No. 18-15368

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BUILDING INDUSTRY ASSOCIATION – BAY AREA

Plaintiff – Appellant,

v.

CITY OF OAKLAND

Defendant – Appellee.

On Appeal from the United States District Court
for the Northern District of California, San Francisco Division,
Case No. 3:15-cv-03392-VC
Honorable Vince Chhabria, District Judge

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES AND INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION IN SUPPORT OF DEFENDANT – APPELLEE CITY OF OAKLAND

THE SOHAGI LAW GROUP, PLC
Margaret M. Sohagi (SBN 126336)
Philip A. Seymour (SBN 116606)
11999 San Vicente Boulevard, Suite 150
Los Angeles, California 90049-5136
Telephone: (310) 475-5700
Facsimile: (310) 475-5707
Email: MSohagi@sohagi.com
Email: PSeymour@silcom.com

Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rules of Appellate Procedure 26.1 and 29(a)(4)(A), amicus curiae League of California Cities ("League"), California State Association of Counties ("CSAC") and International Municipal Lawyers Association ("IMLA") certify that they have no parent corporations or any publicly held corporations owning 10% or more of its stock.

DATE: August 30, 2018

THE SOHAGI LAW GROUP, PLC

/s/ Margaret M. Sohagi

By: Margaret M. Sohagi
Philip A. Seymour
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

Table of Contents

Page

Table of Authorities

Page

Cases

Table of Authorities
(continued)

Page

Table of Authorities
(continued) **Page**

Other Authorities

STATEMENT OF AMICI CURIAE

The League of California Cities ("League"), California State Association of Counties ("CSAC") and International Municipal Lawyers Association ("IMLA") submit the following amicus curiae brief in support of appellee City of Oakland and affirmance of the judgment of the District Court.

The League is an association of 475 incorporated California cities. The League is dedicated to protecting local control over planning and land use decisions affecting municipal residents. The League has served as amicus curiae in dozens of matters before this Court, the United States Supreme Court and other courts of appeal. Filing of this brief was authorized by the Legal Advocacy Committee of the League.

CSAC is a non-profit corporation whose membership consists of the 58 California county governments in California. CSAC is interested in preserving and promoting local authority to regulate land use and development in the best interests of the general public. Filing of this brief was authorized by CSAC's Litigation Overview Committee, which is comprised of county counsels from throughout the state.

IMLA is a nonprofit, nonpartisan professional organization consisting of more than 2,500 members, including city and county governments, state municipal leagues, and individual attorneys representing governmental interests. IMLA's

mission is to advance the responsible development of municipal law through education and advocacy on legal issues before the Supreme Court of the United States, United States Courts of Appeals, and in state supreme courts and appellate courts. Filing of this amicus brief was authorized through IMLA's Legal Advocacy Committee.

The League, CSAC and IMLA believe that this case presents important issues regarding innovative efforts by local governments to enhance the quality of life in their jurisdictions by incorporating provisions for public art in land use regulations. Such regulations, as typified by the challenged percent-for-art ordinance of the City of Oakland, are constitutional for the reasons stated herein.

All parties to the pending appeal have consented to the filing of this amicus brief.

The brief was drafted by The Sohagi Law Group, PLC on behalf of the amici. No party or counsel for any party in this matter authored any part of the brief, or contributed funds for preparation or filing of the brief. No person other than amici curiae and their counsel has contributed funds for the preparation or filing of this brief.

INTRODUCTION TO ARGUMENT

This case poses a simple question. May a city that devotes a small fixed percentage of every city capital project budget to public art impose a similar requirement on private development projects? As the trial court found, the answer is yes. Such a requirement indisputably advances legitimate public interests, and does not require builders to submit to an unconstitutional taking under the standards articulated in *Nollan v. California Coastal Commission ("Nollan")*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard ("Dolan")*, 512 U.S. 374 (1994). The Ordinance also does not compel builders to subsidize or endorse any government-dictated message with which they disagree in violation of the First Amendment.

I. PUBLIC ART AND THE CITY'S PUBLIC ART REQUIREMENTS FOR PRIVATE DEVELOPMENT ORDINANCE

A. Public Art Ordinances – A Brief History

The concept of public art is not new. Public buildings, gathering places and rights-of-way have been embellished with paintings, carvings, murals, friezes, statuary and other works of art funded by the governing powers or civic minded citizens since virtually the dawn of civilization. In the twentieth century, many American municipalities began taking a systematic approach by enacting "percent-for-art" measures which require a percentage of the budget for specified public

works projects – typically 1%-2% – to be devoted to art, either incorporated directly into a project or displayed elsewhere. In 2015, 35 of the 50 most populous cities in this country had such programs. (Asmara M. Tekle, *Rectifying These Mean Streets: Percent-for-Art Ordinances, Street Furniture, and the New Streetscape*, 104 KENTUCKY L.J. 409, 428 (2015).) Smaller cities with such programs include Chapel Hill, North Carolina; Missoula, Montana; and Rockville, Maryland. In California, no less than 17 cities currently have public art ordinances of this type. (SER 027-169.)[1]

Inevitably the question arose as to whether private land developers should not also make similar contributions to civic improvement. Many builders already do voluntarily enhance their projects with artistic adornments. A mandatory percent-for-art requirement for private projects merely establishes a minimum standard.

There is no question that public art ordinances of this type advance legitimate public interests. As the Supreme Court long ago stated in *Berman v. Parker*, 348 U.S. 26, 33 (1954), "It is within the power of the legislature to determine that the community should be beautiful as well as healthy …" The values served by public art are many. The decoration of buildings is the most

[1] These cities include Beverly Hills, Culver City, Los Angeles, Mountain View, Pomona, San Diego, San Francisco, Santa Monica, West Hollywood, Emeryville,
Footnote continued on next page

obvious use of public art, but artwork may also be used to enhance views, increase

Footnote continued

Albany, Richmond, San Luis Obispo, Berkeley, Fremont, Palm Desert, and Oakland.

ambience or a sense of spaciousness; obscure or enhance less attractive utilitarian features; or simply stimulate curiosity and relieve visual boredom. Public art in various forms may enrich the urban culture by evoking natural, historical or other inspiring themes. Most of all, public art promotes civic pride. It is a statement that local government, citizens and civic benefactors – including builders – care about their surroundings and are willing to invest in improving the civic landscape.

Intelligently administered, a public art requirement benefits not only the public, but builders themselves. Indeed, builders will usually be the most direct beneficiary of art funded under such an ordinance, whether the art is used to enhance the builders' own property or the surrounding neighborhood. Public art ordinances such as Oakland's thus classically foster the "reciprocity of advantage" that is a hallmark of fair and reasonable zoning legislation. (*Sierra Preservation Council, Inc. v. Tahoe Regional Planning Council*, 535 U.S. 302, 341 (2002); *Agins v. Tiburon*, 447 U.S. 255, 262 (1980), disapproved on other grounds, *Lingle v. Chevron U.S.A., Inc. ("Lingle")*, 544 U.S. 528, 540-545 (2005).)

Considering the foregoing, it is not surprising that attacks on public art ordinances have been unsuccessful. In *Ehrlich v. City of Culver City ("Ehrlich")*, 12 Cal.4th 854, 885-886 (1996) the California Supreme Court upheld the constitutionality of such an ordinance, specifically rejecting the claim that the

ordinance was subject to review under the tests established for development exactions in *Nollan/Dolan*. This case is at bottom an unjustified attempt to revisit the sound holding of *Ehrlich*.

B. Oakland's Ordinance

Oakland first adopted an ordinance requiring public projects to allocate funds (1.5% of project costs) for public art in 1989. A percent-for-art ordinance for private development projects was first adopted in 2014, leading to this litigation. The current Ordinance is an unlikely target for testing the constitutionality of public art requirements. The Ordinance, while firm in its purpose, is a virtual model of flexibility and non-intrusiveness.

A builder may satisfy the Ordinance in multiple ways. First, builders may commission artworks of their own choosing as part of the project itself. (SER 015, Section 15.78.070.A.) While the Ordinance requires investment in artwork by qualified artists, it is broadly permissive as to the type of art selected and contains no restrictions on the content of such art. The builder may choose a mural, sculpture, mosaics, inscriptions, paintings, photographs or craft objects to name a few options. (SER 014, "Public Art Projects" defined.)

Alternately, a builder may go into partnership with the City to fund an art project on adjoining rights-of-way. (SER 015, Section 15.78.070.A.) While the City may be expected to exercise discretion over artwork authorized on public

property, this option relieves builders from accommodating public art on their own properties, and from associating themselves with any theme or message they disagree with.

Finally, builders who do not wish to incorporate art into their own projects may simply pay an in-lieu fee, which will be used to fund City-approved public art. (SER 016, Section 15.78.070.B.) The amount of the in-lieu fee may be further reduced by allocating space within the project for artistic programs managed by the City or others. (SER 016, Section 15.78.060.B.2.)

The financial contribution required of builders is small, smaller than the 1.5% public art contribution the City requires from its own capital projects. (SER 08.) This is hardly a severe economic burden. Indeed, the 0.5% or 1.0% of development costs required by the Ordinance may well be less than a builder would commonly spend voluntarily to make a project more attractive, and therefore more marketable for sale or rent.

Administratively, the Ordinance is tailored for fairness and expediency. Because the Ordinance establishes flat rates for a builder's contribution based on overall project costs, there is no need for endless wrangling or subjective assessments as to the appropriate level of artistic contribution. The expense can be assessed early in the development process, when critical investment and financing decisions are made. Builders need not fear unexpected costs or delays

that could accrue were contributions assessed later on an ad hoc basis. All builders within each class of development subject to the Ordinance are treated equally; there are no grounds for alleging favoritism or denial of equal protection. The Ordinance provides an appeal procedure for builders who believe they have legitimate constitutional or other claims against strict enforcement of the Ordinance. (SER 017, Section 15.78.080.) Should problems of interpretation, administration or consistent application of the Ordinance arise in the future, the City Administrator is authorized to adopt rules and regulations to provide for fair and efficient implementation. (SER 015, Section 15.78.060.)

II. BIA HAS NOT STATED A VIABLE *NOLLAN/DOLAN* CLAIM

BIA's first claim is that the Ordinance unconstitutionally conditions a builder's right to develop upon submitting to an uncompensated taking of property in violation of principles established in *Nollan*, 483 U.S. 825, *Dolan*, 512 U.S. 374 and *Koontz v. St. Johns River Water Management District ("Koontz")*, 570 U.S. 595 (2013). In making this argument, BIA ignores both the actual requirements of the Ordinance and the inapplicability of the *Nollan/Dolan* test to facial claims and legislative actions in general. By requiring builders to beautify their projects or nearby land with publicly accessible art, the City is not requiring builders to submit to an appropriation of property, which is a prerequisite for the application of *Nollan/Dolan*. What the Ordinance *does* do is establish a general standard

requiring development within its purview to include an aesthetic component, while concurrently providing the greatest flexibility and least intrusiveness in how builders may comply. The Ordinance is no different in function or purpose than the architectural standards and landscaping requirements that are now a common feature of zoning codes in thousands of jurisdictions in this country. (See *Ehrlich*, 12 Cal.4th at 886.) Under this standard, the Ordinance is not only constitutional on its face, but constitutional in all foreseeable applications.

A. A Requirement that a Developer Devote a Certain Percentage of Development Costs to Artwork on Its Own Property is Not an "Exaction" Subject to Review Under *Nollan/Dolan*

BIA's *Nollan/Dolan* claim first fails because the essential prerequisite for such a claim – a threatened physical taking of property or appropriation of money – simply is not present.

It is all but universally recognized that the rules developed in *Nollan* and *Dolan* are designed to address the particular constitutional issue presented by development exactions, i.e., the situation presented when a regulatory agency demands a transfer of property interests or money in exchange for development approvals. (*Koontz*, 570 U.S. at 604; *Lingle*, 544 U.S. at 546-547; *City of Monterey v. Del Monte Dunes at Monterey, LTD*, 526 U.S. 687, 702-703 (1999); *Dolan*, 512 U.S. at 385; *Ehrlich*, 12 Cal.4th at 886; *McClung v. City of Sumner*

("McClung"), 548 F.3d 1219, 1226-1228 (9th Cir. 2008).) Absent such a demand, there is no threatened taking or appropriation of property, no basis for invoking the Fifth Amendment's protection against takings without just compensation (upon which *Nollan*, *Dolan* and *Koontz* are premised), and no unconstitutional condition requiring a builder to submit to an uncompensated taking. The Fifth Amendment Takings Clause protects only against uncompensated takings of property, not against real or imagined infringements of other rights. (*Conti v. United States*, 291 F.3d 1334, 1340 (9th Cir. 2002).)

The default option offered by the Ordinance – funding and installing art on the builder's own property – does not require any transfer of property or funds to the City. Under Section 15.87.070.A, a builder may simply purchase and install art of its own choosing in publicly accessible areas of the proposed project or on an adjoining right of way. (SER 015.) In either case the builder (or property owner) retains ownership of the art. (SER 018, Section 15.78.100.) This provision alone ends BIA's *Nollan/Dolan* claim. (See *Koontz*, 570 U.S. at 611: ["We agree with respondent that, so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition."].) However, Section 15.78.070.A also offers another option that does not require transfer of funds or property to the City, i.e., the option of funding (and retaining ownership

of) art on an adjacent public right-of-way. Under this option it is actually the City ceding a form of property interest to the builder, not the other way around.

The third option available to builders – that of paying an in-lieu fee – is just that: an option. In some cases, builders may prefer it since it eliminates the need to adjust their own building plans to accommodate a display of artwork. This does not undermine the constitutionality of the Ordinance. The in-lieu fee here is not, as in *Koontz*, an alternative to what would otherwise amount to a physical taking. (*Koontz*, 570 U.S. at 611-612.)

It is true that a builder must expend funds to purchase and install art under Section 15.87.070.A. This, however, does not make the Ordinance different from any number of other regulatory requirements which require monetary expenditures, nor convert the requirements of Section 15.78.070.A into an exaction. Compliance with modern building and zoning laws usually does cost money. Builders are commonly required to expend substantial sums on labor, materials and professional services to achieve compliance with seismic safety codes, architectural and landscaping requirements, parking standards, health and sanitation codes, and the like. None of these types of requirements have ever been found to constitute exactions. A builder required to spend money on publicly accessible art is ultimately in no different position than one required to plant trees,

install fire sprinklers or provide covered parking spaces on its property, so long as the requirements advance legitimate public purposes.

BIA also appears to argue that the public art requirements of the Ordinance can only be justified to the extent they offset the adverse aesthetic impacts of individual future developments, consistent with *Nollan/Dolan's* nexus and rough proportionality tests. This argument, however, falsely assumes that all regulations which impose costs on developers should be treated as exactions to which *Nollan* and *Dolan* apply. As discussed in greater detail below, this is not the case. The argument simply misapprehends the scope of the City's police power. The City's powers are not limited to ensuring that the public is made no worse off aesthetically than it was before new development occurred. The City also has the power to ensure that new development is attractive in its own right and contributes positively to the civic environment. As the California Supreme Court found in *Ehrlich*:

> [T]he requirement to provide either art or a cash equivalent thereof is more akin to traditional land use regulations imposing minimal setbacks, parking and lighting conditions, landscaping requirements, and other *design* conditions such as color schemes, building materials and architectural amenities. Such aesthetic conditions have long been held to be valid exercises of the city's traditional police power.

(12 Cal.4th at 886 (emphasis in original).)

B. The *Nollan/Dolan* Test is Not Applicable to Legislative Enactments

The next fundamental problem with BIA's *Nollan/Dolan* claim is that the *Nollan/Dolan* test simply does not apply in a facial attack on legislatively enacted regulations. Existing law on this point is clear in this Circuit and elsewhere. (*McClung*, 548 F.3d at 1226-1228; *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998); see, e.g., *Ehrlich*, 12 Cal.4th at 886; *Dabbs v. Anne Arrundel County, Md.*, 232 Md.App. 314, 332-334 (2017).) The City has addressed this question in greater detail in its brief. However, Amici will offer a few additional comments on this issue.

In attempting to import the *Nollan/Dolan* test into legislative challenges, BIA is not only trying to alter longstanding law, but, consciously or unconsciously, attempting to create a virtual automatic fail mechanism for much zoning legislation. *Nollan* and *Dolan's* "essential nexus" and "rough proportionality" tests were devised to address the particular problem of exactions imposed upon individual development projects in an adjudicative setting, a situation in which landowners are purportedly "especially vulnerable" to abuse. (*Koontz*, 570 U.S. at 605.) The test by its very nature requires an assessment of the actual impacts of a particular project and an "individualized determination" as to whether the mitigating conditions imposed are reasonably related "in nature and

extent." (*Dolan*, 512 U.S. at 391.) The test cannot be applied to unknown building plans or bare hypotheticals that might be envisioned at the time a general zoning ordinance is enacted. BIA seeks to turn this to advantage by arguing that the Ordinance is invalid *precisely because* it does not undertake the impossible, i.e., foresee precisely what aesthetic or other impacts future developments might have, and determine every builder's proportionate public art contribution (if any) accordingly. If this were the constitutional test, then few if any legislative measures establishing standardized development requirements would pass muster. Developers could always argue that the measure failed to take into account the particulars of their particular property and building design.

Such a requirement, if adopted against all logic, would have crippling effects on state and municipal governments' ability to govern. Cities and counties have long relied upon the established tests for determining the constitutionality of zoning and other ordinances. The power to legislate for the public welfare has never previously been conditioned upon finding a perfect fit for every possibly affected person or property. (See, e.g., *Village of Euclid v. Ambleer Realty Co. ("Village of Euclid")*, 272 U.S. 365, 395-396 (1926).) Few existing ordinances establishing development standards would survive, however, if municipalities were required to show that they were based on an "individualized" assessment of

the private costs and public benefits that would result from their application to every affected parcel of land.

Further attempts to establish legislative standards would also become impractical, requiring complex, parcel-by-parcel studies that would effectively defeat the purpose of legislating rules of general application. The inevitable effect would be to drive many or most land use decisions into the adjudicative arena, where, ironically, they are theoretically most subject to the types of extortionate demands that *Nollan* and *Dolan* are intended to combat. One suspects that this would be a nightmare not only for municipal governments, but for the landowners and developers that BIA purports to represent. In place of the certainty and predictability regarding the costs or other requirements that an ordinance imposes, developers would be faced with the prospect of interminable wrangling in permit hearings in which municipal planners, objecting neighbors, and even rival developers as well as the developer would be entitled to have their say. The Supreme Court has never suggested that *Nollan* and *Dolan* were intended to rewrite constitutional law governing the historic legislative powers of elective state or local governments. This Court should not be the first to do so.

C. Regardless of the Standard Applied, BIA Cannot Establish that the Ordinance is Facially Invalid, i.e., That It Would Be Invalid in All Possible Applications

BIA's claims lastly fail because they ignore the basic requirements for a successful facial challenge to the Ordinance. Indeed, they would fail even if the *Nollan/Dolan* test were applicable. To prevail in a facial attack, the plaintiff cannot merely show that the ordinance would be unconstitutional in certain applications. The plaintiff must show "no set of circumstances exists under which the [regulation] would be valid." (*Reno v. Flores*, 507 U.S. 292, 301 (1993); *Sprint Telephony PCS v. County of San Diego*, 543 F.3d 571, 579 (9th Cir. 2008).) Further, "In the takings context, 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, measureable and compensable when the statute is passed." (*Guggenheim v. City of Goleta*, 638 F.3d 1111, 1119 (9th Cir. 2010), quoting *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993).)

Here, no builder has been deprived of anything by mere enactment of the Ordinance. At most, it presages a minor increase in development costs. As the District Court found, this is far from enough to make out a taking claim under the paradigm takings test established in *Penn Central Transportation Co. v. City of*

New York, 438 U.S. 104 (1978).) It is also beyond serious debate that the Ordinance substantially advances legitimate public interests, the longstanding basic test for the underlying constitutional validity of zoning legislation. (*Village of Euclid*, 272 U.S. at 395; see *Lingle*, 544 U.S. at 540-545 [clarifying that this test applies to due process challenges, not taking claims].) Although BIA contends there is no certainty that all future developments will have aesthetic impacts requiring mitigation, this is irrelevant. The City may use its police powers to ensure that future development is even more attractive than it might otherwise be, regardless of whether the proposed development is deemed to have negative aesthetic impacts to begin with. The police power includes the authority to affirmatively advance the public welfare, not merely to preserve an existing aesthetic status quo. (*Berman v. Parker*, 348 U.S. at 33; *Ehrlich*, 12 Cal.4th at 886.)

The result would not change even if BIA were permitted to make a facial challenge based on *Nollan/Dolan*. BIA contends that the Ordinance fails the *Nollan/Dolan* test because it is only "speculative" that future developments will have aesthetic impacts that justify mitigation, and there is no way to determine in the abstract that artwork will truly mitigate these effects in proportion to the costs imposed on a builder. But the test in a facial challenge is not whether one can

conjure hypothetical cases which would fail the applicable test, but whether all future cases would *necessarily* fail. That is hardly the situation here.

BIA suggests that public art, by its nature, will not normally serve to offset the most common types of aesthetic impacts caused by new development, and the Ordinance consequently fails the "essential nexus" requirement of *Nollan*. For this purpose, BIA would apparently like to compartmentalize aesthetic concerns into such things as blockage of light, air or views, or neighborhood compatibility, architectural merit and such, and demand that offsets for these impacts be made in similar kind only. Aesthetic quality, however, is ultimately the sum total of numerous factors. Aesthetic detriments of one type may well be offset by improvements of another. Indeed, nothing is more common in everyday planning practice than builders proposing to minimize the visual impacts caused by the size, bulk or location of their projects by use of creative design, landscaping measures, artistic displays, or preservation of open space, whether or not these are affirmatively required by local regulations. Oakland's Ordinance is incredibly flexible as to the types of art that can be employed by a builder. Appropriate art could take the form of murals to soften building outlines, statuary or other visual displays to attract the eye, or any number of other adornments designed to enhance the overall ambience, warmth or pleasantness of the building and its surroundings.

As to "rough proportionality," there is no reason to believe that the 0.5% or 1% of project costs devoted to art will necessarily be disproportionate to potential negative impacts, even were proportionality at issue. Aesthetic effects, whether positive or negative, do not lend themselves to easy quantification. On their face, the tiny percentages of development costs required by the Ordinance for artistic improvements are manifestly small in comparison to the potential impacts of new development. Cities with public art programs nationwide have long found that devoting similar or larger percentages of costs of their own building projects does not unreasonably burden their capital budgets. Rather than being an attempt to exploit builders (much less an "out-and-out plan of extortion"), the City's Ordinance simply holds private development to the same aesthetic standard applied to public projects.

It should be understood that the League, CSAC and IMLA by no means suggest that the validity of the Ordinance depends upon its ability to mitigate adverse impacts of new development, as opposed to its ability to improve municipal conditions generally. The latter is the true test. (See *Ehrlich*, 12 Cal.4th at 886.) But, contrary to BIA's speculation, it is also difficult to imagine any new development that does not have adverse aesthetic impacts of some type. Neither BIA nor the Court at this juncture can state with certainty that inclusion of publicly accessible art in or near future projects will have no proportionate

compensating effect. BIA's facial attack consequently would fail even were *Nollan* and *Dolan* applicable.

III. THE ORDINANCE DOES NOT INFRINGE FIRST AMENDMENT RIGHTS

BIA also contends that the Ordinance imposes unconstitutional conditions because compliance would require builders to compromise their First Amendment rights against compelled speech. The short answer is that at least two options available to builders under the Ordinance – payment of in-lieu fees or funding artwork on public rights-of-way – indisputably do not implicate First Amendment rights at all. An otherwise valid fee requirement does not violate the First Amendment simply because the fees will be used to fund government speech. (*Johanns v. Livestock Marketing Association ("Johanns")*, 544 U.S. 550, 559 (2005).) The in-lieu fee option of the Ordinance is fundamentally no different for First Amendment purposes than a fee or in-kind contribution to a program for planting street trees or improving public parks to enhance city aesthetics. Similarly, funding of artworks on public rights-of-way, where the government exercises approval authority over the art, does not implicate First Amendment rights. (*Pleasant Grove City, Utah v. Summum ("Summum")*, 555 U.S. 460, 470-473 (2009).)

Because the Ordinance provides at least two options for compliance that implicate no First Amendment rights, the Ordinance cannot be found to impose conditions which unconstitutionally violate First Amendment rights. (*Koontz*, 570 U.S. at 611.) But in any event, the third option available to builders – installing art on their own property – also does not violate First Amendment rights. The Ordinance does not compel builders to convey any particular artistic, ideological or other message, nor, indeed any message at all. The requirements of the Ordinance are fundamentally no different in effect than such commonly employed regulations as landscaping and architectural review requirements, save that the Ordinance gives builders more freedom to choose the type and content of displays used to enhance their property. As the City correctly argues in its brief, this type of requirement does not amount to regulation of speech or expressive conduct *at all*, and therefore does not trigger First Amendment scrutiny. (*Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 63-67 (2006).) But even if this third option triggers First Amendment scrutiny, it easily passes the appropriate rational basis level of scrutiny, as the District Court found.

A. The In-Lieu Fee Option of the Ordinance Merely Requires Builders to Fund Government Speech Activities and Accordingly Does Not Implicate First Amendment Rights at All

In *Johanns*, 544 U.S. 550, the Supreme Court addressed a federal program which required beef producers to pay an assessment which was used by a government-created "Beef Board" to promote beef consumption. The Court concluded that this "government-compelled subsidy of the government's own speech" (*id.* at 557) did not violate the First Amendment, because private citizens have no First Amendment right to decline support for government programs based on disagreements with the government's policies or public messages. (*Id.* at 559.) The Supreme Court majority specifically distinguished earlier cases, such as *Keller v. State Bar of California*, 496 U.S. 1 (1990) and *United States v. United Foods, Inc.*, 533 U.S. 405 (2001), in which the Court had invalidated programs in which private persons or entities to were compelled to contribute to promotional or advocacy programs controlled by non-governmental entities, and whose messages they disagreed with. *Janus v. American Federation of State, County and Municipal Employees*, __ U.S. __, 138 S.Ct. 2448 (2018), upon which BIA now chiefly relies, is inapt here for the same reason. *Janus* involves an "agency fee" paid by public employees to fund advocacy by a private entity, i.e., a union.

Johanns rests on the now well-settled principle that the First Amendment does not confer any right on citizens to control or object to the otherwise-permissible content of a governmental entity's own expressions of fact, policy or opinion. "[T]he dispositive question is whether the [speech] at issue is the Government's own speech and therefore is exempt from First Amendment scrutiny." (*Johanns*, 544 U.S. at 553; see *Walker v. Texas Division, Sons of Confederate Veterans, Inc. ("Walker")*, __ U.S. __, 135 S.Ct. 2239, 2245-2246 (2015); *Summum*, 555 U.S. at 467-468; *Sutcliffe v. Epping School District*, 584 F.3d 314, 329-331 (2009); *People for Ethical Treatment of Animals v. Gittens*, 414 F.3d 23, 28-30 (D.C. Cir. 2005).) [2]

This and other courts have since followed *Johanns* in a variety of cases involving the use of government assessments to support government-controlled speech. (See, e.g., *Paramount Land Company LP v. California Pistachio Commission*, 491 F.3d 1003, 1009-1012 (9th Cir. 2007); *Delano Farms Company v. California Table Grape Commission*, 586 F.3d 1219, 1227-1230 (9th Cir. 2009).)

[2] The District Court in this case did not invoke the government speech doctrine by name, but clearly applied it in its ruling on the merits. Specifically, the District Court noted: "… if developers do not want to purchase and display art on or near their property, they can comply with the ordinance by paying a fee to the City in the same amount. And although Oakland uses this money to fund art, the Association does not argue (and could not reasonably argue) that the First

Footnote continued on next page

There can be no doubt that art funded through the in-lieu fee provision of the Ordinance constitutes government speech. The in-lieu fee is paid directly to the City's Public Art Project Account for the acquisition and placement of public art throughout the City. (SER 016.)

The in-lieu fee is even less objectionable from a First Amendment standpoint than the compulsory payments in the cases discussed above. There is

Footnote continued

Amendment prevents a local government from earmarking revenue collected from its residents to display art." (ER 07.)

no likelihood that builders will be required to subsidize particular messages they disagree with, nor necessarily any discernable message at all. The Ordinance simply requires that the in-lieu fee go to subsidize public art. "Public Art Projects" are broadly defined in the Ordinance to include virtually any type of artistic endeavor, from paintings, photographs and murals to statues, monuments, sculptures, carvings and decorative works of almost any kind. (SER 014.) Should the City choose to fund some particular project that a builder finds objectionable, it may do so. (*Downs v. Los Angeles Unified School District*, 228 F.3d 1003, 1013-1015 (9th Cir. 2000).) But there is no reasonable likelihood that the builder will be viewed as personally endorsing the art. This is not a case of builders being forced to display City-dictated messages on their buildings or personal automobiles.

B. The Option of Funding Art on Public Land Also Amounts to Funding of Government Speech and Does Not Implicate First Amendment Rights

Builders may also satisfy the Ordinance by funding artwork on public rights-of-way adjacent to or near their development. (SER 015, Section 15.78.030.A.) The Ordinance itself does not impose any restrictions on the content of such art, but it can reasonably be assumed that the City will exercise discretion in approving such projects. The City has an obviously legitimate

interest in restricting displays that are unduly provocative, violent, distracting to motorists, politically partisan or just plain ugly on its own property. Precisely for this reason, however, artwork installed under this option must be considered government speech, notwithstanding that it is proposed and funded by the builder. (See, e.g., *Walker*, 135 S.Ct. at 2248-2251 [specialty license plates constitute government speech, despite carrying privately designed messages]; *Summum*, 555 U.S. at 467-473 [privately donated monuments in public parks are government speech]; *Freedom from Religion Foundation, Inc. v. City of Warren*, 707 F.3d 686, 695-697 (6th Cir. 2013) [Christmas holiday display on city property was government speech, although some elements were donated]; *Newton v. LePage*, 700 F.3d 595, 602-603 (1st Cir. 2012) [removal of mural from government office did not violate First Amendment rights of third parties].) The only injury a builder could claim from selecting this option is an economic one, i.e., that of having to expend funds to support government speech. As discussed previously, this does not violate the Constitution. Moreover, under this option, builders still have discretion to propose any type of art and any specific content they think appropriate. The Ordinance does not authorize the City to dictate that the art contain some particular message with which the builder *disagrees*. This is the key requirement for a compelled speech claim. (See *Walker*, 135 S.Ct. at 2253.) In practice, there is no reason to believe that the City and builders cannot work

cooperatively and with due respect for their mutual interests in designing public art on public streets. Should the day ever come when the City attempts to coerce a builder into funding some display that the builder finds offensive, an appeal under Section 15.78.080 of the Ordinance (SER 017) and a possible as-applied claim are the legal answers.

C. The Option of Funding and Displaying Artwork of their Own Choosing on Their Own Property Also Does Not Require Builders to Engage in "Compelled Speech" in Violation of the First Amendment

The third option available to builders – funding artwork on their own property – does not involve government speech, but it also does not require builders to involuntarily espouse any ideological or other message they disagree with. Indeed, technically speaking, the Ordinance does not require the builder to engage in artistic expression at all. The builder may merely provide funds and space to an artist who will create the art. The builder is free to post any number of disclaimers as to the content.

In reality, most builders will probably take a more active role in selecting the type and general theme of the art, and in displaying it to best advantage on their property. It may well be in the builder's own interest to avoid unduly provocative themes that might offend prospective customers, purchasers or

renters. The Ordinance, however, neither dictates nor forbids selection of any particular message, theme or even mode of artistic expression.

Courts addressing comparable compelled speech claims have not always been clear whether the challenged regulations were upheld because they did not implicate First Amendment protections at all, or because the regulations passed muster under the appropriate level of First Amendment scrutiny. What is clear is that there is no absolute "right to remain silent" where a party has entered a field subject to government regulation or is seeking government benefits. The Supreme Court in *Wooley v. Maynard*, 430 U.S. 705 (1977) held that a state may not require citizens to display patriotic messages they disagree with on a license plate. It did not say that the First Amendment exempts citizens from displaying license plates with identifying numerals or an innocuous image of the state flower. School children may not be compelled to recite the pledge of allegiance. (*West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943). But as many generations of school children have learned to their dismay, students may still be required to submit written essays, or even recite a poem of their own choosing in front of their third-grade class.

When a citizen does enter into a regulated field, the government may not require the citizen to adopt or endorse an ideological message, but it may require a

party to engage in non-ideological speech that is reasonably related to the goals of the regulatory scheme.

In *Glickman v. Wileman Brothers & Elliott, Inc.*, 521 U.S. 457 (1997), the Supreme Court addressed federally promulgated marketing orders that required companies in the regulated fruit marketing program to pay assessments that were used in part to support a generic advertising program administered by committees of industry representatives. (*Id.* at 460-463.) The Supreme Court found the context and nature of the compelled subsidies for advertising determinative of both the appropriate standard of review and ultimate outcome of the plaintiffs' First Amendment claims. The challenged orders were (1) merely one particular feature of a comprehensive regulatory scheme affecting the industry; (2) imposed no restraints on participants' freedom to engage in speech of their own; (3) did not require plaintiffs to personally engage in speech; and (4) did not compel participants to support any particular political or ideological views. (*Id*. at 469-471.) Consequently, the appropriate standard of review for the regulations was that governing review of economic regulations in general, i.e., rational basis review, which the regulations easily passed. (*Id*. at 469- 470, 477.) The compelled contributions to the marketing program easily survived scrutiny under this standard.

In *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985), the Court concluded the government may constitutionally require attorneys to disclose certain factual information in their advertising as long as the disclosure requirements were "reasonably related" to the government's stated interest in preventing deception of consumers.

In *Beeman v. Anthem Prescription Management, LLC*, 58 Cal.4th 329, 353 (2013), the California Supreme Court reached a similar conclusion in a case involving compelled commercial speech under the free speech clause of the California Constitution. There, the challenged regulations required prescription drug claims processors to compile and provide certain information to their clients. Although this requirement was both state imposed and content-based, it did not require the plaintiffs to "adopt, endorse, accommodate, or subsidize a moral political or economic viewpoint with which the speaker disagreed." (*Id*. at 349.) The Court, citing numerous federal precedents, expressly applied a rational basis standard of review. (*Id*. at 356-361.)

In *Environmental Defense Center, Inc. v. U.S.E.P.A. ("Environmental Defense Center")*, 344 F.3d 832 (9th Cir. 2003), this Court upheld EPA regulations that required regulated parties to conduct educational programs regarding wastewater issues. The decisive factors found by the court were that the

regulations dictated no particular message or ideological viewpoint, and were consistent with the overall goals of the regulatory program. (*Id*. at 849-851.)

In each of these cases and others like them, the courts have found that the First Amendment interests at issue were vastly different than those at stake when a speaker is compelled to adopt or endorse an ideological message promulgated by government authorities. In this case, the BIA has an even weaker claim. Oakland's Ordinance does not require builders to express any discernable message at all. A builder may, for example, satisfy the Ordinance by commissioning a decorative fountain or mosaic, or tile work which consists of nothing but geometric patterns. On the other hand, a more venturesome builder who wishes to make a bold artistic statement is not prevented from doing so. The choice is that of the builder, not the City. The Ordinance does not control the message, if there will be a message at all. Indeed, the Ordinance does not even limit the medium. Art may take virtually any form, ranging from arches to woodwork, decorative to commemorative, and frescoes to fiberwork. (ER 014.)

The context is also important here. Land use is classically a field of intensive regulation. (*Cf. Environmental Defense Center*, 344 F.3d at 850.) It is also one in which the interests of private property owners and the public closely intertwine. While artwork required by the Ordinance may not be commercial speech, it certainly takes place in a commercial context. The primary goal of

building construction and design is not self-expression for the builder. The builder interests at stake are fundamentally economic in nature. To the extent the builder has an interest in the aesthetics of a project, they are the same interests the Ordinance promotes, i.e., making development attractive as well as functional. At worst the Ordinance makes mandatory what many builders do voluntarily in any case. Moreover, the duty imposed on builders is fundamentally no different in kind than that routinely imposed by more traditional aesthetic regulations, i.e., architectural review and landscaping requirements. A builder who is required to commission a frieze or statuary is no more burdened by the Ordinance than one who is required to install Mediterranean tile roofs, French bay windows or Italian decorative pines to satisfy local architectural standards. While artwork may differ somewhat from architecture for First Amendment purposes, the distinction is purely technical here. The purpose served by the Ordinance is fundamentally the same as any number of other building regulations, and it achieves its purpose in a manner far less intrusive than many.

Under these circumstances, a professed interest in not having to fund enhancement of a builder's own property with art of the builder's own choosing lies at the very outer margins of First Amendment protection, if it falls within the margin at all. At a minimum, the Ordinance easily survives scrutiny under the applicable rational basis test, precisely as the District Court found.

IV. CONCLUSION

The City of Oakland has crafted a highly flexible but effective percentage-for-art Ordinance that serves the City, its citizens and even affected builders well. It passes constitutional muster in all respects and should be upheld by the Court.

DATE: August 30, 2018

THE SOHAGI LAW GROUP, PLC

/s/ Margaret M. Sohagi

By: Margaret M. Sohagi
Philip A. Seymour
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Federal Rules of Appellate Procedure 29, 32(a)(5), and 32(a)(7), the foregoing amicus curiae brief is proportionally spaced, has a typeface of 14-point Times New Roman, and contains 6,997 words, excluding those sections identified in Fed. R. App. P. 32(f).

DATE: August 30, 2018

THE SOHAGI LAW GROUP, PLC

/s/ Margaret M. Sohagi

By: Margaret M. Sohagi
Philip A. Seymour
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION

CERTIFICATE OF SERVICE

I certify that on August 31, 2018, the foregoing amicus curiae brief was served on all parties or their counsel of record through the CM/ECF system.

DATE: August 30, 2018

THE SOHAGI LAW GROUP, PLC

/s/ Margaret M. Sohagi

By: Margaret M. Sohagi
Philip A. Seymour
Attorneys for Amicus Curiae
LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES; INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION