

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S212072

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE,

Respondent.

SUPREME COURT
FILED

FEB 18 2014

Frank A. McGuire Clerk

Deputy

AFFORDABLE HOUSING NETWORK
OF SANTA CLARA COUNTY, et al.,

Intervenors.

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

On Appeal from the Superior Court of Santa Clara County
(Case No. CV167289, Honorable Socrates Manoukian, Judge)

OPPOSITION TO CITY'S MOTION TO DISMISS REVIEW

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The City of San Jose's Motion to Dismiss Review (Motion) should be denied.

The City previously rehearsed the argument in its Motion when it opposed this Court's grant of review. In its Answer to Petition for Review, at pages 16 and 19, the City asserted that CBIA had waived any and all claims based on the Takings Clause in the courts below. This argument was specious then, as CBIA showed in its Reply in Support of Petition for Review, at page 11, note 3, and remains specious today.

CBIA's complaint expressly invokes the state and federal constitutional standards governing exactions and conditions of development approval, as set forth in *San Remo Hotel LP v. City & County of San Francisco*. Complaint ¶ 27, page 10 (AA 0010). A cursory reading of *San Remo Hotel* informs the reader that the constitutional standards applicable to development exactions established in that case are based on the California Constitution's Takings Clause, as informed by the United States Supreme Court's case law interpreting the United States Constitution's Takings Clause. *San Remo Hotel*, 27 Cal. 4th at 649, 663-64.

There are at least two species of claims that arise under the federal and state Takings Clauses. One is a claim for compensation when property has been taken. As repeatedly stated below (in response to the City's repeated assertion of legal principles applicable only to compensation cases), that is not

this case. CBIA does not seek compensation for itself or its members, and has not alleged that the Ordinance has taken any property.

CBIA makes a different species of claim under the Takings Clause, specifically that the Ordinance violates the unconstitutional conditions doctrine, as applied to development exactions. *See Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586, 2594 (2013) (“an overarching principle, known as the unconstitutional conditions doctrine, . . . vindicates the Constitution’s enumerated rights by preventing the government from coercing people into giving them up.”). *Koontz* is instructive in clarifying that the unconstitutional conditions doctrine holds that a “government’s demand for property can violate the Takings Clause” even if no property is actually taken from the plaintiff. *Id.* at 2596.

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a government benefit is a constitutionally cognizable injury.

Id.

CBIA has prosecuted an unconstitutional conditions claim against the Ordinance throughout this litigation, starting with the Complaint (AA 0010), proceeding through pre-trial briefing, *see* Plaintiff’s Opening Trial Brief at 9-10 (AA 0319-0320), and at trial, *see* RT 34:21-35:7; 74:18-23; and 75:1-5.

CBIA consistently defended this claim in the appellate court below. Respondents Brief in the Court of Appeal at 2. And CBIA presented exactly this claim to this Court in its Petition for Review at 1-2, and its Opening Brief at 1-2, 9, 17.

Throughout this litigation, the City has pressed the simplistic argument that any claim for relief premised on the Takings Clause can only be a compensation claim, subject to the ripeness requirements that apply in regulatory takings claims. The current iteration of that argument appears in the City's Response Brief at 22-25. CBIA has consistently rebutted this error and clarified that it is litigating an unconstitutional conditions claim and is not seeking compensation for a taking of property, as evidenced by every citation to the record in the City's Motion.

These rebuttals have been greeted by the City's now oft-repeated refrain that any claim related to the Takings Clause has been waived, as though using the word "taking" to describe (and disclaim) a compensation claim bars an unconstitutional conditions claim merely because that claim arises under the Takings Clause. The Motion is the latest round in this effort.

But the assertions in the Motion are false. CBIA did identify the constitutional basis of its claim in both the trial court and the court of appeal, repeatedly citing the rule in *San Remo Hotel*, which is itself based on the Takings Clause. Nor did CBIA "repeatedly make clear that it was *not* bringing

its challenge under the federal or state constitutional takings clauses.” Rather, CBIA repeatedly made clear that it was bringing an unconstitutional conditions claim under *San Remo Hotel*, which is based in turn on the Takings Clause. And, as explained above, CBIA has not reversed itself in this Court.

The City’s Motion should be denied.

DATED: February 14, 2014.

Respectfully submitted,

DAMIEN M. SCHIFF
ANTHONY L. FRANÇOIS
DAVID P. LANFERMAN

By  _____
ANTHONY L. FRANÇOIS

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DECLARATION OF SERVICE BY MAIL

I, Tawnda Elling, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On February 14, 2014, true copies of OPPOSITION TO CITY'S MOTION TO DISMISS REVIEW were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 14th day of February, 2014, at Sacramento, California.


TAWNDA ELLING