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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

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

Plaintiffs,

vs.

THE CITY OF BERKELEY,

Defendant.

Case No. 16-cv-03046-CRB

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANT CITY OF BERKELEY'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

Date: September 2, 2016
Time: 10:00 a.m.
Courtroom: 6, 17th Floor

Before the Honorable Charles R. Breyer

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I. INTRODUCTION AND SUMMARY OF ARGUMENT.

Plaintiffs OPHCA, LLC ("OPHCA"), Clifford Orloff and Olga Orloff (collectively, "Plaintiffs") respectfully submit this opposition to the Rule 12(b) motion to dismiss filed by Defendant City of Berkeley ("Defendant" or "City").[1] Plaintiffs request that the Court deny the City's motion in its entirety.

First, the City's argument that Plaintiffs lack standing to challenge the tenant payment requirements and certain other provisions of Ordinance No. 7,458-N.S. (the "demolition ordinance" or the "ordinance") fails. With respect to the tenant payment requirements, the ordinance is ambiguous as to when such requirements apply and opponents of Plaintiffs' redevelopment project have suggested that they should apply to the OPHCA property. The tenant provisions also would apply to other rental property owned by Plaintiffs, thus giving them a concrete and particularized interest in establishing their invalidity. Furthermore, the City concedes that Plaintiffs have standing to challenge the "demolition mitigation fee." Plaintiffs thus clearly meet the legal requirements for standing to bring their claims in this case.

Second, Plaintiffs' claims are ripe. The ordinance became effective months ago, thereby imposing on Plaintiffs a mandatory mitigation fee and other exactions as conditions of approval to demolish and reconstruct their uninhabitable property. The suggestion now advanced by the City that the fee is only a "potential" fee and "may not occur at all" finds no basis in the plain language of the ordinance or the administrative record. Plaintiffs have already been harmed, financially and otherwise, by the ordinance's enactment and the statute of limitations on their claims has begun to run. Thus, under well-settled precedent, their claims are ripe.

Third and finally, the Complaint sets forth sufficient well-pleaded takings and unconstitutional conditions claims, meeting the requirements of Rule 12(b)(6), because the City has not shown, and cannot show, the requisite nexus and proportionality required to justify the imposition of an demolition impact fee on demolition projects as a matter of course. Likewise, the Complaint adequately alleges a due process claim because the ordinance, in failing to provide any criteria, standards or methodology

[1] The City's Memorandum of Points and Authorities in support of its Rule 12(b) motion is hereinafter cited as "Def. Memo".

on which its new impact fee will be based, utterly fails to give property owners sufficient notice of the contours of the exaction to be imposed. Furthermore, the City's surprising and unjustified decision to impose the ordinance retroactively on permit applications submitted years before its enactment also violates principles of fair notice inherent in due process.

For these and other reasons, the City's motion to dismiss should be denied in its entirety. However, should there be any perceived deficiencies in the Complaint, Plaintiffs respectfully request that the Court grant leave to amend or, alternatively, enter a stay. A stay would be particularly appropriate in view of the short statute of limitations applicable to Plaintiffs' claims.

II. ARGUMENT.

A. Plaintiffs Have Standing To Challenge The City's Demolition Ordinance, Including The Tenant Protection and Compensation Provisions.

In ruling on a motion to dismiss for lack of standing, the trial courts "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Graham v. Federal Emergency Management Agency*, 149 F.3d 997, 1001 (9th Cir. 1998) (quoting *Warth v. Seldin*, 422 U.S. 490, 501 (1975)). At the pleading stage, the Supreme Court has made clear that "general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we 'presum[e] that general allegations embrace those specific facts that are necessary to support the claim.'" *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)(citations omitted).

At its June 28, 2016 meeting, the City Council made crystal clear that Plaintiffs' project "shall fully comply with Berkeley Municipal Code ("BMC") Section 23C.08.020 by paying a fee to mitigate the loss of affordable units . . ." Declaration of Savith Iyengar dated July 15, 2016 ("Iyengar Decl."), ¶ 2 & Ex. A at 18 (Doc. 20-1).) It therefore appears to be undisputed that Plaintiffs have standing to challenge the newly adopted demolition mitigation fee. *See* Def. Memo at 6:20-21 (acknowledging that "plaintiffs who challenge an ordinance have standing" as to "the provisions that apply to them") (citation omitted).

The City argues, however, that Plaintiffs lack standing to challenge several other provisions of the ordinance. Def. Memo. at 7:1 – 8:17. It focuses in particular on the financially onerous tenant

payment requirements (*see* Compl. ¶¶ 1, 8, 10, 64-67, and BMC Section 22C.08.020(C)), which it contends do not apply to Plaintiffs because Plaintiffs' "property is vacant." Def. Memo at 7:12. However, the ordinance is drafted so ambiguously that it is impossible to know whether the independent Rent Stabilization Board (for whom the City Attorney does not speak) and other interested parties (including former tenants who have a private right of action under BMC Section 23C.08.035) will take the position that the tenant payment requirements apply to Plaintiffs' property. The ordinance provides, for example, that tenant payment requirements apply where "the units in a building to be demolished . . . are occupied." BMC Section 23C.08.020(C)). However, it does not define *when* the units must be occupied for the provisions to apply. The City cites a separate section of the Ordinance stating that "[i]n the case of a unit with a tenant at the time of demolition, the [tenant provisions] apply and the impact fee is due when that tenant vacated that unit." See BMC Section 23C.08.020(A). Even if this provision – which is external to the tenant payment section – defines the full scope of the tenant provisions, it is not clear what it means for a unit to have "a tenant at the time of demolition" since, by definition, a unit will never be occupied "at the time of demolition." In fact, at the June 28, 2016 City Council hearing, several speakers suggested that the tenant payment requirements could and should be applied to the OPHCA project and to Plaintiffs.

Thus, while Plaintiffs agree with the City that the tenant payment requirements *should* not apply to their project because, *inter alia*, the property is vacant, they have not received any ironclad assurance from the City, the Rent Stabilization Board and other interested parties that the tenant provisions *will* not be applied. As a result, Plaintiffs continue to have a concrete and particularized interest in assuring that the unlawful aspects of the tenant payment requirements are invalidated.

In any event, Plaintiffs own other rental property in Berkeley, besides the Durant property, that also is subject to the ordinance. Plaintiff Clifford Orloff – a Berkeley resident for the past 41 years – and his wife, Plaintiff Olga Orloff, "are in the business of buying, renovating and leasing apartment buildings. The rehabilitation of rental property, in Berkeley and elsewhere, has been [their] core business since 1999." Declaration of Clifford Orloff, filed herewith ("Orloff Decl."), at ¶ 2. Between then and now, the Orloffs have owned – either individually or through small-scale limited liability companies – numerous other rental properties. One such property – a five-unit apartment building at

2003-2005 Berkeley Way (the "Berkeley Way Property") – is approximately 65 years old and rented to tenants, thus falling squarely within the cross-hairs of the City's new demolition ordinance. Orloff Decl. ¶ 3. And, consistent with their core business, Plaintiffs "continue to look for opportunities to purchase and development real property in the City of Berkeley, including but not limited to rental housing." Orloff Decl. ¶ 4. The new ordinance thus directly and concretely limits their search for future development projects. These facts, individually and taken together, are sufficient to confer standing on Plaintiffs to challenge the tenant payment requirements.

Finally, while Plaintiffs have not specifically sought to invalidate other provisions of the ordinance (*see* Def. Memo. at 8:8-11), the ordinance itself states that "if any provision of this ordinance is determined to be invalid by a court of competent jurisdiction the entire ordinance shall be deemed automatically repealed, null and void and [of] no force or effect." Ordinance No. 7,458-N.S. at Section 5, attached as Exhibit 1 to the Declaration of David W. Trotter, filed herewith ("Trotter Decl."). Therefore, should the Court find any provision of the ordinance to be invalid, the entire ordinance necessarily must fail because of how the City has chosen to draft its own ordinance.

B. Plaintiffs' Claims Challenging The Enactment Of The City's Demolition Ordinance Are Ripe For Adjudication.

The City contends that Plaintiffs' claims are not ripe because, although the demolition ordinance has been enacted and is in force, the City has not yet imposed – and, the City intimates, may not yet impose – a mitigation fee pursuant to the demolition ordinance. This argument fails for at least three reasons.

1. Plaintiffs' Claims Became Ripe When the Ordinance Was made Effective.

First, courts in this Circuit and elsewhere have repeatedly held that "[i]n the context of a facial challenge under the Takings Clause, the cause of action accrues *on the date that the challenged statute or ordinance went into effect*." *Action Apartments Ass'n, Inc. v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1027 (9th Cir. 2007) (emphasis added; citations and quotation marks omitted). Numerous other decisions are to the same effect. *See, e.g., Colony Cove Properties, LLC v. City of Carson*, 640 F.3d 948, 956 (9th Cir. 2011) (statute of limitations for facial challenges to an ordinance "runs from

the time of adoption"); *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994) ("In a facial taking, the harm is singular and discrete, occurring *only at the time the statute is enacted*"; emphasis added), *overruled on other grounds*, *WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997)(en banc); *Dowd v. City of Los Angeles*, No. CV 09-06731, 2013 WL 4039043, at *4-5 (C.D. Cal. Aug. 7, 2013) (same).

Courts also have long held that "when a cause of action has accrued, . . . it is ripe." *Gemtel Corp. v. Cmty. Redevelopment Agency of City of Los Angeles*, 23 F.3d 1542, 1545 (9th Cir. 1994); *see also Asociacion de Suscripcion Conjunta del Seguro de Responsabilidad Olbligatorio v. Juarbe-Jimenez*, 659 F.3d 42, 50-51 (1st Cir. 2011) ("facial takings challenge accrues at the time the offending statute or regulation is enacted or becomes effective. *A facial challenge also becomes ripe at that time*") (emphasis added). This is so even if uncertainty exists regarding the amount of the demolition impact fee or future implementation of the law. For example, in *Juarbe-Jimenez*, the First Circuit held that a facial takings claim was ripe when the offending law became effective, and this was so "despite the fact that the [plaintiff] did not know the precise dollar amount what would be subject to [the law] in future years." *Id.* at 52. Similarly, in *Gemtel*, 23 F.3d at 1545, the Ninth Circuit reversed a district court ruling that claims "were not ripe for adjudication because no final policy had yet been adopted," reasoning that "[t]he exact terms of the labor policy were not what caused the damages. The damages resulted from *there being a demand that the developer comply with some labor policy to be completed and imposed later*" (emphasis added). "[I]t is the *enactment of an improper fee* . . . that violates the [law] and an affected . . . entity is *entitled to challenge the ordinance, and thereby clarify its legal obligations, without waiting to receive a statement of charges*." *Util. Cost Mgmt. v. Indian Wells Valley Water Dist.*, 26 Cal.4th 1185, 1196 (2001).

This Court reached a similar conclusion involving highly analogous circumstances in *Levin v. City and County of San Francisco*, 71 F.Supp.3d 1072 (N.D. Cal. 2014). There, the plaintiffs challenged the enactment of an ordinance requiring property owners wishing to withdraw their rent-controlled properties from the rental market to make substantial monetary payments to displace tenants. The Court held that the San Francisco ordinance on its face "effects an unconstitutional taking by conditioning property owners' rights to withdraw their property on a monetary exaction not

sufficiently related to the impact of the withdrawal." *Id.* at 1074. The Court also found the facial taking claims to be ripe for adjudication because "Plaintiffs here seek injunctive and declaratory relief. Moreover, takings claims that challenge a legislative demand for money, like the one here, are ripe without a prior damages suit." 71 F.Supp.3d at 1079 (emphasis added), citing *San Remo Hotel, L.P. v. City and Cty. of San Francisco*, 545 U.S. 323, 345-46 (2005) (facial taking claims were instantly ripe "by their nature"), and *Eastern Enters. v. Apfel*, 524 U.S. 498, 521 (1998) (ripeness not applicable where the "challenged statute, rather burdening real or physical property, requires a direct transfer of funds" mandated by government).

The demolition ordinance was adopted by the Berkeley City Council on March 8, 2016 and became effective 30 days thereafter, on or about April 7, 2016. Trotter Decl. ¶ 2. Plaintiffs' claims accrued – and therefore became ripe – at that time. *Gemtel*, 23 F.3d at 1545. Furthermore, if Plaintiffs were required to wait to bring their challenge until after the City completed its nexus study – an occurrence for which the City still has not set a timeline – they would risk the possibility that such claims might be time-barred for failure to bring them within the limitations period. Such an outcome would be manifestly unfair and unjust, as well as contrary to settled law.

2. <u>The Fee is Mandatory.</u>

Second, the premise of the City's ripeness argument – that the demolition mitigation fee is only a "potential" fee, Def. Memo at 2:22 and 5:8-9, and "may not occur at all," Def. Memo at 1:14 – is simply wrong. The ordinance speaks in mandatory terms, providing that the property owner "*shall be required* to pay a fee [or comply with other exactions] for each unit demolished to mitigate the impact of the loss of affordable housing in the City of Berkeley." BMC Section 23C.08.020(A)(4) (emphasis added). The City Council used the same mandatory language in approving OPHCA's project, providing that the project "*shall fully comply* with Berkeley Municipal Code Section 23C.08.020 *by paying a fee* to mitigate the loss of affordable units . . . ." Iyengar Decl. Ex. A, at 18 (emphasis added). "Unlike the word 'may,' which implies discretion, the word 'shall' usually connotes a requirement." *Kingdomware Techs., Inc. v. United States*, __ U.S.__, 136 S. Ct. 1969, 1977 (2016) (citing cases). Consequently, the City's reliance on *Pennell v. City of San Jose*, 485 U.S. 1, 9-11 (1988) is misplaced. Unlike the "hearing officer[']s discretion" at play in *Pennell*, Def. Memo. at 11:12, the City has

determined that a fee *shall* be paid and imposed on projects and property owners seeking to demolish residential housing in Berkeley. Only the amount of the fee – not the fact of the fee – is subject to further determination. And Plaintiffs do not limit their legal challenge to the imposition of an excessive demolition impact fee. Rather, they challenge the imposition of *any* fee because the City has not established an essential nexus between demolition and a compensable impact cognizable under the Fifth Amendment.

The City also suggests – despite the mandatory language of the Ordinance – that it is possible no fee will, in fact, be imposed on Plaintiffs' project because the resolution approving the project included a condition, nowhere to be found in the ordinance itself, stating that the demolition fee shall "not exceed an amount consistent with BMC Section 22.20.070." BMC Section 22.20.070, in turn, provides that "the requirements of this chapter [relating to a different and independent affordable housing mitigation fee] shall not apply or shall be limited . . . where the applicant establishes to the City's satisfaction that the proposed development project will not generate any additional need for affordable housing . . . or other impact for which a mitigation and/or fee is otherwise required."

In essence, the City appears to argue for a limiting construction to the demolition ordinance by relying on language found in a different chapter of the Municipal Code. But courts "may impose a limiting construction . . . only if the [law] is 'readily susceptible' to such a construction." *Reno v. ACLU,* 521 U.S. 844, 884 (1997) (quoting *Virginia v. Am. Booksellers Ass'n,* 484 U.S. 383, 397 (1988)). A court may not "insert missing terms into the statute or adopt an interpretation precluded by the plain language of the ordinance." *Foti v. City of Menlo Park,* 146 F.3d 629, 639 (9th Cir. 1998). As discussed, the demolition ordinance speaks in mandatory language and makes no reference to the limited safety valve in Section 22.20.070. There is no guarantee that other property owners – or even Plaintiffs in a future case – necessarily would be afforded the limited procedural protections of that section. As such, the City's after-the-fact effort to avoid judicial review must fail. *See, e.*g., *United States v. Stevens*, 559 U.S. 460, 480 (2010) ("We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly"); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 946–947 (9th Cir. 2011) ("The City's proposed [construction] finds absolutely no support in the statutory text or the legislative history of the Ordinance. We cannot

simply 'presume[ ] the [City] will act in good faith and adhere to standards absent from the ordinance's face'") (citations and internal punctuation omitted).

Furthermore, even if Section 22.20.070 did constitute a plausible limiting construction (and it does not), it imposes the burden on a property owner to disprove a nexus and proportionality. Controlling Supreme Court precedent, however, is clear that this burden lies with the City. See *Dolan v. City of Tigard*, 512 U.S. 374, 395–96 (1994) ("[T]he city has [the] burden of demonstrating that the [impact] generated by petitioner's development reasonably relate to the city's [exaction]. . . [T]he city must make some effort to quantify its findings in support of the [exaction] beyond . . . conclusory statement[s]"); see also, *Levin*, *supra*, 71 F.Supp.3d at 1082 (the city's "burden is a significant one"). Consequently, Section 22.20.070 does not remedy the ordinance's deficiencies.

3. Plaintiffs Are Harmed by the Ordinance.

Third, the City is simply wrong in asserting that Plaintiffs have not been harmed by the ordinance because the amount of the fee has not yet been announced and Plaintiffs have not yet been required to pay it. Plaintiffs have received final City approval of the OPHCA project. However, they cannot move forward with demolition of the building because the City won't issue a demolition permit until after it commences and completes its nexus study and thereafter informs Plaintiffs of the amount of the fee. The City has identified no timeline by which this will occur. Indeed, at this time it is not even clear that the City has commenced work on a nexus study. In the meantime, the Durant property sits vacant and, due to its dilapidated condition, Plaintiffs are unable to make any economically beneficial use of their property in the absence of a demolition permit. Compl. ¶ 14; Orloff Decl. ¶ 6. Even temporary deprivations of use, such as those occasioned by the City's delay, constitute a concrete and compensable harm. *See, e.g., Ali v. City of Los Angeles*, 77 Cal. App. 4th 246, 251 (1999) (city's delay in issuing demolition permit constituted temporary regulatory taking requiring compensation; citing *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987)). This delay is especially harmful in Plaintiffs' case because, despite significant effort and expense, they have been unable to secure the building against trespassers and squatters who have

stripped most of the internal fixtures, taken up residence at the rear of the property, and created filthy and unsanitary conditions constituting an ongoing public safety hazard. Orloff Decl. ¶ 7.

Plaintiffs also are harmed by the pervasive uncertainty regarding the magnitude of the demolition mitigation fee and/or any possible tenant payment requirements. This uncertainty – which stems from the fact that the City has imposed a fee without identifying any criteria, standards, or methodology on which it will be based – prevents Plaintiffs from exploring and pursuing other development opportunities because they must set aside a large amount of capital to finance the project in the event that the fee is significant. *See* Orloff Decl. ¶ 5. The uncertainty also generally deters them from pursuing other development projects involving demolition they might otherwise pursue in the absence of such an ordinance. *Id.* ¶ 5.

Section 5 of the Ordinance injects additional uncertainty. It provides that if any "use permit condition implementing any of the mitigations required by this ordinance is determined to be invalid or unenforceable by a court of competent jurisdiction, **then the entire use permit . . . which it conditions shall be deemed to [be] automatically invalid as a consequence, and shall be null and void and of no further force or effect**." Trotter Decl. Ex. 1, at p. 5 (emphasis added). Because of this "poison pill" provision, Plaintiffs' use permit could be invalidated by *any* challenge to the ordinance, even if it were brought by someone else. This casts an additional shadow of uncertainty on Plaintiffs' development project. Plaintiffs clearly have an interest in resolving this uncertainty as soon as possible. Finally, the very fact that a fee will be imposed – even if uncertain in amount – necessarily reduces the fair market value of Plaintiffs' property. *See Carson Harbor Village Ltd.*, 37 F.3d at 476 (noting that "the basis of a facial challenge is that the very enactment of the statute has reduced the value of the property or has effected a transfer of a property interest. This is a *single harm*, measurable and compensable *when the statute is passed*") (emphasis in original, citation omitted).

In sum, the Complaint is ripe because the coercive power of the demolition ordinance – and the fees and exactions it necessarily imposes – have been put into effect and actually applied to Plaintiffs. It is no answer that the City has not yet conducted a nexus study. Def. Memo. at 12:1-2. The City cites no authority for the proposition that it can avoid review of a duly enacted law simply because it has not yet established the requisite nexus necessary to uphold the law. If the City wanted or needed

more time to complete its nexus study, the proper course was to postpone the effective date of the ordinance and not apply it until such time as the nexus study was complete. If it were otherwise, cities could enact dubious laws with coercive impact yet insulate such laws from judicial review until such indeterminate time as they completed their work. The fact that the City did not complete the work necessary to justify a law that took effect months ago suggests only that enactment of the ordinance was premature and that the City will be unable to establish its legitimacy and constitutionality. It does not render premature Plaintiffs' facial challenge to the new demolition ordinance here.

C. The Complaint Properly Pleads Takings and Due Process Claims.

The City does not challenge the adequacy of Plaintiffs' claims arising under California law, but requests dismissal of Plaintiffs' federal takings and due process claims for alleged failure to state a claim for relief. This motion should also be denied.

1. Plaintiffs Properly State a Takings Claim.

As a threshold matter, with respect to the standard for facial takings claims, the City cites *United States v. Salerno*, 481 U.S. 739, 745 (1987), in which the Supreme Court held that "the challenger [in a facial suit] must establish that no set of circumstances exists under which the [legislative] Act would be valid." Def. Memo at 13:9-11. However, just last year, the Court clarified that "when assessing whether a status meets this standard, the Court has considered only applications of the statute *in which it actually authorizes or prohibits conduct*." *City of Los Angeles, Calif. v. Patel*, ___ U.S. ___, 135 S. Ct. 2443, 2451 (2015) (emphasis added). In other words, "[t]he proper focus of the constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant." *Id.* (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 894 (1992)). The City is therefore incorrect to frame the facial inquiry as whether "the City's anticipated nexus and feasibility studies will necessarily be invalid" in all its applications. *See* Def. Memo at 2:20-21. Rather, for purposes of Plaintiffs' facial challenge, the "proper focus of the constitutional inquiry" is the projects for which a fee would *not* otherwise be authorized, i.e., those for which the City has not shown and cannot show the requisite nexus and proportionality. *Patel*, 135 S.Ct. at 2451.

On the merits, the City's argument is entirely redundant of its ripeness challenge: it acknowledges that an essential nexus and proportionality are required to uphold the constitutionality of

its ordinance and also that it has "not yet established the nexus." Def. Memo at 14:11. Yet remarkably, it concludes that its failure to establish a nexus for an already enacted mitigation fee somehow provides a basis for *dismissal* of Plaintiffs' claims. *Id.* at 14:12-13. To the contrary: "'monetary exactions' *must* satisfy the nexus and rough proportionality requirements of Nollan and Dolan." *Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S. Ct. 2586, 2599 (emphasis added). Furthermore, the City "has the burden of establishing the constitutionality of its conditions by making an 'individualized determination'" that they satisfy constitutional requirements. *Dolan v. City of Tigard*, 512 U.S. 374, 398 (1994)(citations omitted). Thus, if the City has not established a nexus—as it concedes it has not—its mandatory across-the-board imposition of a fee on demolition projects is necessarily invalid. *See id.*; *see also Lopez-Valenzuela v. Arpaio*, 770 F.3d 772, 789 (9th Cir. 2014) (holding that where challenged law was "not 'carefully limited'" consistent with the applicable "heightened scrutiny test . . . the entire status fails . . . and would thus be invalid in all of its applications").

Not only has the City not yet established a nexus, it *cannot* establish a nexus. Any purported changes in housing affordability with which the City is concerned – if they occur at all – stem from normal market activity and, in the case of previously rent-controlled properties, state law. Such changes cannot be attributed to the property owner or to any "proposed use" of the property. Indeed, in Plaintiffs' case, they have not made any change to the existing "land use." *See Koontz*, 133 S. Ct. at 2600 (fee may be imposed only as related to the "effects of the proposed *new use* of the specific property at issue") (emphasis added). The housing pricing forces with which the City is concerned act independently of Plaintiffs' proposed ongoing land use and are entirely unlike the environmental externalities at issue in *Koontz*, *Dolan*, and *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). The lawful, market-based price adjustments resulting from demolition and subsequent improvements to one's own property – with no change in use – are not the type of impact for which fees may be assessed under the Fifth Amendment. If it were otherwise, a city could assess a fee any time a property owner made improvements that might increase the value of his or her property, stretching *Nollan* and *Dolan*'s tolerance of such conditions beyond its reasonable limits. The City's motion to dismiss Plaintiffs' takings claim should be denied.

2. Plaintiffs Properly State a Due Process Claim.

The City's motion to dismiss Plaintiffs' due process claim also should be denied. Private property is "specifically protected by the Fourteenth Amendment against any state deprivation which does not meet the standards of due process . . . ." *Giaccio v. State of Pennsylvania*, 382 U.S. 399, 402 (1966). "[O]ne of the basic purposes of the Due Process Clause has always been to protect a person against having the Government impose burdens upon him except in accordance with the valid laws of the land. Implicit in this constitutional safeguard is the premise that the law must be one that carries an understandable meaning with legal standards that courts must enforce." *Id.* at 403. Thus, due process requires that a city provide meaningful "standards for definiteness and clarity" to guide the application of its laws. *Kolender v. Lawson*, 461 U.S. 352, 358 (1983). A law fails under the Due Process Clause if it is so "vague and standardless" such that "men [and women] of common intelligence must necessarily guess at its meaning." *Desertrain v. City of Los Angeles*, 754 F.3d 1147, 1155 (9th Cir. 2014). This doctrine "addresses at least two connected but discrete due process concerns: first, that regulated parties should know what is required of them so they may act accordingly; second, precision and guidance are necessary so that those enforcing the law do not act in an arbitrary or discriminatory way." *F.C.C. v. Fox Television Stations, Inc.*, __ U.S.__, 132 S. Ct. 2307, 2317 (2012).

The City's demolition ordinance fails these due process requirements because it imposes a fee without identifying any criteria, standards or methodology on which the fee will be based. As a result, property owners considering demolition "must necessarily guess" as to the magnitude of the fee, *id.*, resulting in uncertainty that burdens the ownership of property and deters development. This ambiguity concerning the amount and calculation of the fee offends the Due Process Clause. *Cf. Kirtsaeng v. John Wiley & Sons, Inc.*, __ U.S. __, 136 S. Ct. 1979, 1985–86 (2016) (observing that "[w]ithout governing standards or principles, [open-ended fee statutes] threaten to condone [the] 'whim' or predilection [of those who administer them]" and "unconstrained discretion prevents individuals from predicting how fee decisions will turn out, and thus from making properly informed judgments"); *Air Transp. Ass'n of Am. v. Dep't of Transp.*, 119 F.3d 38, 43 (D.C. Cir.), *opinion amended on reh'g*, 129 F.3d 625 (D.C. Cir. 1997)) (invalidating agency policy that "provide[d] no real guidance as to how [it] will determine reasonableness" of air fees).

The City's unexpected decision to apply the new ordinance retrospectively to Plaintiffs' application – which was finalized and administratively complete long before enactment of the ordinance and for which the administrative record had already been substantially developed – also runs counter to the fair notice requirements inherent in due process. As the Supreme Court has observed:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.

Landgraf v. USI Film Products, 511 U.S. 244, 265 (1994) (citations and quotation marks omitted). "The presumption against statutory retroactivity has consistently been explained by reference to the unfairness of imposing new burdens on persons after the fact. . . . The largest category of cases in which we have applied the presumption against statutory retroactivity has involved new provisions affecting contractual or property rights, matters in which predictability and stability are of prime importance." *Id.* at 270-271 (citing cases); see also *Beaver v. Tarsadia Hotels*, 816 F.3d 1170, 1187–1188 (9th Cir. 2016) ("In a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions") (quoting *Landgraf*, 511 U.S. at 266). The City's application of the ordinance to Plaintiffs' project violates these principles because it "affect[s] . . . past transactions" and "attaches new legal consequences to events [such the finalization of Plaintiffs' permit application] completed before its enactment." *Landgraf*, 511 U.S. at 268-269.

In its motion, the City simply ignores these principles. It relies on a single case, *Russ Bldg. Partnership v. City & County of San Francisco* (1988) 44 Cal.3d 839, which is not binding on this Court and did not address the concept of fair notice. In fact, in *Russ Bldg. Partnership*, the developers themselves had "proposed to mitigate the impact of their projects on the demand for transportation by participating in a transit funding mechanism if one were established by the City[.]" *Id.* at 844. Furthermore, because the developers' proposal had been incorporated into resolutions approving their permits, the sole issue in the case was whether the resolutions encompassed the later-enacted Transit

Impact Development Fee. Other than a discussion of the "vested rights doctrine" – which Plaintiffs here have not asserted – the court did not discuss due process at all. *Id.* at 853. The court certainly did not hold that the Due Process Clause permits a city to impose a fee on all projects of a certain type – both retroactive and prospectively – without enacting standards to guide its calculation. *Cf. Beaver*, 816 F.3d at 1187–1188 (rejecting argument "that Plaintiffs' rights are not subject to *Landgraf* because those rights have not vested" and emphasizing that "the *Landgraf* Court did not restrict its analysis of 'rights a party possessed' to 'vested rights' only").[2]

For all of these reasons, Defendant' motion to dismiss Plaintiffs' due process claims should be denied.

III. LEAVE TO AMEND SHOULD BE GRANTED TO ADDRESS ANY PERCEIVED DEFICIENCIES IN THE COMPLAINT. ALTERNATIVELY, THE COURT SHOULD STAY, NOT DISMISS, PLAINTIFFS' CLAIMS.

Rule 15(a)(2) provides that "[t]he court should freely grant leave when justice so requires." Fed. R. Civ. Proc. 15(a)(2). Consistent with this liberal standard, the Ninth Circuit has repeatedly held that in ruling on a Rule 12(b)(6) motion, "a district court should grant leave to amend even if no request to amend the pleading was made, unless it determines that the pleading could not possibly be cured by the allegation of other facts." *Doe v. U.S.*, 58 F.3d 494, 497 (9th Cir. 1995) (citing *Cook, Perkiss & Liehe v. N. Cal. Collection Service*, 911 F.2d 242, 247 (9th Cir. 1990)). And where a complaint is dismissed for failure to state a claim, "the order should also inform the plaintiff of the reason for dismissal so that he can make an intelligent choice as to amending." *Bonanno v. Thomas*, 309 F.2d 320, 322 (9th Cir. 1962). If the Court is otherwise inclined to dismiss the case, Plaintiffs respectfully request that the Court grant leave to amend in response to any perceived deficiencies in the Complaint in its current form.

Alternatively, the Court should stay, rather than dismiss, Plaintiffs' claims. A stay would be particularly appropriate in view of the fact that the limitations period applicable to Plaintiffs' claims

[2] The impact fee at issue in *Russ Bldg.* was imposed in 1981, and thus pre-dated the 1987 enactment of the California Mitigation Fee Act (Cal. Gov. Code § 66000, *et seq.*) by several years. Plaintiffs' facial taking claims also rest on the City's failure to comply with the Mitigation Fee Act in adopting the new demolition ordinance and imposing a fee on Plaintiffs.

has already begun to run. A stay "may represent the best accommodation of the competing interests." *Pension Ben. Guar. Corp. v. Carter & Tillery Enterprises*, 133 F.3d 1183, 1187 (9th Cir. 1998) (finding that district court abused its discretion in dismissing rather than staying case). A stay should be ordered when dismissal might mean that a plaintiff would be "barred permanently from asserting his claims in the federal forum" by the running of the statute of limitations. *Rincon Mushroom Corp. v. Mazzetti*, 490 F. App'x 11, 13-14 (9th Cir. 2012) (citing *Sharber v. Spirit Mountain Gaming Inc.*, 343 F.3d 974, 976 (9th Cir. 2003)).

V. CONCLUSION.

For all of the reasons stated herein, Defendant's motion to dismiss is without merit and should be denied in its entirety. Alternatively, the case should be stayed or leave to amend granted.

Dated: July 29, 2016

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