ZACH COWAN, City Attorney, SBN 96372
zcowan@ci.berkeley.ca.us
SAVITH IYENGAR, Deputy City Attorney, SBN 268342
siyengar@ci.berkeley.ca.us
BERKELEY CITY ATTORNEY'S OFFICE
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704
TEL.: (510) 981-6998
FAX.: (510) 981-6960

Attorneys for Defendant
CITY OF BERKELEY

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

OPHCA, LLC, a California limited liability company; CLIFFORD ORLOFF, an individual, and OLGA ORLOFF, an individual,

Plaintiffs,

vs.

CITY OF BERKELEY

Defendant.

NO. C16-03046 CRB

DEFENDANT CITY OF BERKELEY'S NOTICE OF MOTION AND MOTION TO DISMISS PLAINTIFFS' COMPLAINT FOR:

(1) LACK OF STANDING AND RIPENESS UNDER F.R.C.P. 12(b)(1),

AND

(2) FAILURE TO STATE A CLAIM UNDER F.R.C.P. 12(b)6)

Date: September 2, 2016
Time: 10:00 a.m.
Ctrm: 6, 17th floor

NOTICE OF MOTION

PLEASE TAKE NOTICE that on September 2, 2016 at 10:00 a.m., or as soon thereafter as this matter may be heard by the Honorable Charles R. Breyer of the United States District Court for the Northern District of California, located at 450 Golden Gate Avenue, Courtroom 6, Floor 17, San Francisco, California, defendant City of Berkeley will and hereby does move the Court to dismiss the complaint of plaintiffs OPHCA, LLC, Clifford Orloff and Olga Orloff under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6).

This motion is based on this notice, the supporting memorandum of points and authorities set forth below, the pleadings and papers on file with the Court, oral argument of counsel, and all other matters properly before this Court.

Dated: July 15, 2016

Respectfully submitted:

ZACH COWAN, City Attorney
SAVITH IYENGAR, Deputy City Attorney

By: /s/ Savith Iyengar
SAVITH IYENGAR
Deputy City Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES (Con't.)

TABLE OF AUTHORITIES (Con't.)

SUMMARY OF ARGUMENT

Plaintiffs purport to challenge the entirety of the City of Berkeley's demolition ordinance. Yet plaintiffs, who seek to demolish and redevelop a vacant apartment building, have failed to prove either facial or as-applied standing to challenge the sections of the ordinance that do not specifically apply to their property. Those sections regulate occupied units, residential hotel rooms, non-residential buildings, and other inapt situations. *See* BMC §§ 23C.08.020.C, 23C.08.030-070. The Court must dismiss plaintiffs' allegations based on these sections for lack of standing under Rule 12(b)(1).

As to the remainder of the ordinance (BMC §§ 23C.08.010 and 23C.08.020.A, B, and D), plaintiffs challenge the amount of and nexus for the City's anticipated mitigation fee. Plaintiffs assert that the fee is "significant," "sizable," "substantial," and "massive" – *even though it has not been proposed nor set*. Plaintiffs claim the fee is predicated on an infirm nexus – *even though no nexus has yet been adopted*. Plaintiffs' claims rely on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). Plaintiffs' fantastic claims fail to provide "an actual factual setting that makes" the Court's "decision necessary." *Pennell v. City of San Jose*, 485 U.S. 1, 9-11 (1988). The Court must dismiss plaintiffs' claims that rely on the purported amount of the fee and nexus (the first, third, fourth, fifth, and sixth causes of action) as unripe under Rule 12(b)(1).

Even if plaintiffs could prove standing and ripeness, the Court may dismiss their first, second, fourth and fifth claims under Rule 12(b)(6). First, plaintiffs failed to state any facial takings claim. Plaintiffs fall far short of proving "no set of circumstances exists under which the [ordinance] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). The ordinance is, on its face, valid: it rationally relates to a public purpose. Plaintiffs have similarly offered no basis for the Court to preemptively invalidate the City's nexus studies without even reviewing them. Second, plaintiffs are wrong that the City cannot insert conditions of approval that reference mitigation. Such conditions satisfy procedural due process where, as here, they notify project applicants of a future fee, and the fee "[falls] within the broad language of the condition." *Russ Bldg. P'ship v. City & Cty. of San Francisco*, 44 Cal.3d 839, 850 (Cal. 1988).

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The City of Berkeley respectfully requests that the Court dismiss plaintiffs' complaint pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). Plaintiffs seek to invalidate the entirety of the City's demolition ordinance on its face and "as applied" to plaintiffs.[1] Yet plaintiffs lack standing to challenge the vast majority of the ordinance, plaintiffs' claims are unripe as to the remainder, and, to the extent plaintiffs have alleged sufficiently any justiciable controversy, plaintiffs have failed to state a claim upon which this Court may grant relief. This Court must not countenance plaintiffs' tactical attempt to draw it into a premature and inapt action to affect a regulatory outcome. The Court must dismiss the complaint in its entirety.

II. STATEMENT OF ISSUES TO BE DECIDED

1. Whether plaintiffs, who seek to demolish and redevelop their vacant apartment building, have facial or as-applied standing to challenge sections of the demolition ordinance that do not specifically apply to their property.

2. Whether plaintiffs' claims regarding the remainder of the demolition ordinance, *i.e.*, the size and basis for the mitigation fee, are ripe given that City Council has not proposed nor adopted an amount for the fee or nexus and feasibility studies.

3. Whether, to the extent plaintiffs have proven standing or ripeness, they may provide any basis for the Court to conclude that the ordinance is not rationally related to a conceivable public purpose, that the City's anticipated nexus and feasibility studies will necessarily be invalid, and that the City's insertion of conditions of approval notifying project applicants of a potential mitigation fee are unconstitutional.

III. STATEMENT OF FACTS

Plaintiffs own an apartment building in Berkeley. Compl. ¶ 14. The property is vacant. *Id.* Plaintiffs filed an application to demolish and redevelop their vacant apartment building. *Id.*

[1] The demolition ordinance is codified in Berkeley Municipal Code ("BMC") Chapter 23C.08 ("Demolition and Dwelling Control Units").

Thereafter, in 2016, the City amended Sections 23C.08.010, 23C.08.020 and 23C.08.030 of the demolition ordinance to provide a mitigation fee option for demolition, and added Section 23C.08.035. Compl. ¶¶ 7, 15. The remaining sections (Sections 23C.08.040, 23C.08.050, 23C.08.060 and 23C.08.070) remained as originally enacted in 1999. Compl., Ex. 1.

Sections 23C.08.010 and 23C.08.020.A, B and D

Sections 23C.08.010 and 23C.08.020.A, B and D condition use permits for the demolition of certain dwelling units[2] on the Zoning Adjustment Board's finding that "the elimination of the dwelling units would not be materially detrimental to the housing needs and public interest of the affected neighborhood and the City." BMC § 23C.08.010.B. The Board may make this finding based on one of four bases:

1. The building containing the units is hazardous or unusable and is infeasible to repair; or
2. The building containing the units will be moved to a different location within the City of Berkeley with no net loss of units and no change in the affordability levels of the units; or
3. The demolition is necessary to permit construction of special housing needs facilities such as, but not limited to, childcare centers and affordable housing developments that serve the greater good of the entire community; or
4. The demolition is necessary to permit construction approved pursuant to this Chapter of at least the same number of dwelling units.

BMC § 23C.08.020.A. If a project is approved under paragraph 4, "the project applicant shall be required to a pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in the City of Berkeley. The amount of the fee shall be set by resolution of the City Council." *Id.* Project applicants are not required to pay the fee for projects approved under paragraphs 1, 2, or 3. *Id.*

Sections 23C.08.020.C and 23C.08.030-70

Section 23C.08.020.C applies conditions to "unit[s] with a tenant at the time of demolition." The remaining sections regulate the combination of dwelling units for purposes of

[2] These sections apply only to buildings built before June 1980, and on properties containing two or more dwelling units. BMC §§ 23C.08.010-020.

occupancy by a single household (BMC § 23C.08.030), elimination of residential hotel rooms (BMC § 23C.08.040), demolition of non-residential buildings (BMC § 23C.08.050), and building relocation (BMC § 23C.08.060), and establish a private right of action (BMC § 23C.08.035) and set further limits on the ordinance's applicability (BMC § 23C.08.070).

Council Action and Plaintiffs' Use Permit

City Council has not yet set the mitigation fee for projects approved under paragraph 4. *See, e.g.*, Compl. ¶ 52.

Plaintiffs filed their Complaint on June 6, 2016. Plaintiffs allege their project "is scheduled to be heard by the City Council a second time on June 28, 2016." Compl. ¶ 41.

Council heard the matter as scheduled. Council adopted Resolution No. 67,599–N.S. approving the use permit "to demolish a vacant three-story building with 18 rent controlled units and construct a five-story 56 unit apartment building at 2631 Durant Avenue" with the following condition regarding the demolition ordinance:

> *Rent Controlled Demolition Mitigation Fee: The project shall fully comply with Berkeley Municipal Code Section 23C.08.020 by paying a fee to mitigate the loss of affordable units in an amount to be determined by the City Council but not to exceed an amount consistent with BMC Section 22.20.070 or a number of units in lieu of that fee and determined to be equivalent to it.*

Declaration of Savith Iyengar ("Iyengar Dec."), Ex. A at 18. The fee must comply with Section 22.20.070, which states in relevant part:

> A. Notwithstanding any other provision of this chapter, the requirements of this chapter shall not apply or shall be limited as follows:
>
> 1. No mitigation and/or fees shall be imposed on any applicant or development project where the applicant establishes to the City's satisfaction that the proposed development project will not generate any additional need for affordable housing, child care and/or public facilities, adequate employment training and placement services or amenities or any other impact for which a mitigation and/or fee is otherwise required;
>
> 2. The amount and/or level of any mitigation and/or fee under this chapter shall not exceed the reasonable cost of either satisfying the additional demand for affordable housing, child care and/or public facilities, adequate employment training and placement services or amenities or of eliminating and/or reducing to an acceptable level any other impact which reasonably may be anticipated to be generated by or attributed to any individual development project;

3. The City shall not condition any permit in any manner which results in a deprivation of the applicant's constitutional rights.

Iyengar Dec., Ex. B (BMC § 22.20.070). Accordingly, Section 22.20.070 serves to (1) exempt the mitigation or fees if plaintiffs establish that the proposed project will not generate any impact for which the mitigation or fee is required, (2) prohibit mitigation or fees from exceeding the reasonable cost of the impact which reasonably may be anticipated to be generated by plaintiffs' project, and (3) prohibit future permit conditions that deprive plaintiffs of their constitutional rights.

Plaintiffs now possess a use permit to proceed with their project, subject to a potential mitigation fee in an amount to be determined by City Council and consistent with the provisions of Section 22.20.070, or in-lieu units determined to be equivalent to that fee.

IV. ARGUMENT

A. The Court Must Dismiss the Complaint for Lack of Subject Matter Jurisdiction Under Rule 12(b)(1)

1. Plaintiffs Lack Standing To Challenge Sections 23C.08.020.C and 23C.08.030-070 of the Demolition Ordinance

Legal Standard

Article III limits federal courts' jurisdiction to "cases" and "controversies." *Aiuto v. San Francisco's Mayor's Office of Hous.*, No. C 09-2093 CW, 2010 WL 1532319, at *3 (N.D. Cal. Apr. 16, 2010). To create a case or controversy, a plaintiff must prove that he or she has standing. *Id.* The plaintiff carries this burden as the party that seeks the exercise of jurisdiction in its favor. *See United States v. Hays*, 515 U.S. 737, 743 (1995). The plaintiff is required "clearly to allege facts demonstrating that [they are] a proper party to invoke judicial resolution of the dispute." *Id.* Plaintiff's "standing . . . must affirmatively appear in the record." *FW/PBS v. Dallas*, 493 U.S. 215, 231 (1990).[3]

To establish standing, plaintiff must clearly allege that "(1) he or she has suffered an

[3] Article III requirements apply to all plaintiffs, including those who seek to challenge an ordinance on its face or as applied. In these cases, as in others, the "litigant only has standing to vindicate his own constitutional rights." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984). Standing is also required for claims for injunctive and declaratory relief. *See Aetna Life v. Jaworth*, 300 U.S. 227, 240 (1937).

injury in fact that is concrete and particularized, and actual or imminent; (2) the injury is fairly traceable to the challenged conduct; and (3) the injury is likely to be redressed by a favorable court decision." *Aiuto*, 2010 WL 1532319 at *3.

Whether actual or imminent, a plaintiff's alleged injury must give it a "direct stake" in the outcome of the action. *Official English v. Arizona*, 520 U.S. 43, 64 (1997). *See also Allen v. Wright*, 468 U.S. 737, 752 (1984) (considering "whether the *particular plaintiff* is entitled to an adjudication of the *particular claims asserted*"). "[A] plaintiff must have alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Aiuto*, 2010 WL 1532319 at *3 (addressing the actual injury requirement) (internal quotation marks and citations omitted). A plaintiff must plead sufficient facts beyond mere conclusory allegations to establish its stake. *See Carrico v. City and Cty. of San Francisco*, 656 F.3d 1002, 1006-1007 (9th Cir. 2011) (rejecting standing predicated on conclusory allegation that defendant's action "impact[ed] their operations as landlords"); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (explaining that a plaintiff who lacks a direct stake in the law it challenges "cannot alone satisfy the requirements of Art. III without draining those requirements of meaning."). Plaintiffs must demonstrate this direct stake "separately for each form of relief sought." *Daimlerchrysler Corp v. Cuno*, 547 U.S. 332, 352 (2006).

Accordingly, plaintiffs who challenge an ordinance have standing only as to the provisions that apply to them. *See Woodfin Suite Hotels, LLC v. City of Emeryville*, No. C 06-1254 SBA, 2006 WL 2739309, at *4 (N.D. Cal. Aug. 23, 2006) ("[T]he fact that Plaintiffs are a 'target' of the Ordinance and that the Ordinance on its face applies to them is insufficient to confer standing on Plaintiffs to challenge the Ordinance in its entirety."). This is because a court's potential invalidation of provisions that do not apply to a plaintiff would not have any effect, let alone "likely redress," the plaintiff's alleged injury. *Lujan*, 504 U.S. at 559-60.

Sections 23C.08.020.C and 23C.08.030-070

Plaintiffs seek to invalidate the entirety of the City's demolition ordinance. *See, e.g.*, Compl. ¶ 13 (seeking "injunction striking down the [o]rdinance"); Compl. ¶¶ 22-23 (requesting declaratory judgment that the ordinance is "invalid and unenforceable" and an injunction prohibiting the City from "enforc[ing] the [o]rdinance on its face and as applied to [p]laintiffs").

Yet plaintiffs have failed to prove that they have standing to challenge most of the ordinance: specifically, Sections 23C.08.020.C (governing "unit[s] with a tenant at the time of demolition"), 23C.08.030 (combining dwelling units for purposes of occupancy by a single household), 23C.08.035 (establishing private rights of action), 23C.08.040 (elimination of residential hotel rooms), 23C.08.050 (demolishing non-residential buildings), 23C.08.060 (building relocations), and 23C.08.070 (limitations).

Plaintiffs acknowledge their property is vacant. Compl. ¶¶ 14; *see also* Compl. ¶¶ 35-36 (alleging it is "infeasible" to ever make it habitable by repair). Yet plaintiffs repeatedly dispute the ordinance's provisions addressing *tenants*. Compl. ¶ 1 (challenging property owners' payments to "the City and tenants"); ¶ 8 (alleging that "the Ordinance also requires the owner of a demolished residential building to provide any tenant occupying the building prior to demolition with" moving fees, the actual rent differential until the new units are ready, and rights of first refusal); ¶ 10 ("Upon completion of the new construction, the owner also is required to rent 20 of the new units to the prior tenants"); ¶ 11 (alleging that tenant requirements and other fees "add millions of dollars to the cost . . . and are likely prohibitive of many major" projects); ¶¶ 64-67 (basing takings claim "on the payment of money to the City and to tenants").

Plaintiffs lack standing to challenge Section 23C.08.020.C, regarding tenants, because Plaintiffs cannot show actual injury or any imminent threat of the impairment of *their own* interests from its enforcement. To the contrary, plaintiffs admit they have no tenants (Compl. ¶ 14) and allege they can *never* have tenants at the property absent demolition (Compl. ¶¶ 35-36).

Plaintiffs appear to implicitly acknowledge their lack of any "direct stake" in Section 23C.08.020.C by vaguely referencing the law's impact on "other property owners." Compl. ¶ 56 (alleging the ordinance violates the rights of "[p]laintiffs and other property owners"); ¶ 60

(challenging "depriv[ation]" of "[p]laintiffs and other landowners of private property"); ¶ 61 (alleging irreparable injury to "[p]laintiffs and landowners throughout the City" absent injunction).

Plaintiffs may not assert, and the parties should not be required to brief and litigate, plaintiffs' purported claims that apply only to ambiguous "other property owners" – and expressly *not* to plaintiffs themselves. Indeed, allowing plaintiffs' inapt claims to proceed to discovery would improperly burden the City and this Court and "drain[ ] [Article III] requirements of meaning." *Lujan*, 504 U.S. at 561. Similarly, plaintiffs have not included any allegations proving their standing to challenge Sections 23C.08.030-070 regarding single households, non-residential buildings, building relocations, private rights of action and internal limitations on applicability.

Neither Sections 23C.08.020.C nor 23C.08.030-070 present any "concrete adverseness" between the parties. *Aiuto*, 2010 WL 1532319 at *3. Accordingly, plaintiffs lack standing to challenge those sections in any of their causes of action. *See Valley Forge*, 454 U.S. 464, 475-76 (1982) (explaining that a plaintiff's failure to meet Rule 12(b)(1)'s "rigorous" requirements is dispositive). The Court must dismiss all of plaintiffs' allegations regarding Sections 23C.08.020.C and 23C.08.030-070.[4]

2. Plaintiffs' Claims Are Unripe As to the Remaining Sections of the Demolition Ordinance: Sections 23C.08.010 and 23C.08.020.A, B and D

The Court must dismiss the remainder of plaintiffs' complaint as unripe.

Legal Standard

The "ripeness doctrine is drawn both from Article III limitations on judicial power and from prudential reasons for refusing to exercise jurisdiction. *California v. United States*, No. C 05-00328 JSW, 2008 WL 744840, at *2 (N.D. Cal. Mar. 18, 2008); *Thomas v. Anchorage*, 220 F.3d 1134, 1142 (9th Cir. 2000) ("Prudential considerations of ripeness are discretionary.").

[4] Given plaintiffs' failure to prove Article III standing, the Court need not review prudential considerations. Yet those too would negate standing. Plaintiffs' claims relate only to the rights and interests of third parties—not their own. *See Elk Grove v. Newdow*, 542 U.S. 1, 4 (2004).

The Ninth Circuit has described ripeness as "standing on a timeline." *Bova v. City of Medford*, 564 F.3d 1093, 1096 (9th Cir. 2009). Cases are unripe if they do not *yet* have an actual or imminent impact upon the parties. *Thomas v. Union Carbide Ag. Products Co.*, 473 U.S. 568, 580 (1985). A claimed threatened injury is not yet imminent until it is "certainly impending." *Clapper v. Amnesty*, 133 S. Ct. 1138, 1147-53 (2013). The injury cannot be "conjectural or hypothetical." *Lujan*, 504 U.S. at 559-560. Nor can it rely on "contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998). A plaintiff cannot ripen a claim not based on actual or imminent injury simply by disavowing "just compensation." A case remains unripe until the future event is no longer "contingent," for example, where an ordinance actually or imminently "requires a lump-sum payment." *Levin v. City & Cty. of San Francisco*, 71 F. Supp. 3d 1072, 1079 (N.D. Cal. 2014).

The "basic rationale of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements." *Scott v. Pasadena Unified School Dist.*, 306 F.3d 646, 662 (9th Cir. 2002) (internal quotation marks and citation omitted). The Court must evaluate "both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* Alleged issues are unfit for courts' consideration where "further factual development would significantly advance our ability to deal with the legal issues presented and would aid us in their resolution." *Ohio Forestry v. Sierra Club*, 523 U.S. 726, 736-37 (1998). Hardship to the parties "does not mean just anything that makes life harder; it means hardship of a legal kind, or something that imposes a significant practical harm upon the plaintiff." *Colwell v. Dep't of Health and Human Servs.*, 558 F.3d 1112, 1128 (9th Cir. 2009).

Amount of Fee

Plaintiffs bring facial and as-applied challenges to the ordinance based on their claim that the ordinance requires them "to transfer *massive sums of money* to the City." Compl. ¶ 1; ¶ 11 (alleging the ordinance and other fees "add *millions of dollars* to the cost of redevelopment and are likely prohibitive of many major redevelopment projects of existing rental housing."); ¶ 68 ("The [o]rdinance exacts *significant fees and costs* that, both alone and in conjunction with other

fees already imposed by the City, fail both the nexus and proportionality requirements of *Nollan*, *Dolan*, and *Koontz*."); 99 ("The [o]rdinance impermissibly burdens this right [under the California Health and Safety Code and California Constitution] by imposing *sizable fees* on the owner's right to choose demolition where the City concludes that repair is 'feasible.'"); 100 ("The [o]rdinance is therefore inconsistent with and preempted by [these laws]" because it requires "the payment of *substantial*" fees and subsidies.") (emphasis added).

Yet on its face, the ordinance does not require "significant," "sizable," "substantial," or "massive" fees. Section 23C.08.020.A.4 states only that when a project is approved under the paragraph: "the project applicant shall be required to a pay ***a fee*** for each unit demolished to mitigate the impact of the loss of affordable housing in the City of Berkeley. ***The amount of the fee shall be set by resolution of the City Council***." The adoption of that resolution is precisely the "further factual development" this Court needs to "significantly advance" its "ability to deal with the legal issues presented and . . . aid [it] in their resolution." *Ohio Forestry*, 523 U.S. at 736-37. As it stands now, plaintiffs' facial challenge to the fee amount presupposes "contingent future events that may not occur as anticipated" (*Texas*, 523 U.S. at 300), and is therefore unripe.

Plaintiffs' *as-applied* challenge to the amount of the fee is similarly unripe. Plaintiffs' use permit includes the condition that plaintiffs will "pay[ ] a fee to mitigate the loss of affordable units in an amount to be determined by the City Council." Iyengar Dec., Ex. 1 at 18.[5] The amount of the fee has not been set nor applied to plaintiffs. Accordingly, the Court must dismiss plaintiffs' first, fifth and sixth causes of action, which rely on the amount of the fee.

Relationship Between the Ordinance and Fee

To the extent plaintiffs challenge generally the "relationship between the fees and costs imposed by the [o]rdinance," these claims, too, are unripe. Compl. ¶ 94 ("Contrary to these provisions [of the California Mitigation Fee Act], the City has not determined how there is a

[5] The City has not asked the Court to take judicial notice of the minutes from Council's June 28, 2016 approving the use permit because the minutes are not yet official. Council is scheduled to approve the minutes on July 19, 2016. While this is yet another example of plaintiffs' failure to establish ripeness, and should support dismissal of their claims, the City is nonetheless prepared to seek judicial notice of the minutes once approved by Council and certified by the Clerk.

reasonable relationship between the fees and costs imposed by the [o]rdinance and the development action . . . on which the fee is imposed."). This Court cannot evaluate plaintiffs' causes of actions until the Council adopts a resolution setting the fee based on a corresponding nexus study. Once again, the "contingent future event" on which plaintiffs base their complaint – an infirm nexus – "may not occur as anticipated" if, for example, Council adopts the fee with a sufficient nexus. The Court must dismiss each of plaintiffs' claims that rely on a presumptively infirm nexus: its first, third, fourth, fifth and sixth causes of action.

Existence of Any Fee

To the extent plaintiffs facially challenge the existence *of any fee at all*, *i.e.*, as a taking (first cause of action) or violation of substantive due process (third), plaintiffs' claims remain unripe. In *Pennell v. City of San Jose*, the Supreme Court considered a landlord and landlords' association's challenge to a municipal ordinance gave hearing officers discretion to consider tenant hardship in reducing a landlord's proposed rent increase. 485 U.S. 1, 9-11 (1988) (Rehnquist, C.J.). The Court found dispositive the *discretion* in the condition's application, and on that basis rejected plaintiffs' standing:

> We think it would be premature to consider this contention on the present record. As things stand, there simply is no evidence that the "tenant hardship clause" has in fact ever been relied upon by a hearing officer to reduce a rent below the figure it would have been set at on the basis of the other factors set forth in the Ordinance. In addition, there is nothing in the Ordinance requiring that a hearing officer in fact reduce a proposed rent increase on grounds of tenant hardship. Section 5703.29 does make it mandatory that hardship be considered—it states that "the Hearing Officer *shall* consider the economic hardship imposed on the present tenant"—but it then goes on to state that if "the proposed increase constitutes an unreasonably severe financial or economic hardship . . . he *may* order that the excess of the increase" be disallowed. § 5703.29 (emphasis added). **Given the "essentially ad hoc, factual inquir[y]" involved in the takings analysis, we have found it particularly important in takings cases to adhere to our admonition that "the constitutionality of statutes ought not be decided except in an actual factual setting that makes such a decision necessary."** . . . Similarly, in this case we find that the mere fact that a hearing officer is enjoined to consider hardship to the tenant in fixing a landlord's rent, without any showing in a particular case as to the consequences of that injunction in the ultimate determination of the rent, does not present a sufficiently concrete factual setting for the adjudication of the takings claim appellants raise here.

Id. at 9-10 (bold emphasis added) (internal citations omitted). Similarly here, plaintiffs do not challenge the ordinance "in an actual factual setting that makes" the Court's "decision

necessary." *Id.* Facially, the existence of any fee at all is contingent upon a future Council resolution setting the fee pursuant to a nexus and feasibility study. *See* BMC § 23C.08.020.A.4.

Likewise, plaintiffs' as-applied challenge, *i.e.*, the conditions imposed in their use permit, is unripe. Plaintiffs have "not present[ed] a sufficiently concrete factual setting for the adjudication of [their] takings claim." *Pennell*, 485 U.S. at 10. Plaintiffs' use permit (i) exempts mitigation or fees if plaintiffs establish that the proposed project will not generate any impact for which the mitigation or fee is required, (ii) prohibits mitigation or fees from exceeding the reasonable cost of the impact which reasonably may be anticipated to be generated by plaintiffs' project, and (iii) prohibits permit conditions that deprive plaintiffs of their constitutional rights. *See* Iyengar Dec., Ex. A at 18; Ex. B. As in *Pennell*, these conditions render plaintiffs' challenge "premature." *Id.*; *see also Yee v. City of Escondido*, 503 U.S. 519, 533-34 (1992) (holding that petitioners' "claim that the ordinance effects a regulatory taking *as applied* to petitioners' property would be unripe" because the City had not deprived petitioners' of a quantifiable economic use of their property). The Court must dismiss plaintiffs' unripe first and third causes of action under Rule 12(b)(1).

B. The Court Must Dismiss the Complaint for Failure to State a Claim Under Rule 12(b)(6)

A plaintiff must allege sufficient facts to support a "cognizable" and "facially plausible" legal theory in order to state a claim under Rule 12(b)(6). *Shroyer v. New Cingular*, 622 F.3d 1035, 1041 (9th Cir. 2010). This requirement "is a screening mechanism designed to weed out cases that do not warrant either discovery or trial." *Id.* (internal citations omitted). A plaintiff must base any "facially plausible" claim for relief on factual, not conclusory, allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556-57 (2007). Courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Id.* at 555. Instead, courts conduct an exacting analysis of "the elements a plaintiff must plead to state a claim." *Ashcroft v. Iqbal*, 556 U.S. 662, 675 (2009). Courts assume as true only factual allegations, not legal conclusions, and then decide whether those factual allegations allege a plausible claim. *Id.* at 679.

1. Plaintiffs Fail to State A Takings Claim

Even if plaintiffs had standing to assert their first cause of action, a facial takings challenge to the ordinance, based on the City's creation of any mitigation fee at all, plaintiffs' complaint fails to state a claim upon which relief may be granted.

The Takings Clause "provides: '[N]or shall private property be taken for public use, without just compensation.' This two-part test is often characterized as containing a 'public use' requirement and a 'just compensation' requirement." *Levin*, 71 F. Supp. 3d at 1079-80. An ordinance may represent a facial taking *only if* its "constitutional infirmity . . . necessarily arises in all of the [o]rdinance's applications." *Id.* at 1086 (citing *United States v. Salerno,* 481 U.S. 739, 745 (1987) ("[T]he challenger [in a facial suit] must establish that no set of circumstances exists under which the [legislative] Act would be valid.")).

Public Use Requirement

"[A] taking should be upheld as consistent with the Public Use Clause as long as it is rationally related to a conceivable public purpose. The concept of the public welfare is broad and inclusive, in deference to legislative judgments in this field." *Id.* at 1080 (finding that an ordinance whose "stated purpose here is to mitigate the adverse effects of evictions and prevent the displacement of evicted tenants from San Francisco" "does not run afoul of the Public Use Clause" "[d]espite the largely unprecedented nature of the payment at issue here—a lump-sum payout from one private party to another" and "lack of restrictions on how a tenant spends the funds") (internal quotation marks and citations omitted).

Here, the City's purpose appears on the face of the ordinance: "to mitigate the impact of the loss of affordable housing in the City of Berkeley." BMC § 23C.08.020.A.4. Plaintiffs have not proven, because they cannot, that "no set of circumstances exists under which the [ordinance] would be valid." *Salerno*, 481 U.S. at 745. Rather, the ordinance, on its face, is rationally related to a conceivable public purpose – the one stated therein – and is therefore expressly consistent with the Public Use Clause.

Just Compensation Requirement

The ordinance also satisfies the "just compensation" requirement.[6] Cities may condition permits on an exaction only if there is an "'essential nexus' to the government interest that would furnish a valid ground for denial of the permit." *Levin*, 71 F. Supp. 3d at 1082 (citing *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987)). *Dolan* requires further a "'rough proportionality' 'between the exactions imposed by the city and the projected impacts of the proposed development.'" *Id.* (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994)). Courts must evaluate whether a mitigation and fee "have an essential nexus with, and are roughly proportional to, the harm caused by a property owner's" action. *Id.* at 1084 (assessing the withdrawal of a unit from the rental market) (internal citation omitted).

Here, the City has not yet established its nexus. As a result, plaintiffs' claims that the nexus is "extortionate" or disproportional are unripe. The Court must therefore dismiss plaintiffs' first (and on the same basis, its fourth and fifth) causes of action.[7]

2. Plaintiffs Fail to State A Due Process Claim

To the extent plaintiffs have standing to challenge the ordinance on its face or as applied on procedural due process grounds (plaintiffs' second cause of action), *i.e.*, because it requires a condition of approval referencing the fee (*see* Compl. ¶ 77 (alleging that the fee violates due process because "the justification for and the amount of the fee is 'TBD'")), plaintiffs' claims are again subject to dismissal under Rule 12(b)(6).

---

[6] The City notes that plaintiffs expressly disavowed any "just compensation" claim (Compl. ¶ 70), yet the City nonetheless considers it for purposes of facial takings analysis in an abundance of caution.

[7] The City notes that even if plaintiffs had standing to challenge the tenant-related portion of the demolition ordinance (Section 23C.08.020.C), their allegations are distinguishable from *Levin*. This case does not involve an Ellis Act withdrawal, which was specifically analyzed in determining the proportional impact on housing prices. *Id.* at 1085. This case does not implicate any property owner's "right, under the Ellis Act and likely under the Constitution, to cease being a landlord." *Id.* at 1087-88. This case does not involve an unprecedented, mandatory, "massive lump-sum payout" in exchange for a property owners' exercise of the "right of possession" by "an Ellis Act withdrawal." *Id.* at 1087-89. Berkeley's ordinance also does not envision a generalized tenant impact fee, but rather a specific fee tailored to the actual impact a property owner's actions cause to its tenants. *I*d. at 1087.

City-issued permits may include conditions that contemplate the later imposition of a mitigation or fee. *See Russ Bldg. P'ship v. City & Cty. of San Francisco*, 44 Cal. 3d 839, 846 (1988) (holding that where a "mitigation condition included the eventuality of" a mitigation fee, its inclusion—and the later-adopted fee—would neither impair the permit holders' vested rights nor violate due process). The key inquiry is whether "[p]laintiffs should have anticipated being required to participate in any constitutionally permissible funding mechanism that fell within the broad language of the condition." *Id.* at 850. A condition is permissible if "[a]t the time the Commission authorized plaintiffs' building permits, plaintiffs understood that they would be required to pay some amount to fund increased transit demands as a condition to developing their properties." *Id.* at 854 ("To the extent plaintiffs relied on their own self-serving interpretation of the condition, such reliance must be considered unreasonable.").

On its face, the ordinance provides sufficient notice to project applicants that they "shall be required to pay a fee for each unit demolished to mitigate the impact of the loss of affordable housing in the City of Berkeley," in an amount to "be set by resolution of the City Council." BMC § 23C.08.020.A.4. As applied, Council included a condition in plaintiffs' use permit that specifically references "compl[iance] with . . . Section 23C.08.020 by paying a fee to mitigate the loss of affordable units in an amount to be determined by the City Council but not to exceed an amount consistent with BMC Section 22.20.070 or a number of units in lieu of that fee and determined to be equivalent to it." Iyengar Dec., Ex. A at 18; Ex. B. Accordingly, any future mitigation or fee will "[fall] within the broad language of the condition." *Russ*, 44 Cal.3d at 850. Accordingly, plaintiffs have failed to state any claim based on the ordinance's requirement, on its face or as applied, of a condition of approval referencing the mitigation, and the Court must dismiss plaintiffs' second cause of action.

///

///

V. CONCLUSION

For all of the aforementioned reasons, the City respectfully requests that the Court grant this motion to dismiss plaintiffs' complaint for lack of standing and ripeness pursuant to Rule 12(b)(1) and failure to state a claim under Rule 12(b)(6).

Dated: July 15, 2016

Respectfully submitted:

ZACH COWAN, City Attorney
SAVITH IYENGAR, Deputy City Attorney

By: /s/ Savith Iyengar
SAVITH IYENGAR
Deputy City Attorney