planning decisions at all levels of government, including cities, counties, State agencies, and regional councils of governments. APA California monitors litigation that is of importance to planning practice in California with the assistance of its Amicus Curiae Committee, comprised of experienced planners and land use attorneys. The Committee has identified this case as being of particular significance because of its potential effects on the provision of affordable housing in communities in the State.

the limited language of Costa Hawkins, its purpose and legislative history, settled principles of statutory construction, and conflicting legislative enactments, all of which together establish that the Legislature intended only to address the kind of "strict" rent control that had been imposed in a small handful of cities, not to prohibit the inclusionary regulations enacted by the City of Los Angeles and nearly one-third of all other cities statewide.

In so doing, the Opinion violates settled constitutional separation of powers principles. Courts must defer to the legislative judgments made by local elected legislative bodies--here a city council--about the wisdom of and need for local land use regulations. In recognition of this principle, this Court has also emphasized that a law enacted by a City Council should not be found to be preempted by State law unless it is clear that a true conflict exists.

The Opinion stands this principle on its head, and hastens to find a conflict between the Los Angeles' inclusionary requirements and Costa Hawkins where none exists. If left intact, the Opinion will discourage local legislative bodies from addressing perhaps the single most important land use crisis statewide: the need for the development of affordable housing. Indeed, the State Legislature itself has repeatedly emphasized this crisis, and for over 25 years has recognized inclusionary housing programs as one means of addressing the crisis.

1. Courts Are Bound To Defer To Cities' Legislative Land Use Judgments.

Under article XI, §7 of the California Constitution, a "city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." It is this constitutional power, enjoyed by every municipality, that is commonly termed the "police power." As this Court noted in *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 885, "[u]nder the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the 'police power [of a county or city] under this provision . . . is as broad as the police power exercisable by the Legislature itself.' (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140)." Charter cities, such as Los Angeles, have even broader constitutional authority. (Cal. Const. art. XI, §5.)

The police power extends, of course, to the adoption of zoning regulations. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1156.) A zoning 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. (*Ex parte Roach* (1894) 104 Cal. 272.) When a city council enacts a zoning ordinance, it acts in a legislative capacity. (*Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 460.)

Over 50 years ago, this Court recognized that constitutional challenges to cities' legislative zoning judgments, and courts' review of such challenges, implicate important constitutional separation of powers principles. This 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. 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*, 33 Cal.2d 453, 461-462.)

Accordingly, courts must presume a challenged legislative act to be valid, and "every intendment is in favor of [its] validity." (*Lockard v. City of Los Angeles*, 33 Cal.2d 453, 460.)

2. This Court Has Established Clear Rules Limiting The Circumstances Under Which State Law May Be Found To Preempt Local Legislation, And Has Emphasized The Need For Courts To Avoid The Issue If Possible By Carefully Analyzing Whether A True Conflict Exists.

If local legislation conflicts with state law, it is preempted. A conflict exists if the local legislation "duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." (*Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897.) Local legislation is "duplicative" of general law when it is coextensive therewith. Local legislation is "contradictory" to general law when it is inimical thereto. Finally, local legislation enters an area that is "fully occupied" by general law when the Legislature has expressly manifested its intent to "fully occupy" the area or when it has impliedly done so . . ." (Id. at pp. 897-898; see also *People ex rel. Deukemejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484; *Candid Enterprises, Inc. v. Grossmont Union High School District* (1985) 39 Cal.3d 878, 885.)

This Court has repeatedly emphasized the need to avoid making difficult choices between state statutes and local ordinances by first carefully analyzing whether there is in fact a true conflict between the two. (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 398-399; *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17 ("Cal Fed").) The *Cal Fed* Court emphasized both *Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 63-64, upholding a charter city's wage scale on the ground that the Legislature did not intend to subject it to the prevailing wage provisions of the Labor Code, and *Weekes v. City of Oakland* (1978) 21 Cal.3d 386, upholding a "license fee" on all persons employed in a charter city on the ground that it was not an income tax prohibited by state law, as examples of cases in which the Court was able to avoid finding any real conflict.

Determining whether a true conflict exists requires courts to carefully determine exactly what interest the Legislature intended to address. (Cal Fed, 54 Cal.3d at 25.) As this Court has warned, "the sweep of the state's protective measures may be no broader than its interest." (Cal Fed, 54 Cal.3d at 25; *see also Johnson v. Bradley, supra,* 4 Cal.4th 389, 400.)

3. 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" that has created 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. (*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; *Shea Homes Limited Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246, 1260; *Home Builders Ass'n of Northern California v. City of Napa* (2001) 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 continued to expand since.

The Legislature further 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. 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.)

4. To Discharge Their Obligation To Address The State's Affordable Housing Crisis, Over One Third Of All California Cities Have Adopted Inclusionary Housing Requirements.

Like Los Angeles, many cities and counties fulfill their state law obligations by means of inclusionary housing programs. Inclusionary housing programs require a residential developer to set aside a percentage of the housing units constructed in a development to be affordable for very low, low, and moderate income households. (*Home Builders Ass'n of Northern*

California v. City of Napa, supra, 90 Cal.App.4th 188, 192, n.1.) Most inclusionary housing programs in California provide alternative options for developers to meet the set-aside requirement, including off-site construction or payment of an in-lieu fee as set by resolution or ordinance. (See Non-Profit Housing Association of Northern California, Affordable by Choice: Trends in California Inclusionary Housing Programs (2007) (hereinafter "NPH 2007") at p. 5; Barbara Ehrlich Kautz, Comment, *In Defense of Inclusionary Zoning: Successfully Creating Affordable Housing* (2002) 36 U.S.F.L. Rev. 971, 981.)

Inclusionary housing has proven to be a major and effective tool in addressing the affordable housing shortage. According to one report, 170 California jurisdictions, approximately one-third of all California cities and counties, have inclusionary housing programs. This represents an increase of 106 cities since 1994 alone. From 1999 to 2006, inclusionary housing programs created nearly 30,000 affordable housing units statewide, 71 percent of which were rental units. (See NPH 2007 at p. 5.)[3]

Cities and counties—acting in their legislative capacities--have determined inclusionary housing programs to be an effective means of addressing the affordable housing shortage by creating and increasing the affordable housing supply. They have found:

- that inclusionary housing also promotes socioeconomic integration by ensuring mixed-income and diverse communities;
- that lower income families have higher quality educational opportunities and the opportunity to live in middle-class communities with lower crime rates;
- that lower income renters have a chance to own their homes in neighborhoods that undergo gentrification; and
- that there is also better access to jobs, decreased commute times, and lower labor costs.

(Laura M. Padilla, Reflections on Inclusionary Zoning and a Renewed Look at Its Viability, 23 Hofstra L. Rev. 539, 564-70 (1995); Robert Chambers, Pushed Out: A Call for Inclusionary Housing Programs in Local Condominium Conversion Legislation, 42 Cal. W. L. Rev. 355, 370-72 (2006).)

5. Costa Hawkins Was Enacted To Limit Strict Rent Control, Not Land Use or Inclusionary Requirements.

In 1995, California enacted Costa-Hawkins, Civil Code section 1954.50 et seq. (AB 1164; Stats. 1995, ch. 331, § 1, p. 1820.) Costa-Hawkins effectively exempts newly constructed rental units from local rent control. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13.)

The purpose of Costa Hawkins was narrow. It was enacted solely to address the "strict rent control" imposed by a small handful of California cities, such as Berkeley, Santa Monica, West

[3] http://www.nonprofithousing.org/pdf_attachments/IHIReport.pdf.

Hollywood and San Francisco. "Strict" rent control meant "vacancy controls" that applied even when units became vacant.

This narrow purpose is manifest from the Act's language and structure, as well as its legislative history. Yet the Court below disregarded the Legislature's restrained intent by focusing instead on one selected provision of the Act in isolation. In so doing, the Court created conflicts with other statutes and with several of this Court's decisions.

A. The Opinion Conflicts With This Court's Decisions Establishing That Legislature May Not Be Deemed To Have Silently Intended To Overthrow Longstanding Laws Such As Local Inclusionary Regulations Adopted As An Exercise Of The Police Power.

Nothing in either the text of Costa Hawkins or its legislative history even mentions inclusionary regulations. This ringing silence is critical to understanding the Act's narrow scope.

This Court repeatedly has stated that the Legislature may not be deemed to have intended to overthrow a long-established principle of law unless such an intention is clearly expressed or necessarily implied. (*People v. Superior Court* (2000) 23 Cal.4th 183, 199; *Fuentes v. Workers' Comp. Appeals Bd.* (1976) 16 Cal.3d 1, 7; *Theodor v. Superior Court* (1972) 8 Cal.3d 77, 92.) Rather, courts must assume that, when enacting Costa Hawkins, the Legislature was aware of existing, related laws and intended to maintain a consistent body of rules. (*Fuentes, supra*, 16 Cal.3d 1, 7; see also *Apartment Assn., supra,*173 Cal.App.4th 13.) "Without the most cogent and convincing evidence, a court will never attribute to the Legislature the intent to disregard or overturn a sound rule of public policy." (*Interinsurance Exchange v. Ohio Cas. Ins. Co.* (1962) 58 Cal.2d 142, 152.)

Consistent with these principles, this Court in *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal.4th 1158 ("*Torrey Pines*") recently rejected the proposition that the Legislature may be deemed to have intended to significantly change the law in the complete absence of any text or legislative history suggesting such a fundamental change was intended. The Court held:

> "The recent decision of *Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572 ... considered an argument that certain legislation significantly changed the law even though, as here, the supposed change left no trace in the legislative history. The Court of Appeal's summary … is apt. "It is difficult to imagine that legislation that would have [substantially changed existing law] could properly be characterized as 'noncontroversial [or technical].' And we think it highly unlikely that the Legislature would make such a significant change … without so much as a passing reference to what it was doing. The Legislature 'does not, one might say, hide elephants in mouseholes.' [Citations.] … ."

(42 Cal.4th 1158, 1171.)

The Opinion defies these settled principles. In so doing, it invalidates a legislative solution to California's affordable housing crisis adopted by at least 170 cities statewide.

B. The Opinion Conflicts With This Court's Decisions Establishing That Costa Hawkins' Legislative History Should Be Considered In Resolving The Preemption Question.

Although Costa Hawkins' legislative history was presented to the Court of Appeal, it was not mentioned. Instead, the Court concluded that the Act's "plain language" conflicted with the City's regulations. Thus, it did not even consider the Act's legislative history. (175 Cal.App.4th at p. 1411.)

Even assuming arguendo that the Act's meaning is plain in relation to inclusionary zoning, that conclusion conflicts with this Court's views:

> "[T]he "plain meaning" rule does not prohibit a court from determining whether the literal meaning of a statute comports with its purpose ... Literal construction should not prevail if it is contrary to the legislative intent apparent in the statute. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act. [Citations.]" (*Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.)

This Court has recognized that while extrinsic evidence of legislative intent--i.e. legislative history-- generally is not admissible unless a statute is ambiguous, a statute nevertheless may have "latent ambiguity" allowing resort to legislative history. "[A] latent ambiguity is said to exist where the language employed is clear and intelligible and suggests but a single meaning, but some extrinsic evidence creates a necessity for interpretation or a choice among two or more possible meanings." (*Mosk v. Superior Court* (1979) 25 Cal.3d 474, 495, fn. 18)

Indeed, this Court's two seminal preemption decisions--*Cal Fed* and *Johnson v. Bradley*--both explicitly articulated the need to review the state statute's legislative history to determine the extent of the State's interest, and thus whether the "sweep" of the statute exceeds that interest. (*Johnson*, 4 Cal.4th at 400; *Cal Fed,* 54 Cal.3d at 24-25.) In addition, while the Opinion relies heavily on general preemption principles articulated by this Court in *Sherwin-Williams Co. v. City of Los Angeles*, *supra*, 4 Cal.4th 893 (see, e.g., 175 Cal.App.4th at 1406, 1411), it ignores that there too this Court relied extensively on the legislative history of the state statute at issue there.

The Opinion, by focusing solely on one part of the Act in isolation, and by refusing to acknowledge the Act's legislative history showing clearly that the Legislature never intended to preempt inclusionary regulations, conflicts with this Court's more sensible approach to statutory construction. Review by this Court would allow for a considered analysis of Costa Hawkins' complete legislative history.

C. Costa Hawkins' Legislative History Establishes The Legislature's Narrow Intention To Address Only Strict Rent Control.

Had the Court below considered the Act's legislative history, as this Court's decisions require, it would have become manifest, indeed undebatable, that the legislature's sole purpose and focus was the elimination of the "strict" rent control imposed by the select few cities.

First, the legislative history is dead silent about inclusionary regulations. Not once is the topic even mentioned.

Second, what the legislative history does focus on--exclusively--is the need to address perceived problems associated with "strict rent control," namely, the ongoing control of rent when a unit becomes vacant, thus prohibiting increases in rent to market rate when a new tenant occupies the unit. It discusses rent control ordinances statewide, noting those few (14) jurisdictions that had adopted some form of rent control, and compares which jurisdictions would be classified as "strict" and "moderate." It names the specific cities that would be affected by the bill (Berkeley, East Palo Alto, Oakland, Los Angeles, San Francisco, Santa Monica and West Hollywood), and estimates the specific number of units in "strict" rent control jurisdictions that would be affected. (See, e.g., Assembly Floor Analysis, A.B. 1164 (CostaHawkins) (July 25,1995); Sen. Floor Analysis, A.B. 1164 (July 20, 1995); S.B. 1257 Sen. Judiciary Comm. Analysis (for Apr. 4,1995 hearing).)[4]

All the statements by Costa Hawkins' primary sponsor, Assemblyman Phil Hawkins, are to the same end. Assemblyman Hawkins stated that the bill was to solve the problems of extreme vacancy control, meaning strict rent control, which he described as a "failed policy;" he mentions cities such as Berkeley, Santa Monica and West Hollywood. He thus stated that the bill would prohibit extreme vacancy controls, not end rent control. He noted, "Cities with moderate (vacancy decontrol) ordinances such as Los Angeles, San Francisco, San Jose and Oakland are unaffected by the limits on vacancy control in this legislation." Assemblyman Hawkins expanded by stating that the vast majority of cities with "moderate" rent control would not be impacted by the Costa-Hawkins Act. Finally, Assemblyman Hawkins stated: "This measure will have no impact on local governments, even those communities with rent controls in place." All these statements further establish that inclusionary zoning was never intended to be prohibited by Costa-Hawkins. (See Nadia I. El Mallakh, Comment, Does the Costa-Hawkins Act Prohibit Local Inclusionary Zoning Programs?, 89 Cal.L.Rev. 1847,1869-1871 (2001).)

In short, the legislative history makes plain that the sole intent of the Legislature in enacting Costa-Hawkins was to abolish extreme rent control programs in six cities. There is no mention of inclusionary zoning in the legislative history. The Opinion's disregard of this legislative history, and its attendant conclusion that Costa-Hawkins broadly prohibits inclusionary zoning programs, including their in lieu fee alternatives, thereby conflicts not only with the intent of the Act (El Mallakh, 89 Cal.L.Rev. 1847, 1871), but with the decisions of this Court.

[4] The Floor Analysis, along with the rest of Costa Hawkins' legislative history, was attached to a Request for Judicial Notice before the Court of Appeal.

6. The Express Language of Costa Hawkins Does Not Mention Inclusionary Regulations.

Consistent with the legislative history discussed above, the actual text of Costa Hawkins is also quite narrow. It allows the "owner" of "residential real property" to establish the initial rental rate for a new dwelling unit. (Civil Code §1954.51 and 1954.42) However, "owner" and "residential real property" are strictly defined. An "owner" is a person who has the right to offer "residential real property" for rent. (Civil Code §1954.51(b).) "Residential real property" is a dwelling intended for human habitation. (Civil Code §1954.51(e).) A dwelling unit must exist for these terms to apply.

Costa Hawkins on its face contains no language that applies to or even refers to any of the following:

- the regulation of development projects;
- inclusionary requirements, or in lieu fee alternatives to such requirements;
- vacant or underdeveloped sites where a residential development project is proposed but does not exist;
- limitations on adopted General and Specific Plans intended to meet State mandates to make adequate provision for affordable housing.

Costa Hawkins is particularly inapplicable to a development project because, as here, the City's conditions created a *mere possibility* of a conflict with Costa Hawkins. The plaintiff developer was *not* required to offer new rental units at an affordable price, but instead could choose to meet the City's legitimate affordable housing goals through alternative means, in this case by payment of in-lieu fees or by providing affordable units off site – and did, in fact, make an irrevocable election to pay in-lieu fees.

7. The Opinion Neither Acknowledges Nor Resolves Conflicts With Government Code Section 65589.8 And The Mello Act, Both Of Which Expressly Allow Or Recognize Inclusionary Requirements For Rental Property.

When the Legislature first enacted the Housing Element Law (Government Code § 65580 et seq.) in 1983, it explicitly acknowledged that some cities would address their affordable housing obligations by means of inclusionary requirements. Government Code § 65589.8 provides, in relevant part:

> A local government which adopts a requirement in its housing element that a housing development contain a fixed percentage of affordable housing units, shall permit a developer to satisfy all or a portion of that requirement by constructing rental housing at affordable monthly rents, as determined by the local government.

Section 65589.8 was enacted as part of the Housing Element Law in 1983. While the Legislature has amended other parts of the Housing Element Law many times since 1983,

including several amendments since the enactment of Costa Hawkins in 1995, it has never amended § 65589.8. The Opinion does not resolve the conflict with this statutory provision: while the Opinion *forbids* communities from requiring the construction of rental housing at affordable monthly rents, § 65589.8 mandates that communities allow such construction!

The Legislature also has required a form of inclusionary housing, similar to that imposed by Los Angeles here, for developments located in the Coastal Zone. The Mello Act, Government Code §§ 65590-65590.1, enacted in 1981, requires that every new housing development in the coastal zone, "where feasible," provide housing affordable to low and moderate income households and also requires that all housing demolished in the coastal zone and formerly occupied by low and moderate income households be replaced within three years (subject to certain exceptions) or that the developer pay an in-lieu fee. (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 736; *Venice Town Council, Inc. v. City of Los Angeles, supra,* 47 Cal.App.4th 1547, 1552.)

The Opinion below neither acknowledges nor attempts to resolve the conflict between these provisions and Costa Hawkins. In this, the Opinion conflicts not only with *Torrey Pines* and *Ailanto*, as described above, but also with the decision in *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra,* 173 Cal.App.4th 13, and the principles of statutory construction it applied with respect to Costa Hawkins. There, addressing a conflict between Costa Hawkins and the Ellis Act, Government Code § 7060 et seq.,[5] the Court concluded:

> If inconsistent statutes cannot otherwise be reconciled, a particular or specific provision will take precedence over a conflicting general provision. [Citations.]... [W]here the general statute standing alone would include the same matter as the special act, and thus conflict with it, the special act will be considered as an exception to the general statute whether it was passed before or after such general enactment. [Citations.]
>
> Generally, we will presume that the enactment of a statute does not impliedly repeal existing statutes. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476 ....) "Absent an express declaration of legislative intent, we will find an implied repeal 'only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are "irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.

(173 Cal.App.4th at 22.) Applying these principles, the Court rejected a reading of Costa Hawkins that would "swallow" Ellis and render it "nugatory." (173 Cal.App.4th at 26.) The Court did so based on three factors, all of which also apply here.

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[5] In *Nash v. City of Santa Monica* (1984) 37 Cal.3d 97, 99, 109 (Nash), this Court upheld a city ordinance that restricted "the circumstances in which owners of residential properties could evict tenants in order to withdraw from the rental market." (*Pieri v. City and County of San Francisco* (2006) 137 Cal.App.4th 886, 888, italics added.) The Ellis Act, enacted in 1985 (Stats. 1985, ch. 1509, § 1, p. 5560), was a direct response to Nash. (§ 7060.7.) The purpose of the Ellis Act "is to allow landlords who comply with its terms to go out of the residential rental business by evicting their tenants and withdrawing all units from the market ... ." (*City of Santa Monica v. Yarmark* (1988) 203 Cal.App.3d 153, 165.)

First, the provision in Ellis was more specific than Costa Hawkins. (173 Cal.App.4th at 27-28.) Here too, both § 65589.8 and the Mello Act are specific in their recognition of inclusionary requirements.

Second, while Costa-Hawkins expressly repealed many statutes other than the Ellis Act, it did not mention Ellis. The Court held this "indicates that the Legislature did not intend to do the same with respect [Ellis]" (173 Cal.App.4th at 28.) The same may be said with respect to § 65589.8 and the Mello Act: Costa Hawkins is silent on both, thus indicating the Legislature's intention to leave both intact.

Third, the Court noted that because in 2002 Ellis itself had been amended subsequent to the 1995 enactment of Costa Hawkins, the Legislature could not have intended to repeal Ellis with Costa-Hawkins. (173 Cal.App.4th at 28-29, *citing California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 634 (courts cannot presume the Legislature engages in an idle act).) So too with respect to at least one of the statutes recognizing inclusionary requirements. Section 65589.8 is part of the Housing Element Law, Government Code § 65580 et seq., which has been amended several times without change to § 65589.8 following Costa Hawkins' 1995 enactment.

8. The Opinion's Invalidation Of The Inclusionary Regulation's In Lieu Fee Conflicts With The Decision of The Court of Appeal In *Home Builders Association of Northern California v. City of Napa*.

In *Home Builders Association of Northern California v. City of Napa, supra,* 90 Cal.App.4th 188, the Court of Appeal considered and rejected a contention similar to that made by Palmer, namely that inclusionary regulations constitute a form of rent control subject to due process "fair return" standards. The City of Napa's ordinance under challenge, like that considered in the court below, required that a portion of new housing units be affordable also but allowed alternatives including payment of in-lieu fees and donation of land. In direct contradiction to the Court below, the *Napa* court found that it was not correct to say that property owners were required to sell or rent their units to low income individuals. The court noted that:

> "Under the ordinance, any person who does not want to sell or rent a portion of his or her housing units to low income individuals may choose one of the alternatives, such as donating vacant land or paying an in-lieu fee. Thus [plaintiff's] argument is based on an incorrect premise."

(90 Cal.App.4th at 198-199.)

Similarly, the decision of the Court below finding a conflict with Costa Hawkins is based on an incorrect premise. The City of Los Angeles did not "require" the plaintiff to limit his initial rents, in violation of Costa Hawkins. The plaintiff was able, instead, to choose at his option one of the alternatives offered by the City, and did, in fact, make an irrevocable election to pay in-lieu fees, which fund the development of affordable housing, and in no manner limit or set plaintiff's rental levels. Hence he was completely free to set the initial rent for all of his planned rental units.

As this Court has recognized, in lieu fees are a well-recognized alternative means by which cities allow project developers--at their option--to satisfy zoning and other land use requirements imposed pursuant to cities' police power. (See *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 884, noting that if a City finds a requirement "impractical, it may surely levy an in-lieu exaction to accomplish the same objective"; *Associated Home Builders, Inc. v. Walnut Creek* (1971) 4 Cal.3d 633.) Because the in lieu fee is chosen by the developer, it is not a requirement. (*See, e.g., San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 668.) Every appellate decision that has considered the issue also has agreed. (See, e.g., *Home Builders, supra*, 90 Cal.App.4th 188, 192; *Russ Bldg. Partnership v. City & County of San Francisco* (1987) 199 Cal.App.3d 1496, 1505; *Terminal Plaza Corp. v. City & County of San Francisco* (1986) 177 Cal.App.3d. 892, 906-907; 910-911; *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 328.)

The Opinion gives only the most superficial gloss to the validity and the function of Los Angeles' in lieu inclusionary fee. What is more, in so doing it adopts a test--that the inclusionary requirement itself and its in lieu fee alternative are "inextricably intertwined" (175 Cal.App.4th at 1411)--that it seems to have manufactured from whole cloth. This conclusion and unsupported analysis conflict with *Home Builders* and many other decisions, and in so doing threaten the vital in lieu fee component of inclusionary programs adopted by scores of cities statewide.

9. Review Should Be Granted Not Only Because The Opinion Conflicts With The Decisions Of This Court And Several Appellate Courts, But To prevent An Unwarranted Intrusion Into The Legislative Judgments Of Local Governments.

Review is warranted because the issues at stake are fundamental to California's constitutional system of independent coordinate branches of government. The Opinion, if left un-reviewed, authorizes an unprecedented assumption by the courts into what is a legislative function reserved to another branch of government. Moreover, the local legislative judgments it invalidates represent local governments' best effort at addressing and attempting to ameliorate the State's affordable housing crisis.

Elected officials acting as city councils, not the courts, are exclusively charged with the task of making zoning judgments. This authority is not a "circumscribed prerogative," but is deemed to be "plenary" and "elastic" in order that local officials can creatively address the evolving needs and concerns of their communities. (*Candid Enterprises*, *supra*, 39 Cal.3d 878, 882; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 676.) This broad constitutional authority reserved to local legislative bodies will be frustrated and chilled if courts, too ready to find a conflict with State law, can simply invalidate local laws. City councils will be advised by their City Attorneys to be more cautious, and to only zone 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 those city councils 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.

10. If The Court Does Not Grant Review, It Should Order That The Opinion Not Be Published.

If review is not granted, the League and APA California request that the Opinion be decertified for publication pursuant to Rule 8.1125. The Opinion makes a destructive contribution to the case law by its inconsistencies with the prevailing decisions cited above.

11. Conclusion.

For these reasons, the League of California Cities and APA California respectfully urge the Court to grant the City of Los Angeles' petition for review in this matter, or, alternatively, to order that the Opinion not be published.

Very truly yours,

Thomas B. Brown

PROOF OF SERVICE

Palmer v. City of Los Angeles
Court of Appeal Case No. B206102

I, Theresa M. 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 Palmer v. City of Los Angeles ; that my business address is 425 Market Street, 26th Floor, San Francisco, California 94105. On September 15, 2009, I served a true and accurate copy of the document(s) entitled:

LETTER BRIEF IN SUPPORT OF PETITION FOR REVIEW

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:

Attorneys for Palmer/Sixth St. Properties, LP, and Geoffrey Palmer

Jeffrey Lee Costell (SBN 93688)
Alexandre Ian Cornelius (SBN 180652)
Sean M. Cronin (SBN 174933)
COSTELL & CORNELIUS
1299 Ocean Ave., Suite 400
Santa Monica, CA 90401-1007
Tel: (310) 458-5959
Fax: (310) 458-7959

Attorneys for City of Los Angeles

Rockard J. Delgadillo, City Attorney. (SBN 125465X)
Jeri L. Burge, Assistant City Attorney (SBN 102630)
Tayo A. Popoola, Deputy City Attorney (SBN 134564)
Michael J. Bostrom, Deputy City Attorney (SBN 211778)
700 City Hall East
200 North Main Street
Los Angeles, CA 90012
Tel: (213) 978-8228
Fax: (213) 978-8214
Email: Michael.Bostrom@lacity.org

Attorneys for Proposed Amici Curiae SCANPH and ACORN

Peter Bibring, (SBN 223981)
Peter J. Eliasberg, (SBN 189110)
Mark D. Rosenbaum, (SBN 59940)
ACLU FOUNDATION OF SOUTHERN CALIFORNIA
1313 W. 8th Street
Los Angeles, CA 90017
Tel: (213) 977-9500
Fax: (213) 250-3919

Richard Rothschild, SBN (67356)

WESTERN CENTER ON LAW &
POVERTY
3701 Wilshire Blvd., Suite 208
Los Angeles, CA 90010-2809
Tel: (213) 487-7211
Fax: (213) 487-0242

Christian Abasto, (SBN 190603)
LEGAL AID FOUNDATION OF LOS
ANGELES
8601 S. Broadway Ave.
Los Angeles, CA 90003
Tel: (213) 640-3884
Fax: (213) 640-3988

Lynn Martinez, (SBN 164406)
WESTERN CENTER ON LAW &
POVERTY
Post Office Box 9070
Vallejo, CA 94591-4023
Tel: (707) 552-5306
Fax: (707) 552-5316

Michael Rawson, (SBN 95868)
CALIFORNIA AFFORDABLE
HOUSING LAW PROJECT,
PUBLIC INTEREST LAW PROJECT
449 15th Street, Suite 30I
Oakland, CA 94612
Tel: (510) 891-9794 ext. 145
Fax: (510) 891-9727

Shashi Hanuman, (SBN 198522)
PUBLIC COUNSEL
610 South Ardmore Avenue
Los Angeles, California 90005
Tel. (213) 385-2977
Fax (213) 385-9089

Michelle Marie Kezirian, (SBN 189481)
BET TZEDEK LEGAL SERVICES
145 South Fairfax Avenue, Suite 200
Los Angeles, CA 90036
Tel: (323) 939-0506
Fax: (323) 549-5880

☒ (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.

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☐ (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 September 15, 2009 at San Francisco, California.

Theresa M. Hughes