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8 UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
10 OAKLAND DIVISION  
11

12 BUILDING INDUSTRY ASSOCIATION – BAY )  
AREA, )

13 Plaintiff, )

14 v. )

15 CITY OF OAKLAND, )  
16 Defendant. )

No. \_\_\_\_\_

**COMPLAINT FOR  
VIOLATION OF  
FEDERAL CIVIL RIGHTS  
UNDER 42 U.S.C. § 1983**

**DECLARATORY AND  
INJUNCTIVE RELIEF**

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**INTRODUCTION**

1  
2 1. Building Industry Association – Bay Area (Association), brings this complaint for  
3 declaratory and injunctive relief against the City of Oakland (City) to overturn the Oakland Public  
4 Arts Requirements Ordinance (Ordinance). This law requires citizens seeking building permits  
5 to transfer property interests (including public art, fees, and public access to private facilities) to  
6 the City as a condition of developing their property, and to engage in government-approved  
7 speech, all in violation of the United States Constitution.

8 2. The Ordinance requires property developers to spend .5% or 1% of their project cost  
9 for on-site public art installations, provide public access to projects, and/or pay an in-lieu fee that  
10 the City will use to fund public art in public places.

11 3. These requirements compel developers to communicate or fund government  
12 approved art messages to obtain permits. Moreover, new development does not create the need  
13 for the art conditions and the Ordinance recognizes that it is not related to any public impact  
14 arising from new development.

15 4. The Ordinance therefore violates the United States Constitution. While the Fifth  
16 and Fourteenth Amendments allow the City to reasonably regulate development, they forbid local  
17 governments from imposing permit exactions that are unconnected and disproportionate to the  
18 direct impacts of development. The First Amendment forbids the government from forcing  
19 property owners to fund and convey government messages, including through art, as a condition  
20 of granting a permit. Since the Ordinance does all of this, it is unconstitutional, and the  
21 Association is entitled to equitable relief under 42 U.S.C. § 1983, and the Declaratory Judgment  
22 Act, including a preliminary injunction.

**THE PARTIES**

23  
24 5. Building Industry Association – Bay Area is a nonprofit corporation organized  
25 under the laws of the State of California and doing business in Alameda County and the City of  
26 Oakland. The Association comprises hundreds of home builders, developers, property owners,  
27 contractors, subcontractors, building trades, suppliers, engineers, and design professionals  
28 involved in the business of providing housing throughout the Bay Area, including Alameda

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1 County and the City of Oakland. The Association’s mission includes advocacy in support of  
2 housing opportunities for prospective home buyers and renters, and legal representation of the  
3 interests of its members and the community. Its mission also includes the enforcement of the law  
4 governing housing and residential development.

5 6. Some members of the Association are subject to the Ordinance. Others have  
6 considered applying for development permits, or may want to do so in the future, but are now  
7 subject to unconstitutional conditions on the exercise of the right to apply for development  
8 permits. Because the Ordinance causes particularized harm to the Association and its members,  
9 both would benefit from judicial relief.

10 7. Defendant City of Oakland is a political subdivision of the State of California, and  
11 the local governing authority in Oakland. The City enacted the Ordinance challenged by this  
12 lawsuit. The City is entitled to sue and be sued, and is constrained by the laws of the United  
13 States, including the United States Constitution, and 42 U.S.C. § 1983.

14 **JURISDICTION AND VENUE**

15 8. The claims in this action arise under the First and Fifth Amendments to the United  
16 States Constitution, as incorporated against the states by the Fourteenth Amendment. The Court  
17 has jurisdiction under 42 U.S.C. § 1983 and 28 U.S.C. § 1331. A remedy is sought under the  
18 Declaratory Judgment Act, 28 U.S.C. § 2201.

19 9. Venue is proper in this Court because this action concerns private property located  
20 in Oakland, California, and a legislative enactment of the City, all of which are within the  
21 jurisdiction of the Northern District of California.

22 **FACTS**

23 10. The City is responsible for approving development permits for property located in  
24 Oakland, under provisions of California state law and subject to constraints imposed by the United  
25 States Constitution.

26 11. The City has historically carried out a public art program for its own capital  
27 improvement projects, under its Public Art Ordinance No. 11086 C.M.S., adopted in 1989. This

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1 Public Art Ordinance does not apply to private construction, and does not require provision of  
2 publicly accessible art within private development.

3 12. In October, 2014, the City council proposed a new ordinance—the Oakland Public  
4 Arts Requirements Ordinance (Ordinance), Oakland Municipal Code Section 15.70.010,  
5 *et seq.*,—to require private developers to install publicly accessible art in new development  
6 projects or pay an in-lieu fee to fund public art on or within the City's capitol improvement  
7 projects.

8 13. The City adopted the law on December 9, 2014. The Ordinance went into effect on  
9 February 8, 2015. A copy of the Ordinance is attached hereto as Exhibit A and incorporated  
10 herein by reference.<sup>1</sup>

11 14. The Ordinance requires developers to install art works (worth at least .5% of the  
12 total cost for residential and 1% for commercial projects) on their property as part of a  
13 development project. While such art is to be placed on private property, the Ordinance demands  
14 that it be “publicly accessible.” Sections 15.70.050, 15.70.020, and 15.70.060A.

15 15. Developers may meet up to 75% of the art requirements by dedicating a space in  
16 the project, for either a free-of-charge art gallery, or for arts and cultural programming. Section  
17 15.070.060B.2. Such an area must be open to the general public during business hours.

18 16. When installing art to satisfy the Ordinance, builders must choose from a limited  
19 number of artists “verified” by the City. Section 15.70.070. Builders may use a different artist  
20 only if the City approves that person. All art designs must be submitted to the City before they  
21 are installed. Section 15.70.090.

22 17. Builders may opt out of the public art requirement only if they pay an in-lieu fee  
23 to the City, which fee will be used to fund the installation of publicly owned and accessible art on  
24 City property elsewhere in the City. Section 15.70.060B.1.

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28 <sup>1</sup> Subsequent section references are to the Oakland Municipal Code unless otherwise stated.

**DECLARATORY RELIEF ALLEGATIONS**

18. Under the Fifth and Fourteenth Amendments to the United States Constitution, the Association and its members have a right to just compensation for takings of their private property. They have a collateral right to be free from building permit conditions that exact private property interests, without just compensation, where there is no reasonable connection between the impacts of a proposed project and the exaction.

19. Under the First and Fourteenth Amendments to the United States Constitution, the Association and its members have a right not to speak. They have a right to refrain from conveying government speech. They have a collateral right to be free from permit conditions that coerce them to give up First Amendment rights to obtain a building permit.

20. On its face, the Ordinance exacts property from building applicants—including physical property, money, and the right to exclude strangers from private property—without just compensation and without any reasonable connection between these exactions and the social impacts of development. There is accordingly a justiciable controversy in this case as to whether the Ordinance violates the Fifth and Fourteenth Amendments.

21. On its face, the Ordinance further requires building applicants to engage in expressive, noncommercial speech as a condition of putting private property to developmental use.

22. There is accordingly a justiciable controversy in this case as to whether the Ordinance violates the First and Fourteenth Amendments.

23. A declaratory judgment as to whether the Ordinance and the permit conditions it imposes violate the Fifth and First Amendments will clarify the legal relations between the Association and Defendant, with respect to enforcement of the Ordinance.

24. A declaratory judgment as to the constitutionality and legality of the Ordinance will give the parties relief from the uncertainty and insecurity giving rise to this controversy.

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**INJUNCTIVE RELIEF ALLEGATIONS**

25. The Association has no adequate remedy at law to address the violations of their Fifth and First Amendment rights arising from the Ordinance and occurring under color of state law.

26. There is a substantial likelihood that the Association will succeed on the merits of its claims that the Ordinance violates the Fifth and First Amendment by requiring property owners to surrender unrelated property without compensation, where there is no connection between development and such exactions, and to engage in noncommercial speech.

27. The Association and its members will suffer irreparable injury absent a permanent injunction restraining Defendant from enforcing the Ordinance.

28. The Association’s injuries—subjection to uncompensated exactions of property which bear no relation to development, and forced speech—outweigh any harm the injunction might cause Defendant.

29. An injunction restraining Defendant from enforcing the unconstitutional Ordinance on its face will enhance, not impair, the public interest.

**LEGAL CLAIMS**

**FIRST CLAIM**

**Unconstitutional Exaction and Taking of Private Property—  
Facial Claim Under 42 U.S.C. § 1983**

30. The Association hereby re-alleges each and every allegation contained in Paragraphs 1 through 29 as though fully set forth herein.

31. The Ordinance conditions the exercise of a state law and common law property right—a property owners’ right to use and develop property—on the transfer of protected property interests, such as real and personal property, the right to control public access to property, and money to the City.

32. Money is constitutionally protected property.

33. The right to exclude the public from private property, and to control the time, place, and manner of any permitted public access, is constitutionally protected property.

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1           34. Real property and art works are constitutionally protected property.

2           35. If Defendant simply demanded that the Association’s members hand over portions  
3 of their real property, money, art works, or grant public access, it would be liable for a per se  
4 unconstitutional physical taking of property.

5           36. Under *Nollan v. California Coastal Commission (Nollan)*, 483 U.S. 825 (1987),  
6 *Dolan v. City of Tigard (Dolan)*, 512 U.S. 374 (1994), and *Koontz v. St. Johns River Water*  
7 *Management District (Koontz)*, 133 S. Ct. 2586 (2013), the government may constitutionally exact  
8 real property interests, money, and other property from property owners as a condition of  
9 development permission only if:

10           a. The exaction directly mitigates a public impact directly arising from the  
11 property owners’ development of their property;

12           b. The exaction is roughly proportionate in both nature and degree to the  
13 public impact arising from the property owners’ development of their  
14 property.

15           37. The public art requirements of the Ordinance and art fees are not related to, and do  
16 not address, any impact arising from the property owners’ exercise of their right to residential or  
17 commercial development of private property.

18           38. The exactions imposed by the Ordinance are not proportionate in either nature or  
19 degree to any impact arising from the property owners’ exercise of their right to residential or  
20 commercial development of property.

21           39. In requiring property owners such as the Association’s members to pay money,  
22 and/or dedicate art works and public access as a condition of exercising their state law property  
23 right to develop their property, the Ordinance imposes unconstitutional conditions and  
24 unconstitutionally exacts and takes private property.

25           40. The exactions imposed by the Ordinance violate the constitutional principles  
26 articulated in *Nollan*, *Dolan*, and *Koontz*.

27           41. The unconstitutional exactions arising from the Ordinance are imposed under color  
28 of state law and violate 42 U.S.C. § 1983.



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1 52. The First Amendment violations arising from the Ordinance are imposed under  
2 color of state law and violate 42 U.S.C. § 1983.

3 53. This claim seeks equitable relief sufficient to restrain the enforcement of the  
4 unconstitutional speech requirements arising from the Ordinance.

5 54. The Ordinance contains no waiver provision or administrative remedy and in any  
6 event, the Association need not exhaust administrative remedies prior to bringing this claim.

7 55. This facial First Amendment claim is ripe for immediate resolution in federal court.

8 **RELIEF SOUGHT**

9 WHEREFORE, the Association prays for judgment from this Court as follows:

10 1. A declaratory judgment that the Ordinance violates *Nollan, Dolan, and Koontz* and  
11 the Takings Unconstitutional Conditions doctrine on its face, and is therefore invalid and  
12 unenforceable;

13 2. A declaratory judgment that the Ordinance violates the First Amendment and the  
14 Unconstitutional Conditions doctrine on its face, and is therefore invalid and unenforceable;

15 3. A preliminary prohibitory injunction preventing Defendants from enforcing or  
16 taking further action to enforce the Ordinance on its face;

17 4. A permanent prohibitory injunction preventing Defendant from enforcing or taking  
18 further action to enforce the Ordinance on its face;

19 5. An award to the Association of reasonable attorneys' fees and expert fees for  
20 bringing and maintaining this action, including under 42 U.S.C. § 1988;

21 6. An award to the Association of costs of suit pursuant to Federal Rule of Civil  
22 Procedure 54(d); and

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