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BY HAND DELIVERY AND EMAIL

James R. Williams
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Re: Legal Deficiencies in Proposed Stanford University Housing Impact Fee Ordinance and Resolution, and Inclusionary Housing Ordinance

Dear Mr. Williams:

Santa Clara County officials currently are considering a requirement that Stanford University—and only Stanford University—pay a fee or build affordable units to address the demand for affordable housing generated by development of net new academic space. The proposed Stanford housing impact fee would be far higher than that levied, to our knowledge, on any other non-profit institution in the country. The County also is considering a requirement that Stanford alone reserve for affordable housing a specified percentage of units in its faculty/staff residential developments. Imposition of the contemplated Stanford housing impact fee and inclusionary housing requirement would represent deeply unsound policy for many reasons, among them that Stanford long has been a leader in developing affordable housing in the unincorporated County.

Such actions also would be unlawful. This letter explains why passage of the proposed Stanford housing impact fee would violate equal protection principles, constitutional limitations on exactions and the police power, due process protections, and procedural requirements in state and local codes. The letter also describes why enactment of the proposed Stanford inclusionary housing requirement would suffer from similar equal protection and exaction-related legal defects.

Committees of the Board of Supervisors recently have held hearings on a proposed ordinance that would impose the Stanford housing impact fee requirement, the "Stanford Community Plan Academic Space Affordable Housing Impact Mitigation Fee Ordinance," and an accompanying resolution that would set fees at unprecedented levels. For brevity, the term "Stanford Fee Ordinance," as used in this letter, refers to both the Stanford housing impact fee ordinance described here and the accompanying resolution establishing the amount of the fee.[1] A Board

[1] The proposed resolution is entitled "A Resolution of the Board of Supervisors of the County of Santa Clara Establishing Stanford University Community Plan Area Academic Space Affordable Housing Impact Mitigation Fee

committee also has considered the "Inclusionary Housing Ordinance," a Stanford-specific measure distinct from the Stanford Fee Ordinance described above (collectively, the "Ordinances"). The Planning Commission is scheduled to consider the Stanford Inclusionary Housing Ordinance on July 26, 2018. The only development projects covered by the Ordinances would be on Stanford lands; neither ordinance would apply to any other landowners in the County.

For several reasons detailed in this letter, it would be unlawful for the Board of Supervisors to enact the Ordinances.

First, by distinguishing without any lawful basis between Stanford and other landowners, the Stanford Fee Ordinance and the Stanford Inclusionary Housing Ordinance would violate equal protection principles.

- It is irrational to single out only one entity to bear the burden of addressing a regional problem. There can be no debate that many entities and other factors contribute to the region's affordable housing shortage. Singling out Stanford to address its contribution to this regional problem without applying similar requirements to other employers and housing developers is, on its face, nothing short of unconstitutional.

- The County's own studies are the best evidence showing why it is irrational to treat Stanford in a different manner from other non-residential and residential developers. The County's affordable housing nexus studies show that *all* analyzed non-residential and residential uses in the unincorporated County generate demand for new affordable housing units. While Stanford currently seeks approvals for a greater amount of new employment-generating space and new rental housing compared to other applicants, Stanford's proposed land uses are not uniquely different from other countywide land uses in terms of the nexus between new development and affordable housing demand. In fact, according to the County's own studies, Stanford's academic uses generate only about *63 percent* of the affordable housing demand of countywide office uses on a per square foot basis, yet the County has adopted no affordable housing fee that applies to office uses. Nor has the County adopted an inclusionary requirement that applies to housing development elsewhere in the County—even though the County has acknowledged that such residential development elsewhere would generate demands for affordable housing.

Second, the Stanford Fee Ordinance does not bear a reasonable relationship to the impact of Stanford's development on affordable housing demand, and therefore it would be invalid even if it were generally applicable countywide. Moreover, neither of the Ordinances can withstand the

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Amount and the Affordable Housing Fund." The draft ordinance is dated June 6, 2018; the draft resolution is dated June 12, 2018.

heightened judicial scrutiny that applies to ad hoc requirements that are imposed on only one property.

- The Stanford Fee Ordinance is based on the false and unsupportable assumption that the initial capital investment required to provide housing units is equivalent to the permanent subsidy needed to produce those units. To the contrary, the initial investment normally is provided in the form of soft debt or equity that is *repaid* in whole or part over time. The permanent subsidy is less than the amount of the initial investment.

- The Stanford Fee Ordinance is based on unsupported assumptions about the location where Stanford's affordable housing impacts would occur that are contradicted by the County's own published Environmental Impact Report.

- The Stanford Inclusionary Housing Ordinance is based on data that ignore the substantial amounts of affordable housing that Stanford provides on its campus, housing that the County's own General Plan Housing Element acknowledges as benefiting the entire region.

- The County's failure to coordinate the two Ordinances, and to properly address the overlap between the sources of affordable housing demand from Stanford's residential and academic development, creates excessive and duplicative requirements that would force Stanford to mitigate more than its share of impacts.

Third, the Stanford Fee Ordinance would exceed the County's police power by imposing a fee to address affordable housing demand generated outside County jurisdictional boundaries. The County has no authority to collect fees to address an impact that that the County's Environmental Impact Report shows would occur outside County limits.

Finally, passage of the Stanford Fee Ordinance under the County's current process would violate the County's own code, state statutes, and procedural due process protections. To the extent the fee is applied to the 2000 General Use Permit, the Stanford Fee Ordinance would constitute a modification to the approved use permit. Yet the County has failed to follow the procedures required for modification of a use permit. Further, the Stanford Fee Ordinance is inconsistent with the Stanford Community Plan, which is part of the County's General Plan.

In light of the numerous legal deficiencies in the Ordinances, we respectfully ask that the Office of the County Counsel advise the Planning Commission and Board of Supervisors to refrain from taking action upon or adopting either measure.

I. Background

Stanford is the only entity in unincorporated Santa Clara County to have paid a fee to support affordable housing. Under the 2000 General Use Permit, Stanford has paid fees of $20.37 per square foot of new academic space, based on the commercial fees charged by the City of Palo Alto. These fees generated $26 million since 2000, and will generate another $10 million through the life of the current General Use Permit. In addition, Stanford has proposed to contribute $20 per square foot of new academic space as part of the 2018 General Use Permit, at a value of $45 million, escalated over the life of the permit. We are aware of no other employer that has contributed housing fees at these levels. Moreover, Stanford is the only non-profit university to pay a fee anywhere in Santa Clara or San Mateo Counties, and Stanford builds a substantial amount of affordable housing, as described in Section II.B.3, below.

The Stanford Fee Ordinance and its accompanying resolution dramatically would increase housing fees on academic space development and would result in far higher fees than are imposed on commercial uses in neighboring jurisdictions. Specifically, the Stanford Fee Ordinance would impose a fee on academic space that by its second year would reach $143.10 per square foot, a seven-fold increase over what is set forth under the 2000 General Use Permit. When multiplied across the nearly 2.3 million net new square feet of academic space proposed under the 2018 General Use Permit, the fee would total *$325 million* over the life of the permit. Additionally, the fee would impose higher costs on developing remaining academic space under the current use permit, and the Stanford Inclusionary Housing Ordinance would add significant expense to residential projects.

The Stanford Fee Ordinance is a gross outlier relative to how non-profit institutions and other commercial developers are treated throughout the Bay Area and across the country. We have enclosed a memorandum dated April 26, 2018 in which Stanford's consultant presents data showing the following:

1. No Bay Area jurisdiction charges *any* housing impact fee to a non-profit college or university; other institutions like Stanford pay no fees at all.

2. Neighboring jurisdictions impose commercial fees at a fraction of the level proposed by the Stanford Fee Ordinance. The highest housing impact fee in the region charged to commercial developers is $35 per square foot and is applied to high-intensity office development that generates far greater employment density than Stanford's academic facilities.

Also enclosed with this memorandum is a table that shows the level of housing impact fees adopted on commercial uses in San Mateo and Santa Clara Counties. A brief review of this table shows the wide discrepancy between fees elsewhere in the region and those proposed under the

Stanford Fee Ordinance. While not listed on the table, even San Francisco assesses fees of only $27 per square foot for office space.

The attached table also shows that jurisdictions typically impose a housing impact fee on commercial uses that is no more than 2 to 17 percent of the amount an affordable housing nexus study deems the maximum fee that legally can be supported. Consistent with this practice, the County nexus study for commercial development outside of Stanford recommends consideration of a fee between $3 and $7 per square foot, or 1 to 7 percent of the "maximum" amount calculated in the nexus study, excluding warehouse uses. In contrast, the Stanford Fee Ordinance would impose a fee equal to 100 percent of the asserted maximum. The methodology used in the County's nexus study for Stanford has not been subjected to scrutiny in court because jurisdictions never impose the maximum rate on commercial development projects.

Finally, in the recent public discussion over the proposed fees, Stanford has acknowledged that it is fortunate to have a substantial endowment. However, Stanford also has explained that the vast majority of funds within the endowment are not discretionary. Funds to support numerous critical programs, therefore, must come from the small percentage of the endowment that is discretionary. Student financial aid is one of the biggest beneficiaries of the endowment. Stanford spends many millions of dollars every year on financial aid for students who otherwise could not afford to attend, with 57 percent of this aid coming from discretionary endowment funds. Those funds are the reason Stanford has become among the most affordable four-year colleges or universities in the country to low-income students; 82 percent of all undergraduate students graduate with zero debt.

II. Analysis of the Ordinances' Legal Deficiencies

A. The Ordinances Would Violate Equal Protection Principles

By imposing an affordable housing impact fee exclusively on Stanford, and not on any other non-residential property owners in the unincorporated portion of the County, the Stanford Fee Ordinance would fail to uphold the constitutional guarantee of equal protection of the laws. Similarly, the Stanford Inclusionary Housing Ordinance would violate equal protection principles for singling out Stanford from among all other residential landowners.

The equal protection clause of the Fourteenth Amendment protects against intentional and arbitrary discrimination, "whether occasioned by express terms of a statute or by its improper execution through duly constituted agents." *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000). The United States Supreme Court has "recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." *Id*. The courts have emphasized that "there must be a rational basis for the

difference in treatment of those similarly situated." *Genesis Environmental Services v. San Joaquin Valley Unified Air Pollution Control Dist.*, 113 Cal. App. 4th 597, 606 (2003) (determining that allegations regarding the unequal application of guidelines adopted by an air pollution control district stated a violation of the Equal Protection Clause under the standards for a claim by a "class of one"). "[T]he rational relation test will not sustain conduct by state officials that is . . . irrational or plainly arbitrary." *Lockary v. Kayfetz*, 917 F.2d 1150, 1155 (9th Cir. 1990) (reversing dismissal of an equal protection claim because triable issues of fact surrounded the existence of a water shortage cited by a utility district to justify denying requests for water hookups).

In interpreting these principles, several court decisions make clear that it is not rational to single out one entity to bear the burden of solving a regional problem to which multiple properties contribute. This is so, the courts have held, even where it may be rational for a government agency to seek to remedy the problem.

In *Gerhart v. Lake County*, 637 F.3d 1013, 1022 (9th Cir. 2011), at least ten of the plaintiff's neighbors allegedly built approaches to the same public street without permits before the county required the plaintiff alone to obtain an approach permit and then denied the application, in part, on the grounds that having too many approaches would be unsafe. The Ninth Circuit Court of Appeals found a genuine issue of material fact as to whether the county's action violated equal protection principles. *Id.* at 1023. The court reasoned: "Even if the Commissioners might have rationally feared that too many approaches would hinder safety of the lane, it may not be rational to require Gerhart to bear this burden alone." *Id.* at 1024. The court emphasized that rational basis review in this context "turns on whether there is a rational basis for the *distinction*, rather than the underlying government *action*." *Id.* at 1023 (stating that the district court "made a crucial error" in failing to appreciate this distinction).

Similarly, in *Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508–09 (9th Cir. 1990), the Ninth Circuit held that landowners stated an equal protection claim where the city required them to reserve land for butterfly habitat on their property, but did not impose the same requirement on owners of surrounding properties that were developed with uses similar to the proposed development. The landowners alleged that the city acted arbitrarily and unreasonably in requiring open space to be set aside on their property and that they were singled out to bear the burden of the city's efforts to "bring back" the Smith's Blue Butterfly. *Id.* The court wrote: "Although the objective of preserving a habitat for the Smith's Blue Butterfly is rational, it may not be rational to single out this parcel to provide it." *Id.* at 1509.

Finally, a decision from the Northern District of California reinforces the need for public agencies to offer a rational basis for singling out a property owner for separate treatment. *See Fry v. City of Hayward*, 701 F. Supp. 179 (N.D. Cal. 1988). In *Fry*, local voters enacted a measure providing that, in contrast to all other property owners in the City, the owner of a 108-

acre former golf course could not obtain a change in her property's zoning designation without prior voter approval. *Id.* at 180. The court agreed that protecting open space was a "legitimate legislative objective," but said that such a conclusion "utterly fails to address the key question: how is the *singling out of [the] property* rationally related to the City's legitimate open space objectives?" *Id.* at 182. The court found the record "devoid of any indication that [the] property bears any unique characteristics that would warrant separate treatment" and found, rather, that the presence of other open space parcels not subject to the measure suggested the opposite. *Id.* On this basis, the court invalidated the measure because its classification was not rationally related to a legitimate governmental interest. *Id.*

By requiring Stanford alone to pay a housing impact fee or to provide inclusionary units, the County would be requiring the University, without any rational basis, to shoulder a burden of addressing the regional need for affordable housing that the County has not required of other property owners. Although it may be permissible for the County to impose legally sound affordable housing requirements on landowners, it is impermissible to single out Stanford alone to meet such a requirement. *See Gerhart*, 637 F.3d 1013 at 1024; *Del Monte Dunes*, 920 F.2d at 1509. As the court found in *Fry*, the record associated with the Ordinances will be "devoid of any indication" that Stanford—and no other landowners—should be subject to a per square foot impact fee and inclusionary requirement. 701 F. Supp. at 182.

The Ordinances would fail both elements of the test identified by the United States Supreme Court in *Village of Willowbrook*, 528 U.S. at 564. The Ordinances would intentionally treat Stanford differently from others similarly situated, and there is no rational basis for the difference in treatment.

On the first point, the County's record could not be clearer: The County intends to adopt Ordinances that would apply to Stanford and that would not apply elsewhere in the unincorporated County.[2] Stanford would be treated differently from other similarly situated non-residential and residential developers under the Ordinances. Large employment-generating uses in the unincorporated County include, among others, Santa Clara Valley Medical Center and the garlic-producer Christopher Ranch. As of 2011, Santa Clara Valley Medical Center reported employing over 6,345 workers, though this figure may include some workers based at facilities other than its main campus in the unincorporated County.[3] Despite the presence in the unincorporated County of other employment-generating uses like these, the Stanford Fee Ordinance would single out Stanford to pay a housing impact fee. No fees on other such entities

[2] The County has initiated consideration of separate ordinances that might apply elsewhere in the County, but the Board of Supervisors has stated that it will not consider those ordinances until 2019. It is unknown whether the countywide ordinances will be adopted or what the resulting fee amounts would be, if any.

[3] *See* Santa Clara Valley Medical Center, Delivery System Reform Incentive Pool Plan (Feb. 18, 2011), at 5, available at http://www.dhcs.ca.gov/Documents/11_SCVMC%20DSRIP%20Proposal%202-18-11.pdf.

are proposed for adoption alongside the Stanford Fee Ordinance. Similarly, other land within the unincorporated county is zoned for housing development and could be re-designated or re-zoned for such development. Yet no inclusionary housing requirements for other housing developers are proposed for adoption alongside the Stanford Inclusionary Housing Ordinance.

Additionally, our research suggests that the County has not imposed housing fees or other conditions related to affordable housing on recent use permits issued to other employment-generating uses. Online searches located use permits that were (or likely were) issued or modified by the County since 2000 for 19 projects unassociated with Stanford that appear to generate at least some level of employment. These uses include a nursery, golf facilities, wineries, concert and events facilities, a recreational facility, religious institutions, a recycling and concrete crushing facility, a dog kennel and training facility, an agricultural processing facility, mining, storage, a commercial reception facility, and a wildlife refuge and rehabilitation facility. We have enclosed with this letter a table providing basic information about the use permits, including proposed use permits, we located and reviewed. In short, numerous employment-generating uses throughout the County have been issued use permits without any requirement that landowners address their demand for affordable housing.

The County itself is proposing a major redevelopment project at its main office complex, with no apparent commitment to address its affordable housing impacts. Although the County Civic Center site is located in the City of San Jose, the County has jurisdiction and was the lead agency for a Draft Environmental Impact Report released this May that proposed no mitigation for housing impacts. The Draft Environmental Impact Report acknowledges that the project would result in a net increase in jobs, but identifies no significant impacts or mitigation measures because "[t]here is currently an abundance of housing within the City of San Jose compared to the number of jobs within the City."[4] The County, therefore, is proceeding with its own employment-generating project without addressing the demand it will generate for affordable housing.

A similar analysis applies to the Stanford Inclusionary Housing Ordinance. There is other residential property in unincorporated Santa Clara County. However, we are not aware of any that has been subjected to a requirement that a certain percentage of new units be reserved as affordable, and no corresponding requirement is proposed for adoption.

With regard to the second element of the equal protection analysis, there is no rational basis for the difference in treatment between other employment-generating or residential project applicants and Stanford. The County's own nexus studies show that *all* analyzed non-residential

[4] Santa Clara County Civic Center Master Plan Project Draft Environmental Impact Report (May 2018), at 148, 204.

and residential uses would generate new demand for housing.[5] Yet under the Ordinances Stanford is the *only* employer the County would single out to pay an affordable housing fee, and the only residential developer the County would single out to provide inclusionary units.

Moreover, the nexus studies prepared by the County show that Stanford generates demand for affordable housing at a substantially *lower* level per square foot of academic space compared to other non-residential development in the unincorporated County. Data reported in the County's nexus studies indicate that Stanford academic uses generate about 63 percent the affordable housing demand of County office uses per square foot.[6] This is so because Stanford has a relatively low employment density per square foot of academic space. Academic facilities like concert halls, museums, academic farms, athletic venues, and gymnasia necessitate few employees per square foot.

While Stanford currently has applied to construct more new academic space and new rental housing than other applicants in the unincorporated County, the size of the development proposal would be accounted for in the total fees that might be collected under a generally applicable housing impact fee, as housing impact fees are assessed based on a project's net new square footage. The size of Stanford's development request cannot justify a unique requirement to charge Stanford a fee *per square foot* of new development that is not similarly imposed on others.

The Ordinances, therefore, would deny Stanford equal protection of the laws. Contrary to the extensive precedent discussed in this section, the Ordinances unlawfully would single out Stanford to address its contribution to a regional problem to which multiple properties also contribute. The Ordinances intentionally would treat Stanford differently from other similarly-situated landowners, and there is no rational basis for the difference in treatment.

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[5] *See* Keyser Marston Associates, Inc., Affordable Housing Nexus Studies (Public Review Draft, Apr. 2018), at 28–34. With regard to residential uses, the underlying premise of the County's affordable housing nexus studies is that, countywide, newly constructed residential units in the unincorporated County "represent new income in the County that will consume goods and services," and that this "[n]ew consumption generates new local jobs," a portion of which are at lower compensation levels. Based on this key premise, the County's nexus studies conclude that new residential development in the unincorporated area will increase housing demand for "lower income households that cannot afford market rate units and therefore need affordable housing." *Id.* at 28.

[6] This excludes warehouse uses, which generate very low rates of employment. *Compare* Keyser Marston Associates, Inc., Non-Residential Nexus Analysis, att. B (Dec. 2016), at 12–13 (providing findings for non-residential development in the unincorporated County outside of Stanford), *with* Keyser Marston Associates, Inc., Affordable Housing Nexus Analysis Addendum Addressing the Stanford University Campus, att. C (Public Review Draft, Apr. 2018), at 16 (providing comparable figures for Stanford).

B. The Exactions Imposed by the Ordinances Cannot Withstand Judicial Scrutiny

Even if one were to assume the County could treat Stanford differently from other similarly situated property owners, the Ordinances would not withstand the judicial scrutiny imposed by controlling decisions of the United States and California Supreme Courts. The amount of the proposed housing impact fee does not bear a reasonable relationship to the impact of Stanford's development on affordable housing demand. Further, as explained below, a less deferential standard applies to both proposed Ordinances because the Ordinances would not be applicable to others—resulting in a bar that that the County's proposals cannot clear.

1. Searching Judicial Scrutiny Would Apply

Impact fees and inclusionary housing mandates may be imposed on a development project only if the local agency can meet established legal standards that vary based on whether the requirements are imposed on a specific applicant on an ad hoc basis, or as part of a generally applicable legislative enactment.

Impact fees adopted as part of broadly-applicable legislation are subject to a "reasonable relationship" test. *See Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 876 (1996). Fees to which this standard applies "must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development." *San Remo Hotel L.P. v. City & County of San Francisco*, 27 Cal. 4th 643, 671 (2002).

However, the reasonable relationship standard applies only to legislatively imposed fees or other exactions that apply generally throughout a community. In *Ehrlich*, the California Supreme Court stated that this standard applies to "legislatively formulated development assessments imposed on a broad class of property owners." 12 Cal. 4th at 876. In *San Remo Hotel*, the California Supreme Court followed its own precedent and explained that a more searching standard of review applies to ad hoc exactions than to generally-applicable measures because exactions imposed only on a few citizens are more likely to escape adequate political controls:

> [G]enerally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees *for all property development*, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny

> mainly because, *affecting fewer citizens and evading systematic assessment*, they are more likely to escape such political controls.

27 Cal. 4th at 671 (emphasis added).[7]

Ad hoc requirements applied to an individual property or entity are subject to a more searching test established by the United States Supreme Court that requires a showing of "essential nexus" and "rough proportionality" between the exaction and the nature and extent of the impact of the proposed project. *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Ehrlich*, 12 Cal. 4th at 874–81.

In *Nollan v. California Coastal Commission*, 483 U.S. at 837, the United States Supreme Court held that an "essential nexus" must exist between a proposed condition on a development project and a projected impact of that project. There, the Court considered the permissibility of a permit condition on a residential project that would have transferred to the public a lateral beachfront easement across private property. The Court determined that no essential nexus existed between that easement to allow public access along the beach, and the burden the public agency found the project would impose on "visual access" to the beach from the street. *Id.* The Court required a close relationship between the condition and the impact to be addressed by the condition.

Subsequently, the United States Supreme Court decided *Dolan v. City of Tigard* and adopted a requirement of "rough proportionality" for an ad hoc, property-specific exaction. The Court explained the standard as follows: "No precise mathematical calculation is required, but the [agency] must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan*, 512 U.S. at 391. The United States Supreme Court applied the "rough proportionality" test to strike down a city's demand that a floodplain easement over private property include an additional public recreational easement. The Court found it "difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems along Fanno Creek," and noted that the city offered no individualized determination to support the public access component of its request. *Id.* at 393.

[7] A similar distinction would apply to an inclusionary housing ordinance. In *California Building Industry Association v. City of San Jose*, 61 Cal. 4th 435 (2015), the California Supreme Court upheld against challenge San Jose's citywide requirement that all new residential development projects of 20 or more units reserve at least 15 percent of for-sale units for low or moderate-income households. The court determined that such an affordability restriction is legally permissible, provided it "bears a reasonable relationship to the public welfare." *Id*. at 455, 461. However, the court in *California Building Industry Association* did not consider the standard that would apply to an ad hoc inclusionary housing requirement.

Finally, with regard to housing impact fees, both the United States Supreme Court and the California Supreme Court have held that the *Nollan* and *Dolan* standards apply to "monetary exactions" imposed on an ad hoc basis on individual property owners. In *Ehrlich*, 12 Cal. 4th 854, the California Supreme Court analyzed a condition of approval that required payment of a $280,000 recreation fee. The developer in *Ehrlich* had sought general plan and specific plan amendments to facilitate development of multifamily housing on its property. The developer did not apply to construct recreational facilities, but the proposed general plan and specific plan amendments would have removed a restriction on the property's use to commercial recreational activities. The court determined that the recreation fee must be analyzed under the *Nollan* and *Dolan* standards, as there is an "enhanced potential" for abuse of the police power where land use conditions are imposed in individual cases. *Id.* at 868–69. The court then struck down the fee for the city's failure to show it was roughly proportional to the local recreational need created by the development. *Id.* at 883. Subsequently, in *Koontz v. St. Johns River Water Management District*, 570 U.S. 595, the United States Supreme Court subjected "monetary exactions" to scrutiny under *Nollan* and *Dolan*, confirming that those decisions extend beyond dedications of land to govern requirements to spend money.

In sum, the courts would review the Ordinances under the heightened *Nollan* / *Dolan* standard of review because the Ordinances plainly do not have broad application. The Board of Supervisors, in fact, expressly decided to hold hearings on the Ordinances, both of which would apply exclusively to Stanford, while postponing until 2019 possible consideration of fees on residential and non-residential development everywhere else in the County. The Ordinances, therefore, do not involve "legislatively formulated development assessments imposed on a broad class of property owners." *Ehrlich*, 12 Cal. 4th at 876. Rather, under the Ordinances, the County would impose housing impact fees and inclusionary housing requirements on just one property owner—Stanford. And that property owner currently is seeking approval for a discretionary land use permit, the 2018 General Use Permit. Indeed, the County's Stanford-specific nexus study is based on the square footage and population growth identified in Stanford's application for the 2018 General Use Permit.[8]

While the Ordinances technically could apply to any "person, persons, or entity that applies for [development] in the Stanford Community Plan area," Stanford University is the sole landowner in the Stanford Community Plan area. Stanford is the unambiguous target of the Ordinances.

Because the Ordinances would apply only to Stanford, they would not be "subject to the ordinary restraints of the democratic political process," as the court has said is true of generally-applicable requirements. *San Remo Hotel*, 27 Cal. 4th at 671. The same rationale for heightened scrutiny applies here as to other ad hoc exactions, which "deserve special judicial scrutiny mainly

[8] *See* Keyser Marston Associates, Inc., Affordable Housing Nexus Analysis Addendum Addressing the Stanford University Campus, att. C (Public Review Draft, Apr. 2018), at 5-10.

because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls." *Id.* Other landowners would not be affected by the level of housing impact fees charged to Stanford or the inclusionary housing requirements imposed on Stanford and, therefore, would be unlikely to register their concern with elected officials.

2. The Proposed Stanford Fee Ordinance Does Not Bear a Reasonable Relationship and Lacks Essential Nexus and Rough Proportionality to Impacts from Stanford's Development

The Stanford Fee Ordinance would fail to satisfy the Courts' standards for imposition of an exaction, whether reviewed under the standard that applies to legislation of general application or to the heightened level of scrutiny that applies to ad hoc requirements. (The Inclusionary Housing Ordinance is discussed further in Section II.B.3, below.) Stanford identified multiple deficiencies in the Stanford-specific nexus study prepared by the County's consultant in a letter to the Board of Supervisors dated April 27, 2018 and a letter to two Board committees dated June 13, 2018. These letters and their enclosures are attached to this letter. We also summarize below certain main points the letters raise. The shortcomings in the County's Stanford-specific nexus study indicate the absence of the required reasonable relationship, as well as the lack of an essential nexus and rough proportionality between the Stanford Fee Ordinance and the impacts of Stanford's academic development.

a. The Calculated Subsidy for Affordable Housing Is Overstated

As indicated in Stanford's June 13 letter, the Stanford-specific nexus study calculates the maximum housing impact fee in a manner that greatly overstates the subsidy needed for production of affordable housing.

The maximum fee calculated by the County's consultant, Keyser Marston Associates (KMA), is based on a calculated "affordability gap," the entirety of which is treated as a permanent subsidy to build affordable units. However, this methodology fails to recognize that the initial investment the nexus study calls the "affordability gap" is financed with soft debt loans and equity investments that are expected to be *paid back* over time; the year-one initial investment is distinct from the amount of permanent subsidy needed to develop affordable housing. Future cash flow ordinarily pays back the loaned funds that are provided as soft debt to support affordable housing development, particularly in the Low-Income category (which comprises *75 percent* of Stanford-related affordability tiers), but KMA ignores this fact and does not account for loan repayments in its fee calculations. Loan repayments should be an offset to development costs to determine the true permanent subsidy required to support affordable housing development.

Failing to use a methodology that acknowledges the distinction between the initial investment and the permanent subsidy needed to produce affordable housing violates the requirement that any fee must be roughly proportional to the impacts of Stanford's development. Under the methodology used in the Stanford-specific nexus study, Stanford would be required to fund the entirety of an affordable housing project's initial capital investment with no consideration of future gains or returns on that investment that would be reaped by either the housing developer if the subsidy were provided in the form of a grant or, more likely, the County if the subsidy were provided in the form of a loan. This would lead to a fee far out of proportion to any permanent impact caused by Stanford's growth—and a fee that, consequently, would be unlawful.

A simplified example illustrates this point. Assume growth in academic space at Stanford were to generate demand for 100 low-income affordable housing units. Also assume that to build those 100 low-income affordable housing units, an initial investment of $70,000 per unit would be needed for a total of $7 million. If the County treats this entire initial investment as the required impact fee to be paid by Stanford, Stanford would provide $7 million to the County. One of two things would then happen. The County could grant an affordable housing developer $7 million to build 100 low-income units. Over time, the low-income units would produce revenue and equity such that those revenues would offset $5 million of the initial $7 million investment. In that case, the affordable housing developer, operator, or investor would profit because the grant that it received would be $5 million more than the permanent subsidy needed to produce 100 units of low income housing. More likely, however, the County would not award a grant for low-income housing. Rather, the County could provide the $7 million subsidy in the form of a loan. The affordable housing developer would use the loan to build 100 low-income units, and then as revenue comes in, the housing developer would repay the loan. In this second scenario, it is the County that would receive an unlawful windfall: The County could use the excess funds to finance additional affordable housing unrelated to the impacts of Stanford's development. In either case, Stanford would have paid $7 million in fees, yet the permanent subsidy required for 100 units of low-income housing would have been only $2 million. The excess $5 million in fees could be used for purposes beyond the impact for which the fees were collected.

Regardless of whether this windfall goes to the County or to a private party, the outcome would violate constitutional limitations on exactions, as there would be no reasonable relationship—much less rough proportionality—between the funds collected by the County under the Stanford Fee Ordinance and the impacts of Stanford's academic development. A 2014 decision from the United States District Court for the Northern District of California demonstrates why the County cannot impose a fee on a private developer that would allow the County or a private party to retain recovered funds for uses beyond addressing the impact that is directly attributable to Stanford's development.

In *Levin v. City and County of San Francisco*, 71 F. Supp. 3d 1072, 1081 (N.D. Cal. 2014), the court struck down a San Francisco tenant relocation ordinance that required property owners who sought to withdraw rent-controlled units from the rental market to obtain a city permit. As a condition on that permit, the ordinance required owners to pay displaced tenants the greater of a relocation payment or an amount equal to 24 times the difference between the units' current rent-controlled monthly rate and the purported market rate of a comparable unit. *Id*. at 1074, 1081. The court in *Levin* held that the condition failed to satisfy the essential nexus and rough proportionality requirements of *Nollan* and *Dolan*. The court determined that the ordinance's condition required an "enormous payout untethered in both nature and amount to the social harm actually caused by the property owner's action." *Id*. at 1085.

Similarly, here, the Stanford Fee Ordinance would represent an "enormous payout" untethered to the impacts of Stanford's academic uses. This type of wealth transfer would represent a blatant violation of governing law. The County cannot collect money from Stanford in an amount that is greater than the amount that is required to address the impacts of Stanford's development.

The state Subdivision Map Act recognizes the same legal principle in the context of required reimbursement for subdivision improvements. Local agencies are authorized to require that improvements installed for the benefit of a subdivision contain "supplemental size, capacity, number, or length" to benefit property outside the subdivision. Gov't Code § 66485. However, if a developer is required to bear the full year-one cost of the initial installation of improvements greater than those needed to serve the subdivision, the Map Act requires the local agency to enter into an agreement to *reimburse* the developer for the portion of the improvements' cost that exceeds the developer's fair share. *Id.* § 66486 ("[T]he local agency shall enter into an agreement with the subdivider to reimburse the subdivider for that portion of the cost of those improvements, including an amount attributable to interest, in excess of the construction required for the subdivision.").

Finally, the Mitigation Fee Act requires that municipalities justify and account for all fees they impose, including earnings on fee receipts, and use such fees solely for their intended purposes. Government Code section 66006(a) expressly provides: "Any interest income earned by moneys in the capital facilities account or fund shall also be deposited in that account or fund and shall be expended only for the purpose for which the fee was originally collected." Under the Mitigation Fee Act, any unexpended fees—or fee proceeds—in the public agency's account must be reimbursed to the property owner unless findings are made showing how the monies are going to be used for the purposes for which fees were imposed.

The permissible purpose of County housing impact fees imposed under the Stanford Fee Ordinance would be limited to the mitigation, in rough proportion, of impacts from Stanford's academic projects. Under the Mitigation Fee Act, any use for other purposes of fee proceeds or returns from fee-related investments, even if to develop additional affordable housing beyond

that required to offset Stanford's academic space impacts, would be prohibited by law. The County cannot collect and retain greater fees than the amounts needed to address the impact of the development project upon which the fees are imposed.

b. The Proposed Stanford Fee Ordinance Assumes Expenditure of Housing Fees in a Geographic Area That Does Not Match the Location of Increased Demand

The Stanford Fee Ordinance cannot meet the United States Supreme Court's "reasonable relationship," "substantial nexus," and "rough proportionality" tests for an additional reason, as well. The Stanford Fee Ordinance is premised on a methodology that assumes housing impact fees would be expended in a geographic area that does not match the location of the increased demand for housing caused by Stanford's academic development. This major error artificially inflates the projected cost of developing affordable housing to meet demand generated by new academic space and thus results in a maximum fee than cannot be justified.

Key provisions of the proposed Stanford Fee Ordinance do not correspond to the actual location of increased housing demand that results from new academic space at Stanford. First, Section 2 of the Resolution would impose a fee of $143.10 per square foot of academic space starting in the second year after the Stanford Fee Ordinance's operative date. The Stanford-specific nexus study identifies this amount as the maximum justifiable fee by accounting for factors that include calculating the cost of acquiring land for use as affordable housing within a six-mile radius of the Sanford campus.[9] Second, Section 5 of the Resolution states that housing fees "shall be used to provide affordable housing within a six-mile radius of the Stanford Community Plan Area."

KMA acknowledges that the six-mile geographic constraint results in higher fee maximums than if affordable housing were considered for areas with lower land costs.[10] Yet the six-mile radius relied upon in these provisions of the Resolution does not match the location of the increased demand for affordable housing caused by Stanford's academic development: The County's Environmental Impact Report for the 2018 General Use Permit shows that the demand for affordable housing would be distributed among jurisdictions throughout the Bay Area, not solely within a six-mile radius of campus. In fact, nearly half (approximately 48 percent) of the growth in households under the proposed 2018 General Use Permit is estimated to occur outside Santa Clara County.[11] Even within the County, the jurisdiction with the second highest demand for housing from Stanford workers (12 percent) is San Jose, which is located outside the six-mile

[9] *See* Keyser Marston Associates, Inc., Affordable Housing Nexus Analysis Addendum Addressing the Stanford University Campus, att. C (Public Review Draft, Apr. 2018), at 46.

[10] *See* Keyser Marston Associates, Inc., Affordable Housing Nexus Studies (Public Review Draft, Apr. 2018), at 46.

[11] Draft Stanford University 2018 General Use Permit Environmental Impact Report (Oct. 2017), vol. 1, at 5.12-17.

radius.[12] Please find enclosed with this letter a table replicated from the County's Environmental Impact Report that shows the projected household increase resulting from the 2018 General Use Permit in various Bay Area counties and cities. The table demonstrates just how dispersed Stanford's housing demand is, with a share of demand occurring as far away as Alameda County (about 10 percent) and San Francisco (about 8 percent).

The six-mile radius relied upon to justify the housing impact fee simply does not capture where much of the new demand for affordable housing will occur, as households choose where to live based on several factors beyond solely the location of one individual's workplace. The County's own consultant has recognized this basic point, writing in a nexus study prepared for another jurisdiction: "The choice of where one lives depends on additional factors (schools, style of housing, types of amenities, and local services, etc.) as well as where one works."[13]

Limiting development cost data to the immediate vicinity of Stanford is responsible for a large component of the academic space impact fee by inflating the affordability gaps, as shown below.

Affordability Gaps[14]			
Income Category	**Stanford**	**County**	**Difference**
Extremely Low (Under 30% AMI)	($402,000)	($251,500)	($150,500)
Very Low (30% to 50% AMI)	($321,000)	($175,500)	($145,500)
Low (50% to 80% AMI)	($281,000)	($136,500)	($144,500)
Moderate (80% to 120% AMI)	($399,000)	($181,500)	($217,500)

To remove the effect of the inflated Stanford-specific development costs, the academic space impact fee can be recalculated using the Countywide cost data, as shown in the following table.

[12] *Id.*

[13] Keyser Marston Associates, Inc., Jobs-Housing Nexus Study Prepared for City of San Diego (Aug. 2013), at 18.

[14] *See* Keyser Marston Associates, Inc., Residential Nexus Analysis, att. A (Dec. 2016) at 35, 42; Non-Residential Nexus Analysis, att. B (Dec. 2016), at 24, 32; Affordable Housing Nexus Analysis Addendum Addressing the Stanford University Campus, att. C (Public Review Draft, Apr. 2018), at 17, 34, 48, 50.

Mitigation Costs Per Square Foot of Academic Space (Maximum Supported Fee)[15]					
		Stanford (KMA Analysis)		Countywide (Analysis Based on KMA Countywide Assumptions)	
Income Category	Housing Need Per SF of Academic Space	Mitigation Cost Per Affordable Unit (Affordability Gap)	Mitigation Cost Per SF of Academic Space	Mitigation Cost Per Affordable Unit (Affordability Gap)	Mitigation Cost Per SF of Academic Space
Extremely Low	0.00001662	($402,000)	$6.70	($251,500)	$4.18
Very Low	0.00004765	($321,000)	$15.30	($175,500)	$8.36
Low	0.00018839	($281,000)	$52.90	($136,500)	$25.79
Moderate	0.00017094	($399,000)	$68.20	($181,500)	$31.03
Total Maximum Supported Fee			$143.10		$69.33

If Countywide development cost data were applied to the Stanford nexus analysis, as has been done for most if not all other jurisdictions, the impact fee for academic space would decrease to $69.33.

Constraining development costs to a subset of the County is contrary to KMA's standard approach, and reflects a methodology that KMA cautions against in its other published studies. In its nexus study for all other unincorporated parts of Santa Clara County, KMA calculated impact fees based on a Countywide average of the affordability gap. This approach avoided problems with "variation of real estate values and housing densities," which caused the affordability gap to "vary significantly from one part of the County to another."[16]

In its commercial nexus study for Napa County, KMA stated that, "[a]s a general rule, geographic area variations should be applied to already existing special areas with firm boundaries. Geographic variation for the purpose of fees alone is not advisable."[17] The

[15] *See* Keyser Marston Associates, Inc., Residential Nexus Analysis, att. A (Dec. 2016) at 35, 42; Non-Residential Nexus Analysis, att. B (Dec. 2016), at 24, 32; Affordable Housing Nexus Analysis Addendum Addressing the Stanford University Campus, att. C (Public Review Draft, Apr. 2018), at 17.

[16] *See* Keyser Marston Associates, Inc., Affordable Housing Nexus Studies (Public Review Draft, Apr. 2018), at 32; Non-Residential Nexus Analysis, att. B (Dec. 2016), at 21.

[17] Keyser Marston Associates, Inc., Draft Non-Residential Jobs-Housing Nexus Study Update Prepared for County of Napa (Apr. 2014), at 23.

commercial nexus study for Walnut Creek emphasized the same point when discussing the possibility of limiting a fee study to a redevelopment area:

> In general, geographic area special treatments are recommended only when they are previously established areas for another purpose. The same is true for the reverse treatment—having a fee program in effect only for a designated area such as the high density commercial zone or a newly developing area. Designating geographic boundaries for the sole purpose of fee application is to be avoided.[18]

Just as the public agency in *Dolan* could not require measures that failed to address the specific impacts that project would cause, so here the County may not require the funding of housing substantially in excess of the specific impacts caused by Stanford's academic development. Stanford previously submitted a memorandum dated April 26, 2018 from the consulting firm BAE Urban Economics that compares data from the Stanford-specific study to the Countywide study to indicate the magnitude of this difference: Land costs from the Stanford-specific study are 2.4 to 3.3 times higher than land costs shown in the Countywide study. We have enclosed this memorandum for your review and would direct you to pages 14 to 17 for the analysis.

County staff subsequently commissioned KMA to prepare a supplemental analysis dated May 8, 2018 that shows only a slight reduction in the maximum permissible fee (from $143.10 to $127.40 per square foot) if a six-mile radius no longer is used.[19] However, the revised analysis continues to overstate the permissible fee because it again inaccurately reflects the geographic distribution of housing demand from Stanford. As indicated above, only half (approximately 52 percent) of the growth in households under the proposed 2018 General Use Permit is estimated to occur within Santa Clara County.[20] This figure was published in the County's own Environmental Impact Report. However, the County's consultant failed to use this critical piece of data when calculating the level of permissible fees in the absence of a six-mile-radius assumption. Rather, the supplemental calculations assumed, without basis, that 100 percent of demand for housing would occur within Santa Clara County, with half of total housing demand occurring within the six-mile radius and the other half within "Central County."[21] The County's

[18] Keyser Marston Associates, Inc., Jobs Housing Nexus Analysis Prepared for City of Walnut Creek (Dec. 2004), at 49-50.

[19] County of Santa Clara Memorandum from Sylvia Gallegos, Kirk Girard, and Ky Le to the Board of Supervisors re: Supplemental Report – Affordable Housing Impact Fee Nexus Studies (May 8, 2018).

[20] Draft Stanford University 2018 General Use Permit Environmental Impact Report (Oct. 2017), vol. 1, at 5.12-17.

[21] *See* data tables provided by Keyser Marston Associates, Inc. to Stanford University, tbls. 1, 2 (May 15, 2018).

supplemental calculations, therefore, assume without evidence far too much housing demand within the County and far too much housing within the high-cost six-mile radius from the Stanford campus. These erroneous assumptions yield inflated estimates of how much it would cost to acquire land and construct the amount of affordable housing needed to meet demand generated by Stanford's academic uses.

As a result of these critical defects, there is an insufficient relationship between the Stanford Fee Ordinance and the impacts it is meant to address. For this additional reason, the Stanford Fee Ordinance would not satisfy the standards identified in governing United States Supreme Court precedents.

3. The Proposed Inclusionary Requirement Lacks Essential Nexus and Rough Proportionality to Impacts from Stanford's Development

The Stanford Inclusionary Housing Ordinance also would fail to meet the United States and California Supreme Courts' standards.

As a general matter, there is no demonstrated nexus between new residential development and the need for affordable housing. Residential nexus studies, including the County's Stanford-specific study, are not based on any research or empirical evidence supporting the existence of a cause-and-effect relationship between these two types of housing. While such a showing may not be necessary for generally-applicable inclusionary housing ordinances, it is required before the County may impose an ad hoc inclusionary requirement on a single entity.

Furthermore, an extraordinary percentage of existing and planned Stanford campus housing already qualifies, or will qualify, as affordable housing. Stanford discounts the rental housing it provides, including hundreds of graduate student apartments that are classified by Santa Clara County as affordable units for purposes of the Regional Housing Needs Allocation under state housing law. As shown in the Annual Reports for the 2000 General Use Permit, Stanford has constructed 1,011 net new housing units under that permit. In the Housing Element of its General Plan, the County officially has recognized 816 of these units as affordable to Very Low-Income and Low-Income households, and the County has attested to the California Department of Housing and Community Development that Stanford's affordable units qualify for purposes of meeting the County's state housing law obligations.

As the County, therefore, recognizes in its Housing Element, *more than 80 percent* of the units Stanford has constructed under the 2000 General Use Permit are affordable. Furthermore, Stanford anticipates opening the Escondido Village Graduate Residences within two years, which will add 1,300 *additional* graduate student apartments. As with Stanford's other graduate student apartments, all or most of these units are expected to meet state law definitions for affordable housing units.

Nevertheless, the Stanford Inclusionary Housing Ordinance arbitrarily excludes consideration of housing provided to Stanford students from eligibility as "inclusionary housing." This is despite the County's recognition in its Housing Element and its attestation to the State of California that such units constitute affordable housing.

There is no nexus to an impact of Stanford's residential development where, as here, Stanford already is producing a more-than-sufficient share of affordable units alongside the other housing units it builds. Given the substantial amount of affordable housing Stanford has produced and will continue to produce, there simply is no demonstrated impact of Stanford's residential development on affordable housing need. As the County's own Housing Element explains (p. 103): "By making this housing available, Stanford is reducing the demand for housing in nearby communities, thus making more housing available to all members of the community." By arbitrarily excluding student housing from eligibility, the Stanford Inclusionary Housing Ordinance improperly fails to account for existing and planned affordable housing units on campus.

The Stanford Inclusionary Housing Ordinance and the assumptions that underlie the ordinance also contain several other defects that further undermine any asserted nexus between Stanford's development and a requirement that Stanford build inclusionary units. Stanford submitted letters dated June 19, 2018 and July 6, 2018 that detail each of these defects, describe the underlying facts, and provide factual support and citations for the claims in the preceding paragraphs. We have enclosed these letters here for your review.

4. Overlap Between the Two Ordinances Exacerbates the Lack of Essential Nexus and Rough Proportionality to the Impacts from Stanford's Development

The Ordinances would violate the applicable constitutional standards for another, independent reason: They do not adequately address the overlap between the affordable housing demand generated by Stanford's residential development and the demand generated by its academic development. As a result of this deficiency, the two Ordinances in combination would impose duplicative and excessive housing requirements on Stanford that would not be proportionate to its housing impacts.

A review of other affordable housing nexus studies prepared by the County's consultant, KMA, revealed that the Stanford-specific nexus study deviates from KMA's typical methodology. When a jurisdiction is considering imposing housing requirements to address the impacts of both residential and non-residential (e.g., commercial) development, KMA typically uses a methodology that ensures that the two sets of requirements do not overlap with one another. This approach is based on the recognition that if new residences necessitate new workers to serve those residences, those new workers may work in the new commercial development. Thus, the

demand from residential and commercial development is not additive—the demand overlaps. But the Stanford-specific nexus study does not follow this approach.

The County's own nexus study prepared by KMA for non-Stanford lands illustrates the typical approach. Specifically, the study proposes a maximum fee on non-residential development ($7 per square foot) that represents 3 percent of the demand for affordable units that would be generated by new non-residential space. The study further proposes a maximum fee on residential development ($16 per square foot) that represents 96 percent of demand for affordable units that would be generated by new residential space. The study then explains that these two figures add up to 99 percent of the housing demand—by keeping the aggregate total under 100 percent, this methodology ensures there is no overlap between the requirements that are imposed on non-residential development, and those imposed on residential development.[22]

But this approach is not used for Stanford. For Stanford, as KMA represents and the County's staff report recognizes, the 16 percent inclusionary requirement is intended to satisfy 100 percent of the demand that would be generated by Stanford's residential development.[23] KMA further recommends a housing impact fee of $143 per square foot of academic space, in order to generate 964 affordable units, which according to KMA represents more than 96 percent of the demand (i.e., 999 units) that would be generated by Stanford's academic development.[24] While KMA purports to address the overlap issue by reducing the number of units, from 999 to 964, that serves as the basis for calculating the housing impact fee on academic uses, this small reduction represents a substantial deviation from KMA's standard approach and results in a cumulative total that clearly exceeds 100 percent of the demand.

In summary, the Ordinances deviate from KMA's normal methodology used to recognize the potential for double-counting housing impacts from developing residential and non-residential uses, and, for this additional reason, the Ordinances' proposed requirements are not roughly proportionate to the true impacts of Stanford's campus development.

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[22] *See* Keyser Marston Associates, Inc., Non-Residential Nexus Analysis, att. B (Dec. 2016), at 57-58.

[23] *See* Keyser Marston Associates, Inc., Affordable Housing Nexus Analysis Addendum Addressing the Stanford University Campus, att. C (Public Review Draft, Apr. 2018), at 32 tbl. III-5.

[24] *Id*. at 14 tbl. II-7B, 16 tbl. II-8, and 17 tbl. II-11.

C. The Stanford Fee Ordinance Unlawfully Would Require Stanford To Fund Affordable Housing Based on Demand Generated in Other Counties

By purporting to authorize the County to levy a fee to address affordable housing demand generated outside its jurisdictional boundaries, the Stanford Fee Ordinance would exceed the police power granted to the County by the California Constitution.

The proposed housing impact fee is calculated to address impacts that occur outside Santa Clara County limits. The County's Stanford-specific nexus study calculates the housing fee based on housing demand generated both within and outside of Santa Clara County, as the first step in the nexus analysis is to identify the total number of workers to be added by buildout of academic space under the 2018 General Use Permit.[25] The County's Environmental Impact Report for the 2018 General Use Permit shows that about 48 percent of Stanford's off-campus workers live outside of Santa Clara County, and therefore 48 percent of Stanford's housing demand would occur outside of Santa Clara County.[26] The Stanford Fee Ordinance would set the housing fee at the maximum level the County's nexus study claims is permissible, a level that includes affordable housing demand generated outside the County. For this reason, the fee is overstated, as the County lacks the authority to address impacts in other jurisdictions.

KMA acknowledges that if an adjustment were made to reflect the percentage of Stanford employees who do not live within Santa Clara County, the maximum supportable fee would be reduced by 48.2 percent. In studies prepared for other jurisdictions, KMA reduced the maximum supportable fee to account for employees living outside the jurisdiction. For example, KMA reduced its calculation of San Diego's commercial affordable housing impacts by more than one-third to recognize that only 58.6 percent of San Diego jobs were held by residents.[27] Similarly, KMA reduced its calculation of affordable housing impacts by 45 percent for San Francisco's inclusionary requirement.[28] KMA also adjusted its calculation of affordable housing impacts for Cupertino, where only 10 percent of jobs were held by residents.[29] KMA did not, however, adjust Stanford's affordable housing demand to account for commuters outside Santa Clara County.

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[25] *See* Keyser Marston Associates, Inc., Affordable Housing Nexus Analysis Addendum Addressing the Stanford University Campus, att. C (Public Review Draft, Apr. 2018), at 6.

[26] Draft Stanford University 2018 General Use Permit Environmental Impact Report (Oct. 2017), vol. 1, at 5.12-17.

[27] Keyser Marston Associates, Inc., Jobs-Housing Nexus Study Prepared for City of San Diego (Aug. 2013), at 32.

[28] Keyser Marston Associates, Inc., Residential Nexus Analysis Prepared for City and County of San Francisco (Apr. 2007), at 33.

[29] Keyser Marston Associates, Inc., Non-Residential Jobs-Housing Nexus Analysis Prepared for City of Cupertino (Apr. 2015), at 30 (discussing 2004 nexus study).

The following table provides a recalculation of the academic fee using the commute boundary adjustment.

Commute/Boundary Adjustment[30]		
	Stanford (KMA Analysis)	**Countywide (Analysis Based on Countywide Assumptions)**
Income Category	Mitigation Cost Per SF of Academic Space	Mitigation Cost Per SF of Academic Space
Extremely Low	$6.70	$4.18
Very Low	$15.30	$8.36
Low	$52.90	$25.79
Moderate	$68.20	$31.03
Total Mitigation Cost/Maximum Supported Fee	$143.10	$69.33
Commute Adjustment, Employees Living Outside County (48.2%)	($68.97)	($33.41)
Adjusted Total Maximum Supported Fee	$74.13	$35.92

Combined, removal of the artificial six-mile radius for use of the fee and removal of employees who live outside Santa Clara County reduce the maximum supportable housing impact fee for academic space by approximately 75 percent from $143.10 to $35.92.

The County has no extraterritorial powers and, therefore, cannot impose a fee to address housing demand outside its jurisdictional boundaries. Article XI, Section 7 of the California Constitution grants broad "police powers" to local governments. The provision states: "A county or city may make and enforce *within its limits* all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const., Art. XI, § 7 (emphasis added). This constitutional "police power" serves as the basis for a local government to impose conditions on a development project, either by ordinance or project-specific conditions. The County's authority to impose housing impact fees is confined to addressing impacts that occur "within its limits."

[30] *See* Keyser Marston Associates, Inc., Affordable Housing Nexus Studies (Public Review Draft, Apr. 2018), at 35; Affordable Housing Nexus Analysis Addendum Addressing the Stanford University Campus, att. C (Public Review Draft, Apr. 2018), at 17.

Courts interpreting the phrase "within its limits" long have recognized that a city or county "generally has no extraterritorial powers of regulation" and therefore "may not exercise its governmental functions beyond its corporate boundaries." *See City of Oakland v. Brock*, 8 Cal. 2d 639, 641 (1937) (while city had the authority to inspect meat sold within the city and slaughterhouses located within the city, it did not have the power to inspect slaughterhouses beyond its borders, even if the slaughterhouses provided meat to its inhabitants).

There is an exception to this general rule when the exercise of extraterritorial powers is essential to the proper conduct of local governmental affairs. *See Ex Parte Blois*, 179 Cal. 291, 296 (1918) (citing cases). There also is an exception where a local government acts as a contractor, rather than as a regulator pursuant to its police power. *See Burns Int'l Security Services Corp. v. County of Los Angeles*, 123 Cal. App. 4th 162, 168–72 (2004) (upholding county requirement that companies contracting with the county accord certain benefits to their employees, even where the companies are located outside of the county's jurisdiction). But neither of these two exceptions would apply here. First, imposing a housing fee on Stanford based on impacts in other counties would not be essential to the County's exercise of its governmental functions and affairs. Second, in imposing a housing fee on Stanford's development of its campus, the County would be acting in a regulatory capacity as a land use permitting agency under its police powers, and not as a contracting agency.

Mulville v. City of San Diego, 183 Cal. 734 (1920), is the leading case interpreting the constitutional text "within its limits." There, the plaintiff, a voter and taxpayer within the city's municipal improvement district no. 1, challenged the district's sale of bonds for the construction of waterside improvements that would be located in large part outside of the district's boundaries. The California Supreme Court agreed with the plaintiff and enjoined the sale of the bonds. The court explained that a municipality may not act outside of its boundaries unless such power is granted by the Legislature:

> The general rule is that without legislative grant the authority of the municipal corporation is confined to its own area; hence its acts and ordinances have no force beyond its corporate limits. Thus, in the absence of such grant the municipality cannot open a street, repair a highway, grade an avenue, or aid in the construction of a plank road or bridge beyond its boundaries. Sometimes authority to act outside of the municipal boundaries may be implied on the ground of necessity, as, for example, to obtain outlets for sewers and drains…. Likewise a municipality, possessing power to supply its inhabitants with water, may acquire for that purpose a water supply without its territory….

> Therefore, in a case of a municipality, power to act outside of the boundaries of the municipality is dependent entirely upon legislative grant; it does not exist unless expressly granted, necessarily or fairly implied in or incident to the powers expressly granted, or essential to the declared objects and purposes of the corporation.

Id. at 737–38 (citations omitted). The court concluded that the same rule applied by analogy to whether the municipal improvement district in the case at hand properly could issue the challenged bonds, "the proceeds of which are to be used in the construction of public works outside of the boundaries of the district." *Id*. Looking to the underlying statute that authorized the district's formation and its operations, the court found that the district did not have the authority to issue the bonds, since the district's authority was limited to the area within its boundaries.

Similarly, the County's authority in relation to housing impact fees is limited to the affordable housing demand that Stanford's academic uses would generate within the County. Yet the proposed fee amount under the Stanford Fee Ordinance is premised, in part, on impacts that would occur *outside* of the County. The proposed fee, therefore, is higher than permissible under the County's police power. Under the authorities discussed above, the County may not collect housing fees to address impacts that occur outside of County jurisdiction.

This flaw in the Stanford Fee Ordinance would remain even if the County were to use fees collected from Stanford to provide additional affordable housing within the County in an attempt to meet the demand projected outside the County. Under this scenario, demand outside the County would remain for affordable housing attributable to Stanford academic uses. There are no data or other evidence to show that all Stanford employees who need affordable housing would live in the County if housing were available there. Rather, households balance numerous factors in determining where to live, only one of which is the location of one worker's place of work. This is especially true of two-income households, the norm in the Bay Area.

D. Passage of the Stanford Fee Ordinance Would Violate the County Code, State Statutes, and Due Process Requirements

At present, the Board of Supervisors plans to consider the Stanford Fee Ordinance at its August 28, 2018 meeting, without any hearings at the County Planning Commission. However, to the extent that the ordinance would be applied to development authorized by Stanford's 2000 General Use Permit, the Stanford Fee Ordinance would constitute a modification to the adopted use permit. By failing to hold a Planning Commission hearing on a potential modification to the 2000 General Use Permit, the County would violate its own code, state law, and procedural due process rights.

The Stanford Fee Ordinance would conflict directly with Condition F.6 of the 2000 General Use Permit, by purporting to change the requirements that would apply to the remaining campus development authorized under that permit. Condition F.6 requires that Stanford either provide an affordable housing unit for each 11,763 square feet of academic development or pay an affordable housing fee equal to the amount Palo Alto is charging to commercial development projects. In accordance with this longstanding permit condition, Stanford has paid fees of $20.37 per square foot of academic space, based on the commercial fees charged by Palo Alto.

In contravention of this permit condition, the Stanford Fee Ordinance and its accompanying resolution would dramatically increase housing fees on academic space development within the Stanford Community Plan area. Specifically, the ordinance would impose a fee on academic space that by its second year would reach $143.10 per square foot, a seven-fold increase over what is set forth in the 2000 General Use Permit. Fees under the new Stanford Fee Ordinance would take effect 60 days after the Resolution was adopted, and no exemption is provided for the remaining development under the approved 2000 General Use Permit. Thus, the Stanford Fee Ordinance would seek to change the conditions of the 2000 General Use Permit, but without following the proper procedures for implementing such a change.

Indeed, the County Code of Ordinances does not authorize the Board of Supervisors to modify an issued use permit on its own. Rather, the Planning Commission must hold a hearing before the County may modify a use permit. Code of Ordinances §§ 5.20.210(B), 5.65.070. An appeal may be taken to the Board of Supervisors. *Id.* §§ 5.10.020, 5.20.210(D).

Furthermore, state statutes and procedural due process protections require that a property owner receive notice that modifications to its approved use permit might be considered at a public hearing. The state Government Code provides that a public hearing must be held on a proposed modification to a use permit and that notice of that hearing must be provided by adhering to detailed statutory provisions. Gov't Code §§ 65091, 65905. Among these provisions is a requirement that the landowner receive notice of the use permit modification hearing. *Id.* § 65091(a)(1).

Due process protections also require provision of notice and an opportunity to be heard specifically on the proposed modification of the 2000 General Use Permit. Governmental decisions that are adjudicatory in nature are subject to procedural due process requirements, while purely legislative action is not. *Horn v. County of Ventura*, 24 Cal. 3d 605, 612 (1979). Decisions on use permits are adjudicatory. *Id*. at 613; *Johnston v. City of Claremont*, 49 Cal. 2d 826, 834 (1958); *Neighborhood Action Group v. County of Calaveras*, 156 Cal. App. 3d 1176, 1186 (1984). A use permit "creates a property right which may not be revoked without constitutional rights of due process." *Malibu Mountains Recreation, Inc. v. County of Los Angeles*, 67 Cal. App. 4th 359, 367 (1998). "Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest."

Horn, 24 Cal. 3d at 612. The requisite notice must be "adequate in light of the purpose to be served." *Drum v. Fresno County Dep't of Public Works*, 144 Cal. App. 3d 777, 782 (1983).

For similar reasons, the Stanford Fee Ordinance also would conflict with the Stanford University Community Plan. Implementation Recommendation SCP-H(i)8 (p. 54) calls for the County to identify an appropriate payment Stanford may make to address affordable housing needs generated by new academic development. The implementation measure provides that the payment "shall be equal to the affordable housing payment (also known as the below market rate program payment) charged by the City of Palo Alto when the development project is built." By imposing a housing impact fee on academic space that would represent a substantial increase over Palo Alto's equivalent fee, the Stanford Fee Ordinance would be inconsistent with the Stanford Community Plan. *See, e.g., Spring Valley Lake Ass'n v. City of Victorville*, 248 Cal. App. 4th 91, 101 (2016) (concluding that substantial evidence did not support a public agency's finding of a project's consistency with its general plan where substantial evidence was not presented to show consistency with a general plan implementation measure). The County has not provided notice of or complied with the procedural requirements that pertain to amendments to its General Plan.

In sum, under the County's current proposed process for adopting the Stanford Fee Ordinance, the County would violate its own code, the state Government Code, and procedural due process. First, as described above, the County code plainly does not allow the Board of Supervisors to consider a modification to the 2000 General Use Permit in the first instance; only the Planning Commission may hold such a hearing. Second, Stanford and other specified parties must receive notice that the County is considering a modification to the 2000 General Use Permit. Such an action must properly be noticed as a modification to an existing use permit. Third, the County has not followed its required procedures for amendments to its General Plan.

In short, it would be unlawful for the Board of Supervisors to enact the Stanford Fee Ordinance or the Stanford Inclusionary Housing Ordinance. We very much appreciate your careful consideration of this analysis. We respectfully request that the Office of the County Counsel inform Planning Commission and Board of Supervisors members of the significant liability the County would assume by passing either ordinance, and advise the Planning Commission and Board of Supervisors to refrain from taking such action.

We are available to meet at your convenience. We value our working relationship with the County Counsel's Office and would be pleased to provide you with any further information that might prove useful. Thank you, once again, for your attention to this issue.

Very truly yours,

Barbara J. Schussman

List of Enclosures:

Attachment A:	Rates of Adopted Commercial Fees in Nearby Jurisdictions and Comparisons to Nexus Study Maximum Fees
Attachment B:	Santa Clara County Use Permits for Non-Stanford Employment-Generating Uses
Attachment C:	Draft Stanford University 2018 General Use Permit Environmental Impact Report Table 5.12-11
Attachment D:	Letter from Stanford University to County Board of Supervisors dated April 27, 2018 re: Stanford Affordable Housing Impact Fee Nexus Study
Attachment E:	Memorandum from BAE Urban Economics to Stanford University dated April 26, 2018 re: Review of Santa Clara County Affordable Housing Nexus Study
Attachment F:	Letter from Stanford University to County Board of Supervisors Committees dated June 13, 2018 re: Draft Affordable Housing Impact Mitigation Fee Ordinance, and attachments
Attachment G:	Letter from Stanford University to County Housing, Land Use, Environment, and Transportation Committee dated June 19, 2018 re: Draft Inclusionary Housing Ordinance and Draft Affordable Housing Impact Mitigation Fee Ordinance
Attachment H:	Letter from Stanford University to Sylvia Gallegos, Deputy County Executive, dated July 6, 2018 re: Stanford's Affordable Housing Stock, and attachments

cc: Elizabeth G. Pianca, Office of the County Counsel, County of Santa Clara

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