

S212072

**IN THE SUPREME COURT OF CALIFORNIA**

CALIFORNIA BUILDING INDUSTRY  
ASSOCIATION,

Petitioner,

v.

CITY OF SAN JOSE AND CITY COUNCIL  
AND MAYOR OF THE CITY OF SAN JOSE,

Defendants, Appellants and  
Respondents.

AFFORDABLE HOUSING NETWORK OF  
SANTA CLARA COUNTY, et al.

Intervenors.

SUPREME COURT  
**FILED**

JAN 31 2014

Frank A. McGuire Clerk

Deputy

**CITY OF SAN JOSE'S MOTION TO TAKE JUDICIAL NOTICE**

After a Decision by the Court of Appeal  
Sixth Appellate District, Case No. H038563  
Superior Court, Santa Clara County,  
Case No. 1-10-CV167289

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Attorneys for CITY OF SAN JOSE and MAYOR and  
CITY COUNCIL OF THE CITY OF SAN JOSE

To: The Chief Justice and the Associate Justices of the Supreme Court of the State of California:

Pursuant to California Rules of Court Rule 8.252 and Evidence Code section 459, Defendants and Appellants City of San Jose and City Council and Mayor of the City of San Jose (“City”) respectfully bring this motion requesting the Court to take judicial notice of San Jose Municipal Code section 1.04.160, “Severability.”

I. ARGUMENT.

California Evidence Code section 459 permits a reviewing court to take judicial notice of any matter specified in Evidence Code 452, which in turn allows a court to take judicial notice of regulations and legislative enactments issued by or under the authority of any public entity in the United States. (Evidence Code § 452(b).) The City respectfully asks that this Court take judicial notice of San Jose Municipal Code section 1.04.160, which provides that:

If any section, subsection, sentence, clause, or phrase of any ordinance heretofore or hereafter adopted by the city council of the city of San José is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portion of such ordinance. Each and every section, subsection, sentence, clause or phrase of any ordinance is severable from all other sections, subsections, sentences, clauses or phrases unless such ordinance contains a provision which states that the council would not have passed the remainder of such ordinance if it had known that any section, subsection, sentence, clause or phrase of the ordinance would subsequently be declared invalid or unconstitutional.

(See Exhibit A to Declaration of Thomas P. Murphy in Support of Motion to Take Judicial Notice.)

The trial court and court of appeal did not take judicial notice of San Jose Municipal Code section 1.04.160. However, the section is relevant to this case because Petitioner California Building Industry Association (CBIA) asserts in this case that the City's inclusionary housing ordinance, San Jose Municipal Code Chapter 5.08 (the Ordinance), is invalid in its entirety.

The Ordinance requires developers of new residential housing projects of more than 20 units in the City to sell 15 percent of their units at below market prices as affordable housing. The Ordinance provides for a number of alternative methods by which a developer subject to its provisions may comply with this basic inclusionary requirement, such as by payment of an "in-lieu" fee or dedication of land. (San Jose Municipal Code §§5.08.510-5.08.550 (Appellants' Appendix 689, 692-697).) In its Opening Brief, CBIA has argued that these alternative compliance options, in addition to the underlying inclusionary requirement, are invalid. (See CBIA Opening Brief, p. 5, stating that alternative compliance options "are properly viewed as an integrated program of exactions, the constitutionality of which should be considered as a whole . . . .")

For the reasons stated in its Answer Brief on the Merits, the City disputes this assertion, and contends that, if the Court should deem invalid the provisions of the Ordinance allowing developers at their option to comply with the underlying inclusionary requirement by alternative means (which it should not), it should nonetheless sever any such provision deemed invalid and enforce the remainder of the Ordinance, including the underlying inclusionary requirement itself. (City Answer Brief, pp. 48-50.) As it addresses severability and by its terms is effectively incorporated into the Ordinance, San Jose Municipal Code section 1.04.160, is relevant to the

City's position. Also, by its terms it is effectively incorporated into the Ordinance. It therefore forms part of the subject matter of this case.

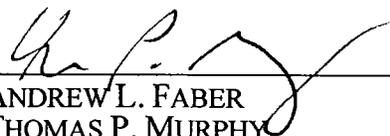
II. CONCLUSION.

For these reasons, the City respectfully requests that the Court take judicial notice of San Jose Municipal Code section 1.04.160.

DATED: JANUARY 31, 2014      RICHARD DOYLE, CITY ATTORNEY

AND

BERLINER COHEN

By   
\_\_\_\_\_  
ANDREW L. FABER  
THOMAS P. MURPHY  
ATTORNEYS FOR THE CITY OF SAN  
JOSE AND CITY COUNCIL AND MAYOR  
OF THE CITY OF SAN JOSE

CERTIFICATE OF SERVICE

Supreme Court, Case No. S212072

Court of Appeal, Sixth District, Case No. H038563

Santa Clara County Superior Court Case No.: 110-CV-167289

I, Elizabeth Sierra Garcia, declare under penalty of perjury under the laws of the State of California that the following facts are true and correct:

I am a citizen of the United States, over the age of eighteen years, and not a party to the within action. I am an employee of Berliner Cohen, and my business address is Ten Almaden Boulevard, Suite 1100, San Jose, California 95113-2233. On January 31, 2014, I served the following document(s):

**CITY OF SAN JOSE'S MOTION TO TAKE JUDICIAL NOTICE**

in the following manner:

by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Jose, California addressed as set forth below.

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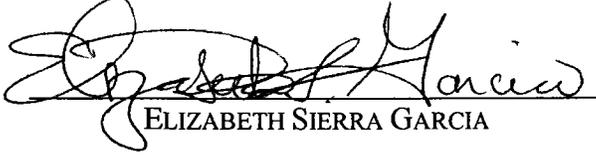
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San Jose, CA 95113  
Telephone: (408) 277-1004

The Honorable Socrates Manoukian  
Santa Clara County Superior Court  
Old Courthouse  
191 N. First Street  
San Jose, CA 95113  
Telephone: (408) 882-2310

I am readily familiar with my firm's practice for collection and processing of correspondence for mailing with the United States Postal Service/Express Mail, Federal Express and other overnight mail services, to wit, that correspondence will be deposited with the United States Postal Service/overnight mail service this same day in the ordinary course of business.

Executed on January 31, 2014, at San Jose, California.

  
ELIZABETH SIERRA GARCIA

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**DECLARATION OF THOMAS P. MURPHY IN SUPPORT OF CITY OF  
SAN JOSE'S MOTION TO TAKE JUDICIAL NOTICE**

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Attorneys for CITY OF SAN JOSE and MAYOR and  
CITY COUNCIL OF THE CITY OF SAN JOSE

**DECLARATION OF THOMAS P. MURPHY IN SUPPORT OF CITY  
OF SAN JOSE'S MOTION TO TAKE JUDICIAL NOTICE**

I, Thomas P. Murphy, declare as follows:

1. I am an attorney with the law firm of Berliner Cohen, one of the counsel of record for the City of San Jose and City Council and Mayor of the City of San Jose ("City"), Defendants and Appellants below in this matter. I am duly licensed and admitted to practice before this Court.
2. Attached hereto as Exhibit A is a copy of San Jose Municipal Code section 1.04.160, "Severability."

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 31<sup>st</sup> day of January, 2014 at San Jose, California.

  
THOMAS P. MURPHY

which shows service in conformity with this code or other provisions of law applicable to the subject matter concerned.

(Prior code § 1308.)

**1.04.160 Severability.**

If any section, subsection, sentence, clause, or phrase of any ordinance heretofore or hereafter adopted by the city council of the city of San José is for any reason held to be invalid or unconstitutional by a decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portion of such ordinance. Each and every section, subsection, sentence, clause or phrase of any ordinance is severable from all other sections, subsections, sentences, clauses or phrases unless such ordinance contains a provision which states that the council would not have passed the remainder of such ordinance if it had known that any section, subsection, sentence, clause or phrase of the ordinance would subsequently be declared invalid or unconstitutional. (Ord. 21619.)

**Chapter 1.08**

**ENFORCEMENT OF CODE<sup>2</sup>**

**Sections:**

- 1.08.010** Violations and remedies.
- 1.08.015** Injunction and civil penalties.
- 1.08.015.5** Personal liability for unpaid taxes.
- 1.08.016** Cost recovery for enforcement; attorneys' fees.
- 1.08.020** Certain violations deemed infractions.
- 1.08.025** Parking violations.
- 1.08.030** Violation of administrative provisions.
- 1.08.040** Enforcement powers.
- 1.08.050** City manager authorized to appoint reserve or auxiliary city policemen.

**1.08.010 Violations and remedies.**

A. No person shall violate any provision or fail to comply with any of the requirements of this Code or of any other ordinance of the city. Any person violating any of the provisions or failing to comply with any of the mandatory requirements

of this Code or of any city ordinance, other than administrative provisions thereof, shall be guilty of a misdemeanor, unless the violation of such provision is designated as an infraction or is a parking violation. The Code provisions for which a violation is an infraction are set forth in Section 1.08.020. The Code provisions for which a violation is a parking violation are set forth in Section 1.08.025.

- B. Any person convicted of a misdemeanor under the provisions of this Code or other city ordinance shall be punishable by a fine of not more than one thousand dollars or by imprisonment in the city or county jail for a period not exceeding six months, or by both such fine and imprisonment.
- C. Any person convicted of an infraction under the provisions of this Code or other city ordinance shall be punishable by:
  - 1. A fine not exceeding one hundred dollars for a first violation;
  - 2. A fine not exceeding two hundred dollars for a second violation, within one year, of the same provision of this Code or of the same ordinance;
  - 3. A fine not exceeding five hundred dollars for a third violation, within one year, of the same provisions of this Code or of the same ordinance; and
  - 4. Any person violating the same provision of this Code or other city ordinance that is designated as an infraction, for the fourth time within one year, shall be guilty of a misdemeanor.
- D. Any person determined to have committed a parking violation under the provisions of this Code or other city ordinance shall be subject to parking penalties and late payment penalties as set forth by resolution of the city council.
- E. Each such person shall be guilty of a separate offense for each and every day during any portion of which any violation of any provision of this Code or of any other city ordinance is committed, continued or permitted by such person, and shall be punishable accordingly.
- F. Any condition existing in violation of any of the provisions of any state or federal law or regulation or of this Code or any other city ordinance shall be deemed a public nuisance and may be abated by the city. Nuisance shall include, but is not limited to, the factors in Section 1.13.050.

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