IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAN REMO HOTEL, L.P., a California Limited Partnership, THOMAS FIELD, an individual, ROBERT FIELD, an individual, and T & R INVESTMENT CORP., a California Corporation, Plaintiffs, Cross-Defendants, and Appellants, vs. CITY AND COUNTY OF SAN FRANCISCO, et al., Defendants, Cross-Complainants, and Respondents.	Case No. S091757 (Court of Appeal No. 083530) (San Francisco Superior Court No. 950166)

AMICI CURIAE BRIEF ON BEHALF OF SIXTY-SEVEN CALIFORNIA CITIES, THE COUNTY COUNSELS' ASSOCIATION OF CALIFORNIA, AND THE INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF THE CITY AND COUNTY OF SAN FRANCISCO

After a Decision of the Court of Appeal, First Appellate District, Division Five, Reversing the Judgment of the Superior Court for the City and County of San Francisco (the Honorable William J. Cahill, the Honorable Raymond Williamson, Jr., and the Honorable Ina Levin Gyemant)

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STATEMENT OF INTEREST

The amici curiae include sixty-seven cities in California, as well as the California State Association of Counties, a non-profit corporation whose membership consists of all 58 California counties. Amici also include the International Municipal Lawyers Association (IMLA), a non-profit, professional organization that has been an advocate and resource for local government attorneys since 1935. IMLA members include attorneys from more than 1400 municipalities across the country.

The amici have a substantial interest in this case because the appeal court adopted an extremely broad, unprecedented reading of the Takings Clause as applied to mitigation fees. The implications of this case reach well beyond a tight San Francisco housing market. Mitigation fees are at the center of many of the most prominent housing, environmental, and land-use planning programs administered by municipalities. If the appeal court ruling is upheld, countless impact fees could receive unduly stringent scrutiny from the judiciary, and scores of lawsuits probably would be filed against local officials to test the limits of the newly expanded scope of this heightened scrutiny.

The appeal court ruling would severely undermine the ability of California local officials to impose reasonable mitigation fees to address harm to their communities posed by new development and other land-use proposals. It would undermine amici's fiscal health, restrict their authority to maintain safe, healthy, and affordable communities, and reduce the ability of democratically elected local officials to respond to the needs of their constituents. In view of the potential effect of California takings jurisprudence on other jurisdictions, municipalities outside California share a similar interest in this matter.

ARGUMENT

At bottom, this case turns on a simple, well-established principle of law: that mitigation fees legislatively imposed on a class of landowners warrant greater judicial deference than fees adjudicatively imposed on an individualized and discretionary basis. This principle derives from fundamental notions of separation of powers and appropriate judicial respect for public policy determinations made by the legislature.

The City and County of San Francisco has demonstrated that the HCO -- which applies equally to 500 hotels and more than 18,000 residential hotel units -- is a legislative regulation of general applicability subject to deferential review in accordance with the clear rulings of this Court.[1] Rather than repeating the compelling arguments made by the City, this amicus brief supplements the City's briefs in four ways.

- Section I discusses the importance to local governments of preserving the legislative-adjudicative distinction. The appeal court effectively eviscerated this distinction, thereby dramatically expanding the application of the "essential nexus" and "rough proportionality" tests set forth in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825, and *Dolan v. City of Tigard* (1994) 512 U.S. 374. This radical change to existing law threatens a broad range of routinely imposed

[1] *See* City's Opening Brief at pp. 15-23; City's Reply Brief at pp. 2-8; *see also Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 966-67, cert. denied, 526 U.S. 1131 ("individualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan*, whereas generally applicable development fees warrant the more deferential review . . . ."); *Landgate v. California Coastal Comm'n* (1998) 17 Cal.4th 1006, 1022, cert. denied, 525 U.S. 876 (deferential review is required for legislatively imposed fees, as opposed to "fees imposed on a property owner on an individual and discretionary basis . . . ."); *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 876 (the *Dolan/Nollan* tests do not apply to "legislatively formulated development assessments imposed on a broad class of property owners . . . because the heightened risk of the 'extortionate' use of the police power to exact unconstitutional conditions is not present."). The City also persuasively explains why the HCO easily survives deferential review. (City's Opening Brief at pp. 23-27; City's Reply Brief at pp. 8-10.) The City's briefs further show that under recent rulings by the U.S. Supreme Court, the *Dolan/Nollan* tests should not be applied to monetary fees at all. (City's Opening Brief at pp. 30-36; City's Reply Brief at p. 10.)

impact fees and the ability of municipalities to protect their communities from harmful land use.

- Section II explains why the historical relationship between due process and takings analysis strongly cautions against the dramatic expansion of the *Dolan/Nollan* tests proposed by the San Remo Hotel.
- Section III shows that the HCO does not work a taking because the San Remo Hotel may avoid the HCO fee by continuing to pursue the historic use of the property. Longstanding, binding precedent demonstrates that land-use controls that permit continuation of a parcel's historic use do not constitute a taking.
- Section IV rebuts the San Remo Hotel's suggestion that the HCO effects a taking merely because it affects hotel owners more severely than other landowners or the public at large. The San Remo Hotel's argument in this regard contradicts decades of U.S. Supreme Court takings jurisprudence.

I. Application of the *Dolan/Nollan* Tests to the HCO Threatens Routine Impact Fees Throughout California and Nationwide.

The San Remo Hotel urged the appeal court "to stake out its own views" on the fundamental questions of constitutional law at issue in this case,[2] and the appeal court did exactly that. The appeal court ruling rides roughshod over this Court's carefully crafted distinction between legislative and adjudicative exactions. It does so because it effectively expands the concept of an adjudicative exaction to include any exaction that does not apply to <u>every</u> parcel of property within the relevant jurisdiction.

A quick review of the facts and the ruling below shows that this is so. The HCO fee is fixed by legislative formula and applies in a ministerial fashion to 500 hotels in San Francisco.

[2] Appellants' Opening Brief, at p. 30 (Ct. App. April 5, 1999).

There is no individualized discretion left to city officials as to whether to impose the fee to the San Remo Hotel or any of the other 499 hotels to which the HCO applies. The City quite naturally argues that this fee is legislatively imposed on a broad class of landowners and thus is subject to deferential review under *Ehrlich*, *Landgate*, and *Santa Monica Beach*. On the surface, the court of appeal's opinion appears to recognize the distinction between legislative and adjudicative exactions. (Slip op. at pp. 12-14.) But in addressing the City's contention that the HCO fee is legislatively imposed and thus subject to deference, the appeal court responded:

> [The San Remo Hotel owners] allege that the HCO affected only them and a small group of other property owners, leaving unregulated all of the many thousands of other commercial and residential properties in the City. The $567,000 mitigation fee obviously was not imposed on every other property in the City. Consequently, a heightened level of scrutiny is proper, because this is the type of particularized governmental exaction imposed upon a property owner which was seen in *Ehrlich*.

(Slip op. at p. 14 fn. 5 [citation omitted].)

The practical implications of this ruling cannot be overestimated. Under this approach, the *Dolan/Nollan* tests apply to a mitigation fee unless the fee is imposed on "every other property" in the relevant jurisdiction. But mitigation fees are never imposed on "every other property." The very purpose of a mitigation fee is to seek relief from the particular class of properties giving rise to harm sought to be mitigated. These focused fees help to ensure that the regulated class of properties neither imposes a burden on the public by leaving the harm unremedied, nor reaps a windfall by forcing the taxpayers to pick up the tab for mitigation. The San Remo Hotel's position thus radically expands the concept of an adjudicative exaction subject to the *Dolan/Nollan* tests -- described by this Court as "a relatively narrow class" (*Ehrlich*, *supra*, 12 Cal.4th at p. 868) -- to include virtually <u>all</u> mitigation fees. Under the San Remo

Hotel's approach, the *Dolan/Nollan* tests previously required only for a narrow class of fees would apply to countless mitigation fee programs.

Under this Court's rulings, the "sine qua non" of *Dolan/Nollan* review is the risk that the government will exploit a landowner's desire for a land-use permit by using discretionary authority to demand an unfair exaction unrelated to the proposed land use.[3] The HCO raises no such risk of unfair "leveraging" because neither the San Remo Hotel nor any other hotel has been singled out for individualized, discretionary treatment by the government. The HCO applies equally to 500 hotel properties, and the ministerial act of collecting the fee upon conversion of units from residential to tourist use poses no risk of unfair leveraging. The San Remo Hotel's approach would obliterate the distinction between legislative and adjudicative fees and extend the *Dolan/Nollan* tests to cases like this one that are devoid of any risk of unfair leverage.

The ruling below jeopardizes not only affordable housing programs that rely on mitigation fees, but scores of other impact fee programs. In good faith reliance on this Court's ruling five years ago in *Ehrlich*, California cities and counties have come to expect that fees imposed on a general class of property owners will be given appropriate deference by the courts. More than 125 California municipalities have enacted legislation imposing impact fees and other exactions. (Exs. A and B to City's Sept. 18, 2000 Request for Judicial Notice.) The San Remo Hotel's approach would seriously undermine their ability to assess legislatively imposed impact fees to address the economic burdens caused by new development, including the need for new roads, schools, parks, sewers, and water treatment facilities. Legislative fees to protect ecologically sensitive areas and promote public health and safety also are threatened. These fees

[3] *Ehrlich, supra*, 12 Cal.4th at p. 869 ("It is the imposition of land-use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the intermediate standard of

are a particularly important fiscal tool to mitigate harmful land use in California in view of article XIII A of the state Constitution, commonly known as the Jarvis-Gann Property Tax Initiative or Proposition 13, which imposes limits on the ability of California municipalities to raise local taxes.

Consider the art-in-public-places fee upheld in *Ehrlich*. It did not apply to every parcel in Culver City, but only to commercial and public building projects valued at more than $500,000, and residential development projects of more than four units. (*Ehrlich, supra*, 12 Cal.4th at p. 862.) The Court sustained the City's determination that only projects of a certain size should be called upon to remedy the absence of art in public places. (*Id*. at pp. 885-86.)

Likewise, the rent control ordinance upheld in *Santa Monica* applied only to rental properties. Like San Francisco's HCO, Santa Monica's rent control is designed to address an affordable housing crisis. (*Santa Monica*, *supra*, 19 Cal.4th at p. 957.) This Court applied deferential review even though the fee did not affect every parcel of property in Santa Monica. Because rental properties gave rise to the problem that the City sought to address, this Court did not second-guess the City's decision to address the problem through special controls on that limited class of properties.

The State of California has authorized school districts to levy "school development fees" to mitigate costs associated with new school construction. (*See* Cal. Gov't Code § 53080.) In *Loyola Marymount University v. Los Angeles Unified School Dist.* (1996) 45 Cal.App.4th 1256, the court properly upheld these fees as "legislatively formulated development assessments imposed on a broad class of property owners" and thus subject to deferential review. (*Id*. at p.

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scrutiny formulated by the court in *Nollan* and *Dolan*. "); *accord Santa Monica Beach, supra,* 19 Cal.4th at pp. 966-67.

1271). A school development fee obviously does not apply to every parcel of property in a given school district, and typically would apply to far fewer properties than the HCO.

Countless other examples could be cited. Subdivision impact fees used to fund new roads do not apply to every parcel of property, but only to new developments that give rise to the need for additional infrastructure. Fees used to buy new parkland often are imposed only on those who convert open space to residential or commercial use. Local governments often impose water capacity fees exclusively on new developments that do not provide water well and wellhead treatment facilities.

In a case similar to the case at bar, just weeks ago the highest court of another western state rejected a takings challenge to a plant investment fee imposed by a sanitation district for new development that requires additional wastewater collection and treatment facilities. (*See Krupp v. Breckenridge Sanitation District* (Colo. Feb. 26, 2001) No. 99SC491, 2001 WL 185035, at pp. *5-*10.) Citing this Court's ruling in *Ehrlich,* the Colorado Supreme Court held that *Dolan/Nollan* scrutiny applies only to adjudicative exactions, not legislatively imposed requirements. (*Id*. at pp. *7-*8 ["Application of the *Nollan/Dolan* test has been limited to the narrow set of cases where a permitting authority, through a specific, discretionary adjudicative determination, conditions continued development on the exaction of private property for public use."].) Because the wastewater fee in question is legislatively imposed on a single class of landowners -- those pursuing new development -- the Colorado Supreme Court refused to apply *Dolan/Nollan* scrutiny to the fee. (*Id.* at p. *8 ["Unlike the landowners in *Nollan* and *Dolan*, whose conditions for development were determined on an individualized adjudicative basis, the Krupps were charged a fee that was assessed on all new development within the District."].)

Indeed, the overwhelming majority of U.S. municipalities impose impact fees or other exactions. (*See* Douglas T. Kendall & James E. Ryan, *"Paying" for the Change* (1995) 81 VIRGINIA L. REV. 1801, 1802 ["Given that few municipalities have a surfeit of funds to devote to land-use regulation, it is not surprising that the use of exactions has become increasingly popular."]; Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine* (1991) 91 COLUM. L. REV. 473, 481 & n. 42 [survey of municipalities shows that almost 90 % of all communities in the United States impose impact fees or other exactions]; Stewart E. Sterk, *Nollan, Henry George, and Exactions* (1988) 88 COLUM. L. REV. 1731, 1731 ["In recent years, exactions . . . have become increasingly popular."].) As this Court knows, the rulings of California courts in takings cases may be influential in other jurisdictions, as they were in the recent ruling by the Colorado Supreme Court in *Krupp*, *supra*. If allowed to stand, the San Remo Hotel's approach would create vast confusion regarding the appropriate level of judicial review for impact-fee programs in any jurisdiction that follows California's lead on these issues.

Three key aspects of the appeal court's ruling show that its invocation of heightened scrutiny portends untoward judicial activism. First, the court allowed the San Remo Hotel to challenge a critical component of the mitigation fee calculation -- the number of residential units in the Hotel as of 1979 -- a figure that the Hotel itself supplied the City in 1981. Any challenge to the accuracy of that figure should have been brought through the local administrative process. It is extraordinary to suggest that the San Remo Hotel may challenge the accuracy of its own report more than ten years after the fact simply by filing a takings challenge in 1993. One is left to wonder how the City could possibly "prove" at trial the accuracy of the landowner's self-reporting decades later. To impose this burden through a misbegotten application of *Dolan* and

Nollan would turn land-use planning on its head by allowing landowners to sidestep established local procedures and requiring municipalities to fight out in court the reasonableness of long-settled, legislative factual assumptions. This Court should not allow the San Remo Hotel to hijack the Takings Clause in an effort to circumvent the applicable statute of limitations (Cal. Gov't Code § 66022) and resurrect long dead administrative issues.[4]

Second, under the guise of *Dolan/Nollan* review, the appeal court second-guessed the basic purpose of the HCO, suggesting that it serves to provide housing only to the specific individuals using the San Remo Hotel and other residential hotels in 1979. This mischaracterization allowed the court to conclude that the HCO fails to advance any legitimate public interest because more than 10 years later, some of these residential guests may have been given lifetime leases. (Slip op. at pp. 17-18.) But the primary purpose of the HCO is not to provide housing to specific individuals, but to preserve affordable housing stock generally throughout the City,[5] which it indisputably does. Every residential unit at the San Remo Hotel that is converted to tourist use constitutes one less unit available to the City's affordable housing

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[4] The San Remo Hotel's repeated assertion (*e.g.*, Bf. at pp. 1, 5, 20) that it has done nothing to exacerbate the City's affordable housing crises should be seen for the ruse that it is. Every San Remo residential unit that has been converted to tourist use is one less unit of affordable housing available to the poor, the elderly, and others whose lives are degraded by the lack of affordable housing. By insisting that it has not contributed to the affordable housing shortage, the San Remo Hotel is improperly attempting, twenty years after the fact, to use the guise of a takings lawsuit to challenge its own reported figures. As noted above, any challenge in this regard should have been brought through local administrative processes long ago, and the San Remo Hotel should not be allowed at this late date to call into question its own report. (*Cf. Consolidated Rock Prods. Co. v. City of Los Angeles* (Cal. 1962) 57 Cal.2d 515, 533-35 [landowner's own conduct terminated any nonconforming use status]; *Jefferson County v. Timmel* (Wis. 1952) 51 N.W.2d 518, 530-31 [where a landowner fails to challenge a permit denial for a proposed land use through available administrative processes, he waives any right to assert as a defense, in an action to enjoin the proposed use, that he is entitled to pursue the proposed use because it is actually a prior nonconforming use].)

The San Remo Hotel's only response is that it should not be bound by its agent's alleged misreporting of the actual number of residential tenants. The San Remo Hotel, however, is bound by the representations of its agent to the City. (Cal. Civ. Code §§ 2330, 2334.)

[5] *See* HCO, S.F. Admin. Code § 41.2, Appellants' Appendix at p. 44 (the HCO is designed "to benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition.").

stock, even if every San Remo residential tenant is given a lifetime lease. In imposing the *Dolan/Nollan* tests, the appeal court engaged in precisely the improper second-guessing of the legislative purpose that this Court disparaged as "indeed novel" in *Santa Monica.* (19 Cal.4th at p. 963.)

Third, in applying the *Dolan/Nollan* tests, the appeal court disregarded the fact that the HCO is not only roughly proportional, but exactly proportional, to the harm caused by proposed conversions. It requires landowners to contribute a fee calibrated to replace the precise number of residential units that will be lost through the proposed conversion. In fact, the San Remo Hotel's fee is far less burdensome than an exactly proportionate response because it constitutes only 40% of estimated construction costs (plus land costs). The San Remo Hotel's basic complaint is that the fee is not imposed on other landowners whose conduct did not worsen the City's affordable housing crises, an odd notion of fairness totally foreign to takings jurisprudence.

If allowed to stand, the appeal court ruling would have a severe chilling effect on workaday municipal land-use planning. Local officials could never be sure that a court would sustain reasonable government reliance on factual propositions established decades earlier, or accept the stated purpose of a mitigation fee ordinance, or uphold reasonable municipal conclusions regarding the causal relationship between landowner conduct and social ills. The resulting reduction in mitigation fee programs, either through an inevitable chilling effect or judicial invalidation, would unfairly burden the public with harms caused by the regulated community. Nothing in the Takings Clause requires this perverse result, and this Court's precedents plainly prohibit it.

II. The Historical Relationship Between Due Process and Takings Analysis Strongly Cautions Against Radical Expansion of the *Dolan/Nollan* Tests.

The City persuasively argues (City's Opening Brief at pp. 30-36) that in view of recent U.S. Supreme Court rulings, heightened means-end scrutiny under the Takings Clause should never apply to mitigation fees of any sort, legislative or adjudicative. The City urges this Court to abandon its ruling in *Ehrlich* that the *Dolan/Nollan* tests apply to adjudicative fees. We support this request, but at a minimum this Court should recognize that *Ehrlich* is already at the far outer limits of takings jurisprudence. As explained in this section, a means-end inquiry into the legitimacy of government action under the Takings Clause is appropriate only for government-compelled dedications of property like those at issue in *Dolan* and *Nollan*. Because the Takings Clause does not authorize a means-end inquiry in other contexts, any further extension of *Ehrlich* (such as that proposed by the San Remo Hotel) would stretch logic to the breaking point.

In *Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, five Justices expressly retreated from a general means-end inquiry as a standard of takings liability. In an opinion concurring in the judgment, Justice Kennedy cited *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304, 314-15, for the proposition that the Takings Clause presumes the reasonableness and validity of government action, and merely conditions otherwise permissible government action on the payment of compensation. (*See Eastern Enterprises*, *supra*, 524 U.S. at p. 545.) He then characterized a means-end inquiry as "in uneasy tension with our basic understanding of the Takings Clause, which has not been understood to be a substantive or absolute limit on the Government's power to act." (*Id*.) He candidly acknowledged that the means-end inquiry results from "'[t]he imprecision of our regulatory takings doctrine," not from any coherent explication of the Takings Clause. (*Id*.) Where the constitutionality of regulation "appears to turn on the legitimacy of Congress' judgment rather

than on the availability of compensation," he concluded, "the more appropriate constitutional analysis arises under general due process principles rather than under the Takings Clause." (*Id*.) Finding prior precedents to be "equivocal" regarding the means-end inquiry, he again emphasized that "the more appropriate constitutional analysis arises under general due process principles rather than the Takings Clause." (*Id*.)

Similarly, Justices Breyer, Stevens, Souter, and Ginsburg concluded in dissent that the reasonableness of government action is governed by the Due Process Clause, not the Takings Clause: "[T]he plurality views this case through the wrong legal lens. The Constitution's Takings Clause does not apply." (*Id*. at p. 554.) Agreeing with Justice Kennedy, these four Justices emphasized that "at the heart of the [Takings] Clause lies a concern, not with preventing arbitrary or unfair government action, but with providing *compensation* for legitimate government action that takes 'private property' to serve the 'public' good." (*Id.*) There was "no need to torture the Takings Clause to fit this case" because issues regarding the reasonableness of government action "find[] a natural home in the Due Process Clause, a Fifth Amendment neighbor." (*Id*. at p. 556.) The dissent stressed that the Due Process Clause, not the Takings Clause, "safeguards citizens from arbitrary or irrational legislation." (*Id*). The Due Process Clause, not the Takings Clause, promotes the "fair application of law, which purpose hearkens back to the Magna Carta." (*Id.* at p. 558.)

Justice Kennard reviewed the checkered history of the means-end inquiry under the Takings Clause in her concurrence in *Santa Monica Beach*. There, she described the inquiry's derivation from due process case law and noted the U.S. Supreme Court's retreat from the inquiry in *Eastern Enterprises*. (*See Santa Monica Beach*, *supra*, 19 Cal.4th at pp. 975-83 [Kennard, J., concurring].) Justice Kennard explained how lower courts have reached disparate

conclusions regarding the reach of *Dolan*'s rough proportionality test, and she called on the high court to clarify *Dolan*'s scope once and for all.

The City's Opening Brief (pp. 34-35) explains how the U.S. Supreme Court subsequently resolved any question regarding the reach of *Dolan*'s rough-proportionality test in *City of Monterey v. Del Monte Dunes at Monterey, Ltd*. (1999) 526 U.S. 687. There, the Court unanimously confirmed that rough proportionality review under *Dolan* is limited to the narrow context of compelled dedications of property:

> [W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions -- land-use decisions conditioning approval of development on the dedication of property to public use.

(*Id*. at p. 702; *accord*, *id.* at p. 723 [Scalia, J. concurring], p. 733 [Souter, J. dissenting, joined by O'Connor, Ginsburg, and Breyer, JJ.].)

In the wake of *Del Monte Dunes,* the New York Court of Appeals overruled the primary case upon which the appeal court relied in applying the rough proportionality test to the HCO, *Seawall Assocs. v. New York* (N.Y. 1989) 542 N.E.2d 1059. In *Bonnie Briar Syndicate, Inc. v. Town of Mamaroneck* (N.Y. 1999) 721 N.E.2d 971, New York's high court recognized that immediately after *Nollan* and *Dolan*, "there was considerable disagreement as to the reach of those holdings" outside the context of compelled dedications of property. (*Id*. at p. 975.) It noted that *Seawall* opened the door for broader means-end scrutiny under the Takings Clause, but the court then expressly repudiated the *Seawall* approach, ruling that *Del Monte Dunes* has "finally resolved" the matter by limiting such scrutiny to *Dolan/Nollan* dedications. (*Id*. at pp. 975-76.) The *Bonnie Briar* ruling cuts the heart out of *Seawall* and the appeal court's legal analysis in this case.

Other courts have largely disregarded any purported means-end inquiry under the Takings Clause. The U.S. Claims Court -- the court with jurisdiction over takings claims against the United States -- canvassed the case law in 1988 and concluded: "[N]o court has ever found that a taking has occurred solely because a legitimate state interest was not substantially advanced." (*Loveladies Harbor, Inc. v. United States* (1988) 15 Cl. Ct. 381, 390). Its successor, the U.S. Court of Federal Claims, recently refused to extend the means-end test beyond the *Dolan/Nollan* context of compelled dedications of property. (*Bamber v. United States* (1999) 45 Fed. Cl. 162, 165-66 [means-end test "has not had a fruitful life" and is limited to regulations that "create public access to privately held real property" under *Nollan* and *Dolan*] [citing Justice Breyer's dissent in *Eastern Enterprises*]; *see also Brunelle v. Town of South Kingstown* (R.I. 1997) 700 A.2d 1075, 1083 n.5 [the reasonableness of regulation should be examined under the due process clause, not the takings clause]; *Mission Springs Inc. v. City of Spokane* (Wash. 1998) 954 P.2d 250, 258 [same].)

The means-end inquiry under the Takings Clause is not only in "uneasy tension" with the basic purpose of the Clause, but also with the Takings Clause's textual requirement that a taking be for a "public use." In *Hawaii Housing Auth. v. Midkiff* (1984) 467 U.S. 229, the Court made clear that where a taking fails to advance the public interest, the proper remedy is invalidation for failing to meet the public-use requirement. (*See id*. at pp. 241, 245 [a taking that violates the public-use requirement "serves no legitimate purpose of government and would thus be void"].) *Midkiff* further holds that the standard of judicial review of an asserted public purpose is equivalent to the highly deferential test used to evaluate substantive due process claims. (*See id*. at p. 241 [a taking survives a challenge under the public-use requirement where it is "rationally related to a conceivable public purpose"].) It would be anomalous in the extreme to consider a

regulation's means-end "fit" twice under the same clause using differently phrased standards, i.e., first determining if the regulation is rationally related to a conceivable public purpose under the public-use requirement, and then examining whether it substantially advances a legitimate interest to determine liability under a separate means-end inquiry. Even more absurdly, the application of two means-end tests under the Takings Clause would result in two different remedies: invalidation if the regulation failed the public-use test, but money damages ("just compensation") if the regulation were deemed a taking for failing to pass a separate means-end inquiry.

The means-end inquiry also conflicts with the plain meaning of the word "take." The term "take" denotes a physical appropriation of property, and the Court uses physical appropriation as the benchmark for determining regulatory takings liability.[6] The Court's task in regulatory takings cases is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession." (*Williamson County Reg'l Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172, 199.) Regulation that is objectionable only because it fails to advance a legitimate government interest is not the functional equivalent of an expropriation of land. (*See Santa Monica Beach*, *supra*, 19 Cal. 4th at pp. 981-82 [Kennard, J., concurring] [a means-end test does not adequately gauge a regulation's economic impact on a property owner]; *see generally* S. Keith Garner, *"Novel" Constitutional Claims: Rent Control, Means-Ends Tests, and the Takings Clause* (2000) 88 CAL. L. REV. 1547, 1559-60; Douglas T. Kendall, et al., THE TAKINGS LITIGATION HANDBOOK (2000) 237-44.)

[6] *E.g.*, *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1017 (denial of all economically viable use of land is a taking because such regulation is, "from the landowner's point of view, the equivalent of a physical appropriation."); *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 428 (physical occupations

How is it that due process and takings analysis became conflated? Before 1987, many commentators and courts believed that invalidation was a sufficient remedy under the Takings Clause for a taking of property without just compensation. Thus, there often was little need to distinguish between due process and takings analyses because violations of both Clauses led courts to strike down the offending law. The Supreme Court mixed the terminology of the clauses, referring to "takings of property without due process."[7] Justice Stevens has suggested that in *Village of Euclid v. Ambler Realty Co*. (1926) 272 U.S. 365, the Court effectively combined takings and due process analysis into a single standard:

> [*Euclid*] fused the two express constitutional restrictions on any state interference with private property - that property shall not be taken without due process nor for a public purpose without just compensation - into a single standard: [Before] [a zoning] ordinance can be declared unconstitutional, [it must be shown to be] clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

(*Moore v. City of East Cleveland* (1977) 431 U.S. 494, 514 [Stevens, J., concurring in the judgment] [quoting *Euclid*, *supra*, 272 U.S. at p. 395].) To further confuse the issue, the Takings Clause applies to state and local governments through the Due Process Clause of the Fourteenth Amendment, which similarly encourages a blurring of standards and phraseology.

In 1987, however, takings jurisprudence experienced a major shift with the landmark ruling in *First English*. The *First English* Court held that the government must pay just compensation for a taking, regardless of whether the taking occurs directly through the power of eminent domain or inversely through regulation that denies land economically viable use. (482 U.S. at pp. 314-22.) Although the government may limit its liability to temporary damages by

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of land are takings where they "constitute an actual permanent invasion of the land, amounting to an appropriation of, and not merely an injury to, the property.").

[7] *Metromedia, Inc v. City of San Diego* (1981) 453 U.S. 490, 498 n.7; *see also Rotsker v. Goldberg* (1981) 453 U.S. 57, 62 n.2 (same); *Goldblatt v. Town of Hempstead* (1962) 369 U.S. 590, 591 (stating that the landowners allege that the ordinance at issue "takes their property without due process of law").

rescinding the offending regulation, just compensation must be paid. (*See id*. at p. 321.) Since the *First English* ruling, it has become far more important to distinguish between due process and takings analysis. *Eastern Enterprises* constitutes the first express repudiation by five Justices of the due process analysis that crept into takings jurisprudence prior to *First English*.

The only context in which a means-end inquiry under the Takings Clause is still defensible involves permit conditions that require the applicant to dedicate land to the public, such as the permit conditions at issue in *Dolan* and *Nollan*. Those cases turned on a specific application of the doctrine of unconstitutional conditions. (*Dolan*, 512 U.S. at p. 385; *Nollan*, 483 U.S. at pp. 836-37) The doctrine of unconstitutional conditions applied in *Nollan* and *Dolan* because the government sought to compel the landowners, as a condition of a permit grant, to submit to conduct that would otherwise constitute a *per se* taking, i.e., a permanent dedication of land to the public. (*Id*.) Outside of this narrow context, however, the doctrine of unconstitutional conditions and heightened means-end scrutiny is inapplicable.

In sum, this Court should recognize that a heightened means-end test under the Takings Clause skates on thin constitutional ice. A means-end inquiry into the legitimacy of government action finds its home in the Due Process Clause, not the Takings Clause. The only exception to this general principle arises in the context of adjudicative dedications of property under *Dolan* and *Nollan*, an exception explained by the doctrine of unconstitutional conditions and the special issues that arise where a landowner suffers a government-compelled permanent physical occupation. While we join the City's request for a re-examination of *Ehrlich*, at a minimum we urge this Court not to expand the means-end inquiry as applied to mitigation fees by adopting the San Remo Hotel's proposed evisceration of the legislative-adjudicative distinction articulated in *Ehrlich, Landgate,* and *Santa Monica Beach*.

III. The HCO Allows the San Remo Hotel To Continue the Historic Use of the Property and Thus Does Not Work a Taking.

In *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, the U.S. Supreme Court made clear that land-use regulation is not a taking where it allows the landowner to continue to engage in the historic use of the property. The *Penn Central* Court rejected a takings challenge to New York's historic preservation laws that prevented the owners of Grand Central Terminal from building a 50^{+}-story office building atop the Terminal. (*Id*. at pp. 122-38.) Although the permit denial precluded the landowners from realizing a large profit from the office building, the Court found no taking, emphasizing that the city's historic preservation laws did not interfere with the landowners' primary expectation concerning the use of the parcel as a railroad terminal:

> [T]he New York City law does not interfere in any way with the present uses of the Terminal. Its designation as a landmark not only permits but contemplates that appellants may continue to use the property precisely as it has been used for the past 65 years: as a railroad terminal containing office space and concessions. So the law does not interfere with what must be regarded as Penn Central's primary expectation concerning the use of the parcel.

(*Id*. at p. 136.)

In the same way, the HCO does not interfere with Sam Remo's primary expectation concerning the use of its land. The HCO prohibits, or imposes conditions on, changes to the Hotel's historic use. It does not require the San Remo Hotel to deviate from its historic use in any fashion. It requires merely that the San Remo Hotel retain the historic mix of residential and tourist use of the Hotel as reported by the Hotel itself in 1981.

At its root, the San Remo Hotel's theory rests on the notion that the Takings Clause entitles a landowner to make the most profitable use of the land. This has never been the law. (*See Andrus v. Allard* (1979) 444 U.S. 51, 66 [prevention of the most profitable use of property

does not constitute a taking]; *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust* (1993) 508 U.S. 602, 645 ["[O]ur cases have long established that mere diminution in the value of property, however serious, is insufficient to demonstrate a takings."]; *Macleod v. County of Santa Clara* (9th Cir. 1984) 749 F.2d 541, 547 [where a landowner could continue to use the land for investment purposes or cattle ranching, denial of a timber permit did not work a taking because it did not interfere with the owner's primary expectations, citing *Penn Central*].)

This Court repeatedly has recognized as much. In *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, this Court rejected a takings challenge to a municipal condominium conversion ordinance, ruling that the landowner "failed to make out even a colorable claim" because it was "free to continue to rent its apartments, unaffected by the ordinance . . . ." (*Id*. at pp. 266-67.) This Court ruled that a mere prohibition on conversion from the historic rental use to a new condominium use falls far short of a taking. (*Id*.)

Likewise, in *Furey v. City of Sacramento* (1979) 24 Cal.3d 862, the Court rejected a takings challenge to a municipal open space requirement that prohibited conversion of agricultural land to residential and commercial use. (*Id*. at p. 872.) The Court ruled that a regulatory taking occurs only where regulation deprives a landowner of substantially all reasonable use of the land. The *Furey* plaintiffs, however, alleged only "that their lands, which have for many years been used for agricultural purposes, must continue to be so used in the future as a result of [the] City's actions." (*Id*.) This Court stressed that "[i]t cannot be said that agricultural use of lands long devoted to that purpose is other than a reasonable use." (*Id.*)

If the law were otherwise, a landowner could claim a taking whenever local officials refused to allow upzoning of property or grant a variance for more intensive use, regardless of

the harm that would result from that use. To our knowledge, no court has ever held that a municipal refusal to allow a landowner to depart from a reasonable historic use constitutes a taking.

Continued use of the San Remo Hotel at its historic mix of residential and tourist guests is a reasonable, economically viable use that precludes any finding of a taking. If the San Remo Hotel or any other hotel seeks to depart from its historic use, it does so voluntarily and is fairly subject to an appropriate mitigation fee to address the resulting harm to the City's affordable housing stock.

IV. The HCO Is Not a Taking Merely Because It Applies Only to Hotels.

The San Remo Hotel begins and ends its brief (pp. 1, 47) by suggesting that the Constitution prohibits the City from focusing on a single class of citizens when regulating land use in the public interest. The San Remo Hotel concedes that the "homeless problem in San Francisco is significant, and providing housing for the poor is a laudable purpose." (Brief at p. 47.) It argues, however, that the only constitutional way for the City to address its affordable housing crisis is to have "all taxpayers . . . bear the cost equally." (*Id.*) Under this approach, any effort to restrict the conversion of residential hotel units or to require hotels to help replace converted units necessarily fails constitutional muster because it disproportionately burdens the regulated class as compared to other members of the general public.

It is difficult to imagine a theory more out of keeping with hornbook principles of constitutional law. It is, at its root, a frontal assault on the very notion of regulation, for every regulation imposes a special burden on the regulated community. Long ago, the U.S. Supreme Court ruled that the Takings Clause permits the government to call upon a specific class to undertake these special economic burdens:

> A member of the class which is regulated may suffer economic losses not shared by others. His property may lose utility and depreciate in value as a consequence of regulation. But that has never been a barrier to the exercise of the police power. [Citations.] And the restraints imposed on the national government in this regard by the Fifth Amendment are no greater than those imposed on the States by the Fourteenth.

(*Bowles v. Willingham* (1944) 321 U.S. 503, 518.)

Modern takings precedent likewise gives local governments great leeway to regulate property in the public interest, even where the regulation imposes heavy and unique burdens on a particular class of properties. In *Penn Central*, for example, the Supreme Court recognized that "[l]egislation designed to promote the general welfare commonly burdens some more than others." (*Penn Central*, *supra*, 438 U.S. at p. 133). Citing to a long line of previous takings rulings, the *Penn Central* Court emphasized that "[t]he owners of the brickyard in *Hadacheck*, of the cedar trees in *Miller v. Schoene*, and of the gravel and sand mine in *Goldblatt v. Hempstead*, were uniquely burdened by the legislation sustained in those cases." (*Id*.) In the same way, "zoning laws often affect some property owners more severely than others but have not been held to be invalid on that account." (*Id*. at pp. 133-34)

The Supreme Court has reaffirmed this bedrock principle time and again. For instance in *Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987) 480 U.S. 470, the Court observed that "[t]he Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens under this generic rule in excess of the benefits received." (*Id*. at p. 491 n.21). And in *Connolly v. Pension Benefit Guar. Corp.* (1986) 475 U.S. 211, the Court stressed: "Given the propriety of the governmental power to regulate, it cannot be said that the Taking Clause is violated whenever legislation requires one person to use his or her assets for the benefit of another." (*Id*. at p. 223.)

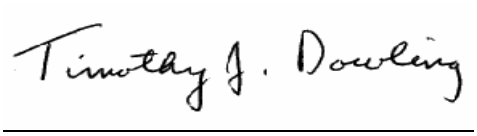
The San Remo Hotel cites *Armstrong v. United States* (1960) 364 U.S. 40, 49 to support its argument, but nothing in *Armstrong* changes the analysis. To be sure, the *Armstrong* court stated that the Takings Clause "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*Id.* at p. 49.) Although fairness should inform the takings inquiry, the Takings Clause does not allow a judge to ignore the text of the Constitution and substitute the judge's personal predilections regarding the fairness of regulation. As is true for the rest of the Constitution, the Takings Clause is not an empty vessel into which judges may pour their own political philosophies. It is violated only in the "extreme circumstance[]" where regulation constitutes the functional equivalent of an appropriation of property. (*United States v. Riverside Bayview Homes, Inc.* (1985) 474 U.S. 121, 126.)

In his famous aphorism, Justice Holmes observed that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics." (*Lochner v. New York* (1905) 198 U.S. 45, 75 [Holmes, J., dissenting].) The Takings Clause similarly does not enshrine a particular political philosophy that favors or disfavors regulation. In a regulatory takings case, a court should not apply a disembodied notion of fairness, but instead ask whether the regulation constitutes the functional equivalent of an appropriation and thereby "takes" property. The mere imposition of a unique economic burden on a particular class of landowners falls far short of the requisite showing.

CONCLUSION

The ruling of the court of appeal should be reversed. In so doing, this Court would simply be "affirming the constitutional propriety if having the political process, through state and local legislative bodies, determine [public] policy." (*Santa Monica Beach*, *supra*, 19 Cal.4th at p. 974.)

Respectfully submitted,



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