Supreme Court Case No. S213468

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF PERRIS

Petitioner,

vs.

RICHARD C. STAMPER, DONALD D. ROBINSON, AND DONALD DEAN ROBINSON LLC,

Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO
CASE NO. E053395

ON APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY, HON. DALLAS S. HOLMES, JUDGE
CASE NO. RIC524291

ANSWER TO PETITION FOR REVIEW BY RICHARD C. STAMPER, DONALD D. ROBINSON, AND DONALD DEAN ROBINSON, LLC

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TABLE OF CONTENTS

Page

Page

TABLE OF AUTHORITIES

Page(s)

California Cases

Page(s)

California Statutes

Federal Cases

Treatises

1. STATEMENT OF ADDITIONAL ISSUES IF REVIEW IS GRANTED.

A. The Eminent Domain Law requires that influences of the project for which a government agency is condemning must be ignored in connection with valuing the property being taken. Are project-influenced dedication requirements, like the City of Perris' claim that its Indian Avenue realignment project creates a basis for requiring a dedication of the entire right-of-way needed for this project, exempt from the project-influence rule?

B. As a matter of law, can a claimed dedication requirement meet the Nollan/Dolan "essential nexus" and "rough proportionality" tests when the city claiming the dedication admits that: (1) the need for the road project giving rise to the claimed dedication is generated exclusively by preexisting development and that the road will be built regardless of whether the property being taken is ever developed; and (2) if the land leftover after the taking is ever developed, its owners will have to pay traffic fees to offset all impacts of the development with no reduction for receiving zero compensation for the dedication, meaning the owners will pay at least twice the amount of any impacts of development?

2. INTRODUCTION.

The opinion of the Court of Appeal in this case plows no significant new ground. It does nothing more than reaffirm the long-established proposition that valuation issues in an eminent domain case are to be tried by a jury. Specifically, just as this Court determined in Metropolitan Water District vs. Campus Crusade for Christ (2007) 41 Cal.App.4th 954, 973 that

the reasonable probability of a zone change is a valuation issue for the jury – because the issue goes to the value of the property being taken – the Court of Appeal here simply determine that the reasonable probability of a dedication requirement, which the City claims will lower the value of the taking, is a valuation issue that also goes to the jury. And there is nothing more complicated about determining the reasonable probability of a dedication than about determining the reasonable probability of a zone change; a properly instructed jury can readily decide either issue.

Likewise, the opinion of the Court of Appeal does nothing more than follow the long-established rule in eminent domain cases that parties must simultaneously exchange statements of valuation before trial for **all** witnesses who will testify about value-related issues, including owners and other party-affiliated witnesses, and that one party cannot ambush the other at trial by having its employees testify to their undisclosed valuation opinions by claiming they have some percipient knowledge. Here, the Court of Appeal simply concluded it was unfair for the City to use its City Manager and City Engineer as valuation witnesses, when the City had hidden their planned testimony from the owners.

More specifically:

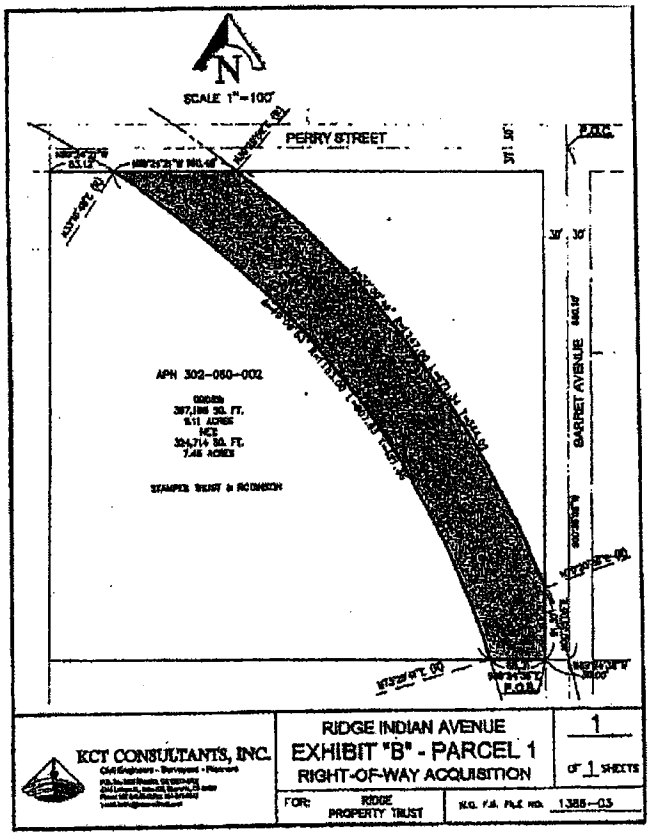
- **The Court of Appeal was correct in deciding the reasonable probability of a dedication requirement must be heard by the jury:** In Campus Crusade for Christ, this Court clarified that valuation determinations in eminent domain cases are for the jury and that the "issues we reserved for the trial court in condemnation actions have been issues of law – or mixed issues of law and fact where the legal issues predominate." Here, the reasonable probability of a dedication requirement (including the

subsidiary issue of the legality of a dedication requirement) raises primarily fact-based issues: Would a fair-minded City Council actually impose a 20-percent dedication requirement, when the realignment of Indian Avenue has nothing to do with development of the Stamper/Robinson property? Since the City is building Indian Avenue regardless of development of the Stamper/Robinson property and still requires them to pay all transportation fees, is there a connection, or nexus, between any development of their property and a need for the claimed dedication? With all fees still required, is the claimed dedication roughly proportionate to the impact created by any development? Numerous cases teach that in a case where the law says an issue goes to a jury, a properly instructed jury can determine constitutional issues such as these Nollan/Dolan issues. In short, the Court of Appeal simply applied existing case law; it did **not** "depart from over 100 years of established eminent domain law." In fact, not one of the cases that the City cites actually **holds** that dedication issues are for the judge; instead, the judge/jury issue was **not** a litigated issue in any of them.

- **The City's case is not based on "lay witness testimony" of its City Engineer and City Manager; their testimony was typical expert opinion testimony; and more importantly, whether lay or expert opinion testimony, the City had to disclose it before trial:** The City argues that the Court of Appeal "is excluding the lay testimony of percipient witnesses, Mr. Motlagh and Mr. Belmudez, who both testified exclusively as to matters that they personally observed." Nonsense. For example, as the City

admitted in its Petition for Rehearing, its City Engineer "analyzed the traffic studies and data based on several hypothetical developments for the highest and best use of the Stamper property . . . ." This is obvious expert testimony on the key valuation issue. But more importantly, whether or not this testimony was "expert opinion" or "lay opinion," the City was required **to disclose it** before trial at the **simultaneous** exchange of valuation data. (See Code Civ. Proc., §§ 1258.210 et seq.) But the City decided to ignore this requirement. Thus, all that the Court of Appeal actually decided was that, if the City wants its employees to testify to opinions, the City must disclose the substance of these witnesses' opinions before trial. The Court of Appeal's ruling in no way contradicts precedent "all the way back to 1894," as the City argues. To the contrary, no cases have ever sanctioned the type of ambush trial tactics the City implemented here.

More broadly, this case represents an extreme example of government overreaching and eminent domain abuse. Here, the City of Perris has ripped out – destructively from its middle – nearly 20 percent of Messrs. Stamper and Robinson's property:



This left Messrs. Stamper and Robinson's flat, 9-acre, industrially zoned property – one ideally suited and situated for the giant warehouses and logistic facilities that the market dictates for the area – virtually unusable. Yet, despite the huge damage to the property – $1.3 million – the City claims it must pay only $44,000 in compensation because it says it would have required Messrs. Stamper and Robinson to "dedicate" this very piece of their property before the City would allow them to use their remaining property. And the City makes this claim despite its plans to charge Messrs. Stamper and Robinson full development fees and to require other dedications to offset any and all potential impacts of their developing their

property (meaning the City wants them to pay twice or three times for any impacts of development).

And when Messrs. Stamper and Robinson would not capitulate to the City's demand, the City determined to bludgeon them with (now five years of) litigation, including employing dirty tricks, like (1) maneuvering to prevent Messrs. Stamper and Robinson from withdrawing nearly $500,000 the trial court ordered the City to deposit so they could have an interim substitute for their lost property (as California's Constitution requires) and (2) sandbagging them by not disclosing that the City planned to have its City Manager and City Engineer give opinion testimony on the key valuation issues. Continuing the bludgeoning, the City now fights – literally – all the way to the Supreme Court.

The law places a duty on condemning governments of "a high order" to ensure property owners are treated fairly: "'The condemnor acts in a quasi-judicial capacity and should be encouraged to exercise [its] tremendous power fairly, equitably and with a deep understanding of the theory and practice of just compensation.'" (City of Los Angeles v. Decker (1977) 18 Cal.3d 860, 871.) But the City of Perris pays no heed to this duty; its wants to take Messrs. Stamper and Robinson's property without paying just compensation and plans to continue to beat on them if they will not capitulate.

In sum, the Court of Appeal got it right on the issues the City complains about, and this Court should deny review, allowing the case to go back to the trial court so a jury can finally determine just compensation.

But if this Court does decide to consider this case, there are two places where the Court of Appeal got it wrong:

- **The Claimed Dedication Requirement Is a Project Effect:** The Eminent Domain Law mandates that project effects be ignored in valuing condemned property; a "condemned property is to be valued as if the project for which the land is taken did not exist." (City of San Diego v. Rancho Penasquitos Partnership (2003) 105 Cal.App.4th 1013, 1033.) In light of this rule, "development constraints 'predicated on [the] very project' for which the land was condemned [are] irrelevant to the valuation of the property taken." (City of San Diego v. Barratt American Incorporated (2005) 128 Cal.App.4th 917, 938.) Here, the Court of Appeal identified that "certainly there would be no requirement of a dedication of property for Indian Avenue, if the Indian Avenue project did not exist . . .." (Opinion, p. 40.) But the Court of Appeal concluded that dedication requirements somehow fall outside of the project-influence rule. But no law nor logic supports this ruling, and this Court should overturn it.
- **No Constitutionally Required Nexus or Rough Proportionality Exists:** The U.S. Supreme Court in its Nollan and Dolan decisions established that an "essential nexus" must exist between any claimed dedication requirement and any adverse impacts of development and that any dedication imposed must also be "roughly proportionate" to the adverse impacts of the proposed development. (Id. at p. 391.) Here, no nexus exists between (1) the City's demand to pave through the middle of the Stamper/Robinson property and (2) anything to do with that property. Instead, the right-of-way is needed **only** because the City realigned Indian Avenue to attract a giant Lowe's

distribution facility and now needs to handle the traffic generated by that and other, existing developments. Absent that Lowe's facility, Indian Avenue would have remained far away from the Stamper/Robinson property. And even if the Stamper/Robinson property never had any development on it, the City would still need to realign and reconnect Indian Avenue to accommodate the earlier Lowe's development. Here, the City never made any analysis to justify how a dedication of nearly 20 percent (or any other amount) of the Stamper/Robinson property relates to the impacts of any future development of that property, particularly considering that, after the City has chopped the property into two odd pieces, the property is hardly developable at all. Moreover, Messrs. Stamper and Robinson will pay their full fair share ($644,231) for Indian Avenue by complying with the City's comprehensive, "North Perris Road and Bridge Benefit District" and other fee programs. And they will receive no credit for any compensation they are shortchanged in this condemnation action. Thus, any dedication requirement across the Stamper/Robinson property for Indian Avenue will be duplicative and, therefore, wholly disproportionate. In fact, using the City's "Benefit District" determination of proportionate contribution, the trial court's judgment means Messrs. Stamper and Robinson will be forced to pay three times their $644,231 proportionate share for any adverse impacts from development of their property. None of these facts are disputed, and since the City did not designate any valuation witnesses on these issues, this Court could and

should rule as a matter of law that the City's claimed dedication would be unconstitutional.

3. STATEMENT OF FACTS AND PROCEDURAL HISTORY.

A. The Stamper/Robinson Property.

Messrs. Stamper and Robinson purchased their property more than a quarter century ago, intending to eventually utilize it for their metal fabricating businesses. (Appellants' Appendix ["AA" volume:tab:page] 5:39:0967; Reporter's Transcript ["RT" volume:page:line] 1:258:17-260:3.) The property is a flat square and contains 9.2 acres. (AA 5:39:0967.) The property is zoned to allow industrial development, and it is located in an area of Perris that has seen booming industrial development, particularly of very large warehousing and distribution facilities. (Ibid.)

The property has paved roads on two sides, Perry Street to the north and Barrett Avenue to the east. (AA 5:39:0967, 0974-0978.)

B. The City's Project.

In the resolution of necessity the City adopted to authorize this condemnation action, the City described the project requiring this action to condemn the property as the "Indian Avenue right-of-way improvements." (See AA 5:39:0967, 0979-1010.)

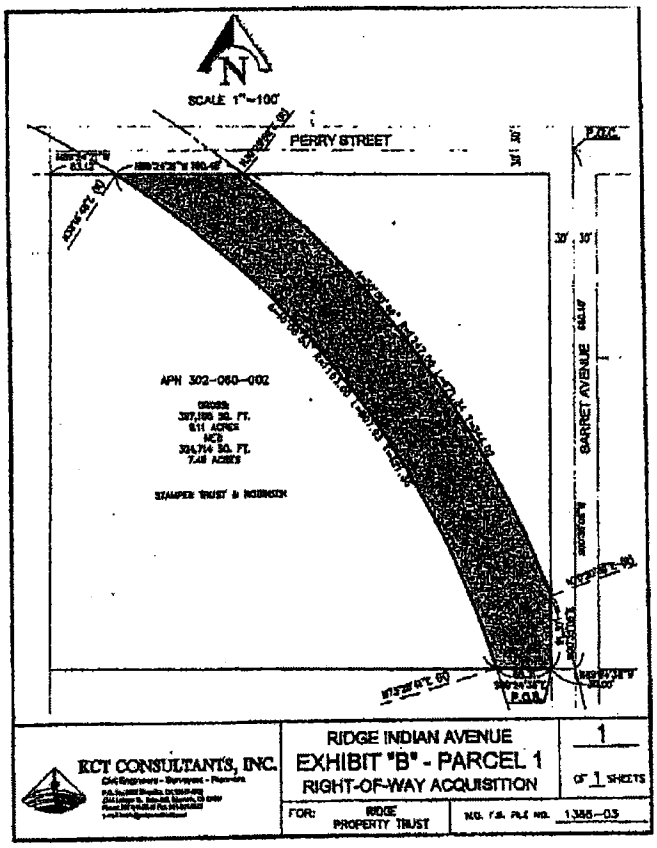
The City's City Engineer explained that Indian Avenue had always been planned as a straight, north/south road and that the right-of-way already existed so that Indian Avenue could be built on that straight alignment (an alignment that would not go near the Stamper/Robinson property). (AA 5:39:0968, 1017-1023.) Then, in the late 1990's, Lowe's began considering a site in the City to build a massive distribution center. But the site had a problem: it was not big enough. (Ibid.; RT 1:158-25-159:25.)

Lowe's and the City came up with a solution: the City would vacate the existing Indian Avenue right-of-way, along with other street right-of-way, and then deed this property to Lowe's at no cost. (Ibid.) Doing this gave Lowe's a single parcel that was more than 40 acres larger than if the streets had remained in place, bisecting the land. (Ibid.) And by luring Lowe's into its boundaries, the City got 460 jobs and an increased tax base. (AA 5:39:0968, 1031-1032; RT 1:160:7-28.)

To make all of this happen, the City had to add an easterly dogleg into Indian Avenue, shifting the road so it skirts the Lowe's development. (AA 5:39:0968, 1031-1032.) While this was expedient for the Lowe's project, it created its own problem: Indian Avenue, which was meant as a significant truck route, no longer matched with the Indian Avenue right-of-way to the north of Ramona Expressway. The City needed to put in a westerly dogleg north of Ramona Expressway to bring Indian Avenue back to its prior alignment. (AA 5:39:0967-0968, 0973-0976, 1013-1016.)

Nothing on the ground, like a hill, canyon, or other obstacle, dictated that the dogleg had to cross the Stamper/Robinson property. (AA 5:39: 0968, 1013-1016.) In fact, any number of other properties could have provided the right-of-way for the westerly dogleg. But the City concluded that those other properties were mostly owned by large developers and thus might be more difficult or expensive to acquire. As a result, the Stamper/ Robinson property became the default location for the dogleg. (Ibid.)

The right-of-way needed for this dogleg consumes almost two acres – about 20 percent – of the Stamper/Robinson property, ripped from its middle. This City's complaint shows this:



(Id., AA 5:39:0978.)

The explanation for why – now – Indian Avenue is being extended and realigned can be found in the City Engineer's declaration:

> The City needs . . . to complete the improvements of the Indian Avenue right-of-way because of the increased traffic flow to and from the business parks and industrial complexes that have been completed in the recent year, including the Lowe's Distribution Center. Indian Avenue has been designated a truck corridor to divert truck traffic away from other primary arterials such as Perris Boulevard. The Indian Avenue right-of-way, which is currently unimproved between Ramona Expressway and Harley Knox Boulevard (formerly Oleander Avenue) must be developed to accommodate the increased traffic flow and public safety issue due to the lack of turnways and increased congestion in the immediate area, including Perris Boulevard.
>
> * * *

> There are other proposed large industrial projects which will utilize Indian Avenue, including the proposed Ridge Commerce Center, a 1.9 million square foot warehouse with 964,460 square feet of truck courts and 1,209 parking spaces.

(AA 5:39:0968, 1049-1050.)

The City never identified future development of the Stamper/ Robinson property as a reason to realign and extend Indian Avenue. (See ibid.) Notably, the City's Engineer acknowledged that absent the Lowe's project, Indian Avenue would not have been re-aligned across the Stamper/Robinson property. (AA 5:39:0968, 1018-1019.) As the Court of Appeal described it in its opinion, "certainly there would be no requirement of a dedication of property for Indian Avenue, if the Indian Avenue project did not exist . . .." (Opinion, p. 40.)

C. The Limited Dedication Required From The Stamper/ Robinson Property Absent The Lowe's Project.

As noted, the Stamper/Robinson property fronts on two paved roads with dedicated right-of-way (Perry Street and Barrett Avenue). But for the realignment of Indian Avenue, the City would have only required the dedication of nine-foot-wide strips along each of these two roads (which would allow these roads to be built out to their ultimate width). (AA 5:39:0967-0968, 0973-0978, 1018-1021; RT 1:170:15-25.) Because these dedications would be on the property's edges, after the dedications Messrs. Stamper and Robinson would have continued to own a nine-acre, easy-to-develop, square property. (Ibid.)

Consistent with this small dedication requirement, the City only conditioned the massive Lowe's facility with dedicating thin roadway strips along the edges of its property. (AA 5:39:0968, 1036-1038; see also 1024-

1027.) At deposition, the City's City Engineer could not identify any development for which the City ever required an unpaid dedication amounting to anywhere near 20 percent of a development's property. (Ibid; see also 1033-1035.)

D. The Requirement That Messrs. Stamper and Robinson Will Pay Their Full Proportionate Share For Traffic Impacts Through An Established Impact-Fee Program.

In order to finance the construction of various roadway improvements, in June 2008 the City adopted the North Perris Road and Bridge Benefit District. (AA 5:39:1068, 1028, 1039-1045.) The benefit district was designed to distribute the cost of roadway improvements proportionately among benefiting properties. The boundaries of that benefit district include the Stamper/Robinson property. (Ibid.)

Indian Avenue, including the costs of acquiring its right-of-way, is among the projects to be constructed with the fees paid by developers into this benefit district. (Ibid.) In other words, the City has in place an impact-fee program – the benefit district – for the fair distribution of the costs of roadway improvements, and that fee program will pay for the right-of-way needed to construct Indian Avenue, including the right-of-way across the Stamper/Robinson property.

According to the City Engineer, Messrs. Stamper and Robinson will be required to pay their full fair share under that benefit district, meaning they will ultimately help pay for the right-of-way being taken from them. (Ibid.; RT 1:154:18-22.) And the City has made no provision in its resolution of necessity – or anywhere else – for Messrs. Stamper and Robinson to get future credit if the City pays less in compensation because of its claimed dedication requirement. (AA 5:39:0968, 1029-1030; RT 1:157:1-

28.) In fact, in response to interrogatories, the City admitted: "In this case, Indian Avenue will have been taken as part of this eminent domain action, so there may not be credit or reduction of fees for Indian Avenue based on its dedication." (AA 5:39:0969, 1055-1056; RT 1:158:12-23.)

E. The City's Appraisal.

The City instructed its appraiser that the City would require the entire portion of the Stamper/Robinson property being condemned to be dedicated to the City prior to any development of the property. The City's appraiser relied on this position without further inquiry. (AA 7:50:1482-1483, 1497-1498.) As a result, instead of basing his valuation on industrial use of the property (as allowed by the property's zoning), the City's appraiser used agricultural values. (AA 7:50:1498-1501.) He also provided for zero severance damages related to slicing the property into two oddly shaped triangles. (Ibid.; 5:39:0970, 1104-1240.)

Based on this, the City made a deposit of "probable compensation" of only $55,000. (AA 1:3:0057-0058; 5:39:0968.)

Messrs. Stamper and Robinson disputed this low valuation and brought a motion for an order that the deposit be increased. (AA 2:12:0330-0350.) Messrs. Stamper and Robinson argued that the claimed dedication requirement was unconstitutional under Nollan/Dolan and had to be disregarded. (Ibid.)

The original trial judge assigned to this case agreed. (AA 2:19:0438-0440; RT 1:9:1-15:9.) And, based on the City's own appraisal, the judge ordered the City to increase its deposit to $511,062 (the amount of the City's appraisal of the part taken alone, without severance damages). (Ibid.) The City complied with this order to increase its deposit. (AA 2:20:0441-0456.) And Messrs. Stamper and Robinson promptly

applied for the release of that deposit. (AA 2:21:0457-0461.) But the City maneuvered to keep them from ever getting the deposit released. (AA 2:25:472; 3:28:0613-0626; 4:31:0894.)

F. The Expert Witness Exchange.

As required by the special eminent domain exchange rules (Code Civ. Proc., §§ 1258.210 et seq.), Messrs. Stamper and Robinson and the City exchanged lists of valuation witnesses and valuation information. (AA 5:39:0969, 0970, 1075-1092, 1104-1240.) Messrs. Stamper and Robinson listed both an appraiser and a planning expert; they designated the planning expert to testify about the validity of the City's claimed dedication requirement and related issues. (AA 6:49:1423-1442; 5:39:0969, 1075-1092.) Both experts testified at deposition that the City cannot require the dedication it is claiming. (AA 5:39:0969.) Both explained that (1) the claimed dedication requirement is a product of the very project for which the City is condemning, (2) the claimed dedication is not reasonably probable, and (3) the claimed dedication fails the Nollan/Dolan tests. (Id.; AA 5:39:1093-1095.)

In contrast, the City listed only its appraiser as an expert. (See AA 7:50:1443-1444; 5:39:0970, 1104-1240.) The City identified no expert to testify as to the dedication issues, for example, as to whether the City's claimed dedication requirement for Indian Avenue has any nexus with the Stamper/Robinson property or that any development of that property could generate sufficient traffic to justify a 20-percent dedication (particularly since, after the condemnation, the property consists of little, oddly shaped triangles). (Ibid.)

Ten weeks after the mutual exchange (and exactly three weeks before the trial was scheduled to start), the City served a "supplemental"

expert designation, listing a planning expert. (AA 5:39:0971, 6:1361-1367.) Messrs. Stamper and Robinson objected to this late designation, pointing out that it was extremely prejudicial because Messrs. Stamper and Robinson were in the midst of final trial preparation and had already made their final statutory demand (and the trial court ultimately excluded this late-designated witness). (Ibid.)

Notably, even in its late "supplemental" designation, the City did not designate its City Manager or City Engineer; the City also never offered them for deposition as experts. (Ibid.)

G. Trial.

When it came time for the trial of the matter, the case was reassigned to a retired judge sitting by assignment. (AA 9:74:2100.)

(1) Motions in Limine.

The trial court ruled on a series of motions in limine. The motions by Messrs. Stamper and Robinson raised a number of issues, including:

- Whether the City's claimed dedication requirement was a project effect (AA 4:35:0912-0923);
- Whether the City's claimed dedication requirement was (1) reasonably probable and (2) unconstitutional under Nollan/Dolan (AA 5:36:0924-0941);
- Whether the reasonable probability of the claimed dedication requirement was an issue for the court or the jury (AA 6:40:1385-1389); and
- Whether the City could present opinion testimony from its City Manager and City Engineer, neither of whom the City had designated as valuation witnesses (AA 5:39:0966-1223).

The trial judge ultimately decided that the court, rather than the jury, would determine whether the City's claimed dedication requirement was "reasonably probable." (RT 1:43:20-49:5.) The trial court also decided to proceed with a court trial on the dedication issues, deferring rulings on the other motions in limine until after that determination. (Ibid.)

(2) The Court Trial.

Because the City had the burden of proof on the dedication issue (see Dolan v. City of Tigard (1994) 512 U.S. 374, 391, fn. 8), the City presented its witnesses first. (RT 1:59:1-11.)

The City called just two witnesses to testify, its City Manager and its City Engineer. (See, e.g., RT 1:101:16-23; 109:18-27; 113:26-14:7; 115:1-22.) Over repeated objections by counsel for Messrs. Stamper and Robinson (see, e.g., AA 5:39:0966-1223; 1:52:20-53:19), the trial court allowed the City Engineer and the City Manager to give opinion testimony regarding (1) the reasonable probability that the City would impose its claimed dedication requirement, (2) whether the City's claimed dedication requirement had a nexus, and (3) whether the City's claimed dedication requirement was roughly proportional. (See RT 1:90:14-186:22.) The trial court's reason for letting the City Manager and the City Engineer give this testimony, even though neither had been designated or deposed as valuation witnesses, was that: "if they are percipient witnesses with knowledge of relevant facts, and their training, skill and experience allows them to form opinion about those facts, I'm going -- under *Kelly v. New West*," to allow the testimony. (RT 1:52:20-53:19.) (Notably, Kelly v. New West (1996) 49 Cal.App.4th 659 deals with the use and scope of motions in limine and does not address undisclosed opinion testimony.)

After the City presented the testimony of its two witnesses, Messrs. Stamper and Robinson presented the testimony of (1) a planning expert and (2) an appraisal expert. (RT 1:191:9-233:3; 265:25-303-14.) Both were offered by Messrs. Stamper and Robinson to testify regarding (1) whether it was reasonably probable that the City would attempt to impose the dedication requirement it claimed, (2) whether there was a nexus between the claimed dedication requirement and any adverse impacts from potential development on the property, and (3) whether the scope of the claimed dedication was roughly proportional to the adverse impacts of any potential development of the property. (Ibid.) But the trial court severely circumscribed the testimony these experts were able to give, including testimony that was meant to rebut the surprise expert testimony of the City Engineer and City Manager. (See, e.g., RT 1:224:10-19.)

Ultimately, the trial court concluded that the City's dedication claim was reasonably probable, and concluded that the City could make future, unspecified adjustments to development fees to ensure that the dedication met the Nolan/Dolan standards. As this meant that the compensation would be based solely on agricultural values, the City and Messrs. Stamper and Robinson stipulated to the agricultural value from the City's appraisal. Messrs. Stamper and Robinson then appealed.

H. The Appeal.

On appeal, the Court of Appeal issued a tentative ruling that initially concluded that the City's claimed dedication requirement was project-influenced and had to be excluded. However, the Court of Appeal eventually withdrew that tentative ruling and issued a new tentative ruling. And in the end, the final ruling concluded that claimed dedications are exempt from the project-influence rule. The Court of Appeal also concluded that, consistent with Campus Crusade for Christ, the determination of whether there is a reasonable likelihood that a dedication would be required is a valuation issue that must go to the jury, just as this Court has determined that the reasonable probability of a zone change that might affect value must go to the jury. Additionally, the Court of Appeal determined that, if the City intends to call its City Manager and City Engineer to testify to opinions of value, then the City must comply with the pretrial, simultaneous-exchange requirements of the Eminent Domain Law.

4. WHETHER A CLAIMED DEDICATION MAY IMPACT VALUE IS A VALUATION ISSUE. THUS, IN EMINENT DOMAIN CASES THE JURY MUST DECIDE THAT ISSUE.

In eminent domain cases, California's Constitution, article I, section 19(a), requires that the jury, not the judge, determine the amount of compensation, i.e., the value of the property taken. As recently as 2007, this Court, in Metropolitan Water District vs. Campus Crusade for Christ (2007) 41 Cal.App.4th 954, 973, clarified that valuation determinations in eminent domain cases are for the jury and that the "issues we reserved for the trial court in condemnation actions have been issues of law – or mixed issues of law and fact where the legal issues predominate."

Here, the reasonable probability of a dedication requirement (including, as the City of Hollister v. McCullough (1994) 26 Cal.App.4th 289 opinion teaches, the subsidiary issue of the constitutionality of a dedication requirement) are primarily fact-based issues:

- Would a reasonable, fair-minded City Council actually impose a 20-percent dedication, while still requiring payment of full transportation fees?
- With (1) full fees still required and (2) the reality that Indian Avenue was only relocated to accommodate Lowe's, is there a connection, or "nexus," between any development and the claimed dedication?
- With full fees still required, is the claimed dedication proportionate to the impact created by any development?

And cases like City of Monterey v. Del Monte Dunes (1999) 526 U.S. 627 teach that in those areas where a jury is ordinarily required, a properly instructed jury can determine constitutional issues like the Nollan/Dolan issues. Thus, the Court of Appeal was correct in its ruling that the jury, and not the judge, should determine, as part of determining the reasonable probability of the City of Perris' claimed dedication requirement, whether the dedication meets the Nollan/Dolan tests.

Notably, the City does not cite a single case that actually holds that **only** judges can decide constitutional issues. (See, e.g., Petition, pp. 8-17.) For example, in State Route 4 Bypass Authority v. Superior Court (2007) 153 Cal.App.4th 1546, 1552, which the City cites, the parties specifically stipulated to bifurcate the trial and have the trial court determine "whether the required dedication would be lawful under California law, the California Constitution, and the federal constitution." Nowhere does the

State Route 4 court discuss, let alone decide, whether the dedication issue would have been properly put to the jury if the parties had not wanted the trial court to decide the issue. And, in fact, juries are frequently allowed to decide constitutional issues. (See Del Monte Dunes v. City of Monterey (1995) 95 F.3d 1422, 1427-1430 [cataloguing various constitutional issues that are determined by the jury], upheld in City of Monterey v. Del Monte Dunes, supra, 526 U.S. 627.)

Of further note, all of the "dedication" cases the City cites in its Petition (p. 20) were decided **before** 2007, the year this Court issued its Campus Crusade for Christ opinion and clarified that, while trial courts have a gatekeeping role in eminent domain cases, it is up to the jury to determine value and that trial courts cannot "usurp the role of the jury in valuing the property."

The City also tries to draw an analogy to inverse condemnation actions, but that analogy does not work either. The City is correct that in inverse condemnation cases, the judge decides liability, the "taking" issue (see Hensler v. City of Glendale (1994) 8 Cal.4th 1, 15), and is correct that liability in some inverse condemnation cases turns on the Nollan/Dolan tests. But the City's logic fails when the City jumps to the conclusion that this means Nollan/Dolan issues are always for the judge, including in eminent domain cases. In other words, inverse condemnation cases put Nollan/Dolan issues to the judge because **in those cases** they are **liability** issues, which are for the judge – again, **in those cases**. This is very different than saying that Nollan/Dolan issue inverse condemnation can **only** be decided by judges in every context.

5. THE CITY'S CITY ENGINEER AND CITY MANAGER DID *NOT* TESTIFY TO SIMPLE LAY OPINIONS. THEY TESTIFIED ABOUT THE CORE VALUATION ISSUES IN THE CASE, INCLUDING "NEXUS" AND "ROUGH PROPORTIONALITY." BUT REGARDLESS OF WHETHER THEY GAVE "LAY" OR "EXPERT" OPINIONS, THE OPINIONS ARE VALUATION OPINIONS THAT THE CITY HAD TO EXCHANGE BEFORE TRIAL, INSTEAD OF AMBUSHING THE OWNERS WITH THEM AT TRIAL.

The City argues in its Petition for Review (p. 23) that "the lower court has excluded the lay testimony of percipient witnesses, Mr. Motlagh and Mr. Belmudez, who both testified exclusively as to matters they personally observed." But one needs only look back to the City's Petition for Rehearing (p. 11) to see that this is untrue. There the City admits to Mr. Motlagh's real testimony:

> Motlagh . . . analyzed the traffic studies and data based on several hypothetical developments for the highest and best use of the Stamper Property on the stand, similar to the method utilized by the government agency in *State Route 4 Bypass Authority* . . . . [Citation.] Not unlike *State Route*, Motlagh extrapolated the data from the NPRBBD traffic and circulation element studies to make individualized analyses of the Stamper Property with regards to hypothetical development and traffic data.

This is **not** simple "lay testimony of percipient witnesses." This "extrapolation" of data is expert testimony on the core valuation issue in the case.

And Mr. Motlagh developed this "analysis" **after** he was deposed as a percipient witness – both as an individual and as the person most

knowledgeable for the City – **and** had testified that the City had **not** done this type of analysis. (See, e.g., RT 1:175:5-176:177:21.) For the City to then have Mr. Motlagh do this analysis, and not disclose it at the valuation witness exchange, was blatant sandbagging by the City, meant to ambush Messrs. Stamper and Robinson at trial. (And it did, leaving Messrs. Stamper and Robinson's counsel scrambling to piece together a rebuttal letter brief over a weekend. [See AA 9:86:2125.])

The Legislature specifically prohibited such sandbagging by cities in eminent domain cases by enacting very specific and detailed requirements for the exchange of expert witness lists and information. (See Code Civ. Proc., §§ 1258.210 et seq.) The Legislature had good reasons for this:

> The special condemnation discovery rules are not accidental. Exceptionally full disclosure is the obvious purpose of the statutes. Ample discovery makes settlement more likely and promotes judicial economy if trial is necessary.

(City of Fresno v. Harrison (1984) 154 Cal.App.3d 296, 301.) And courts have explained that a **mutual** exchange of information is crucial:

> [T]he key element [of the condemnation exchange requirement] is mutuality. Were the courts not rigorous in insisting on mutuality of disclosure and were they to adopt a soft and wishy-washy attitude toward recalcitrant litigants . . ., they would quickly inhibit any genuine disclosure in advance of trial in the case of opinion witnesses, for parties could merely claim . . . they had not yet decided whether to use any expert witnesses and could continue to profess indecision until the day of trial. [¶] The rules of discovery contemplate two-way disclosure and do not envision that one party may sit back in idleness and savor the fruits which his adversary has cultivated and harvested in diligence and industry. Mutual exchange of data provides some protection against attempted one-way disclosure; the

> party seeking discovery must be ready and willing to make an equitable exchange.

(Swartzman v. Superior Court (1964) 231 Cal.App.2d 195, 204; see also City of Santa Clarita v. NTS Technical System (2006) 137 Cal.App.4th 264, 276-277.) And the exchange rules apply to both expert consultants **and party-related witnesses**. (See Law Revision Comments to Code Civ. Proc., § 1258.280; Padre Dam Mun. Water Dist. v. Burkhardt (1995) 38 Cal.App.4th 988, 993, 995.)

To give teeth to the requirement of mutuality, the Legislature imposed a specific penalty for parties who do not mutually exchange:

> No party required to serve a list of expert witnesses on the [opposing] party may call an expert witness to testify on direct examination during his case in chief unless the information required . . . for such witness is included in the list served.

(Code Civ. Proc., § 1258.280, subd. (a).)

In simple terms, the City's argument that the Court of Appeal has somehow gone against case law "all the way back [to] 1894 allowing percipient opinion testimony" (Petition, p. 24) is completely misguided. First, the testimony from the City Manager and the City Engineer is hardly the type of observational opinions, such as opinions on whether someone is drunk or what the speed is of a locomotive, that the courts have allowed into evidence by non-experts. And regardless of whether the testimony is "percipient" opinion testimony or "expert" opinion testimony, it indisputably goes directly to the valuation issues in this case, and thus had to be exchanged before trial. That is the only issue that the Court of Appeal decided.

6. THE CITY'S CLAIMED DEDICATION REQUIREMENT IS A "PROJECT EFFECT" THAT THE EMINENT DOMAIN LAW REQUIRES TO BE IGNORED IN DETERMINING JUST COMPENSATION.

A. Eminent Domain Law Requires Project Effects To Be Ignored, Making Evidence Of Them Inadmissible.

Eminent domain law has long recognized an obvious fact: the very public project for which condemnation is taking place might itself have effects on the value of property being taken, both good and bad. (See 1 Matteoni & Veit, Condemnation Practice in Cal. (3d ed. 2009) Just Compensation, §§ 4.3-4.7, pp. 96-108.) And eminent domain law recognizes it would be unfair to force condemning agencies to pay for increased value that accrues to a property because of the public project. (Ibid.) For example, when an agency builds a reservoir, it does not have to pay the value of "lake front" property. Likewise, eminent domain law recognizes that it would be unfair for a property owner to receive less compensation because the public project lowers the value of the property. (Ibid.) For instance, where the proposed construction of a foul-smelling sewage treatment plant lowers values in the area, the condemning agency does not get the advantage of the lowered value.

A few years ago, a court of appeal articulated this general rule as follows:

> [W]hen assessing fair market value (including its highest and best use and the reasonable probability of a zoning change), any increase or decrease in the property's value *caused by the project for which the property is condemned* may not be considered. Thus, to the extent the fair market value of the property condemned increases or decreases because of the project for which it is condemned, or the eminent domain proceeding in

> which the property is taken, or any preliminary actions of the condemnor relating to the taking of the property, such project-caused increases or decreases must be excluded from the just compensation calculus.

(City of San Diego v. Barratt American Incorporated (2005) 128 Cal.App.4th 917, 934, emphasis original.) The California Legislature has codified this rule in Code of Civil Procedure section 1263.330:

> The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following:
>
> (a) The project for which the property is taken.
>
> (b) The eminent domain proceeding in which the property is taken.
>
> (c) Any preliminary actions of the plaintiff relating to the taking of the property.

Courts have explained how this rule applies in the context of project-influenced land use decisions and city-imposed development constraints:

> [B]ecause "established law [is] that a condemned property is to be valued as if the project for which the land is taken did not exist" . . ., developmental constraints "predicated on [the] very project" for which the land was condemned [are] irrelevant to the valuation of the taken property.

(City of San Diego v. Barratt American Incorporated, supra, 128 Cal.App.4th at p. 938.) Applying this rule, courts have consistently excluded evidence of land-use-related project effects, including down-zoning of the subject property predicated on the project (see, e.g., City of San Diego v. Rancho Penasquitos Partnership, supra, 105 Cal.App.4th at pp. 1028-1029) and refusals to change land use designations because of an impending project (see, e.g., City of San Diego v. Barratt American

Incorporated, supra, 128 Cal.App.4th at p. 938; People ex rel. Dept. of Public Works v. Graziadio (1964) 231 Cal.App.2d 525, 527-528).

In City of San Diego v. Rancho Penasquitos Partnership, supra, for example, the city had enacted a zoning restriction that prohibited development of the subject property until a freeway was built. When the city then sought to condemn right-of-way for that very freeway, the city tried to rely on the zoning restriction to argue that the property should have a low value. The trial court found that the restrictive zoning was an effect of the very freeway project for which the city was condemning the right-of-way and thus prohibited the city from introducing evidence of that restriction. The trial court also prohibited the city's appraisers from relying on the restrictions as a basis for their valuation opinions.

B. The City's Claimed Dedication Requirement Is An Effect Of The City's Indian Avenue Extension/Realignment Project.

No controversy ever existed about (1) what the City's project is or (2) what the basis is for the City's claimed dedication requirement. The City's project is the extension/realignment of Indian Avenue as depicted on the City's General Plan. And the City's depiction of Indian Avenue in that location on its General Plan, the City claims, gives it the ability to require a dedication across the Stamper/Robinson property.

For example, in one of its briefs the City explained: "[t]he Subject Property is being condemned for the public purpose of constructing Indian Avenue . . . for the purpose of realigning the same in accordance with the City's General Plan and Circulation Element." (AA 8:55:1743.) And then the City explained: "given that the realigned Indian Avenue was a part of the City's amended General Plan, as a condition of approval for any plan of

development for the Subject Property, the developing owners would have been required to dedicate Indian Avenue to public use . . .." (AA 8:55:1745.)

It is not a coincidence that the claimed dedication and the condemned portion of the property are identical. The amendment to the General Plan was a "preliminary action[ ] of the plaintiff relating to the taking of the property." (Code Civ. Proc., § 1263.330, subd. (c).) And such a "developmental constraint[ ] 'predicated on [the] very project' for which the land was condemned [is] irrelevant to the valuation of the taken property." (City of San Diego v. Barratt American Incorporated, supra, 128 Cal.App.4th at p. 938.) The Court of Appeal even noted that "certainly there would be no requirement of a dedication of property for Indian Avenue, if the Indian Avenue project did not exist . . . ." (Opinion, p. 40.)

It is difficult to imagine a more classic project effect than this. If the City had not decided to realign Indian Avenue in the first instance, Indian Avenue would have stayed on it original alignment, using the existing right-of-way, and would have been nowhere near the Stamper/Robinson property. And when Messrs. Stamper and Robinson developed their property, the City would have only asked them to dedicate nine-foot-wide strips along two edges of their property.

C. No Law Exempts Claimed Dedications From the Project-Effect Rule.

The Court of Appeal's reasoning exempts all claimed dedication requirements from the project-effect rule. But no law creates this exemption. For example, the Legislature did not tack a subdivision (d) onto section 1263.330 that reads: "except that project-influenced dedications may be considered in valuing the property." And the cases declare no such

exemption. In fact, the court in one of the seminal "dedication" cases, People ex rel. Dept. of Public Works v. Investors Diversified Services (1968) 262 Cal.App.2d 367, 373, analyzed whether the claimed dedication had been imposed by government authorities to depress the value of the property prior to condemnation (and found this had not happened). If the project-effect rule did not apply to dedications, this analysis would not have been necessary.

In most instances where a dedication is claimed, it is for a frontage road, and the dedication is a typical condition of an owner's receiving a zoning change. (See, e.g., Investors Diversified Services, supra, 262 Cal.App.2d at p. 374.) The dedication does not specifically grow out of the agency's project. Here, for instance, had the City claimed the ordinary nine-foot dedications on the edges of their property, Messrs. Stamper and Robinson would have no basis for arguing those dedications resulted from the City's project.

This is **not** true for the City's realignment project. Messrs. Stamper and Robinson's neighbors do **not** have Indian Avenue cutting through the middle of their properties, and Messrs. Stamper and Robinson can easily say – and the City concedes – that but for the City's decision to lure Lowe's into the City by realigning Indian Avenue (and amending its General Plan consistent with that realignment), the City would never have claimed a dedication for this exact same Indian Avenue right-of-way. This is a pure project effect, and this Court can and should rule as such.

7. THE CITY'S CLAIMED DEDICATION REQUIREMENT FLUNKS THE TWO-PART, *NOLLAN/DOLAN* CONSTITUTIONALITY TEST. THIS COURT CAN DETERMINE THIS AS A MATTER OF LAW.

A. No Essential Nexus Exists Between (1) The City's Claimed 20-Percent Dedication Requirement And (2) Anything To Do With The Stamper/Robinson Property.

In Nollan, the U.S. Supreme Court made clear that it was not enough that a connection could be found between some generalized public purpose and a dedication requirement. Instead, the Court was concerned there be a substantial connection between some adverse effect of the proposed development of the property and the dedication requirement. As the Court explained:

> We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. . . . [O]ur cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

(Nollan v. California Coastal Commission (1987) 483 U.S. 825, 841, emphasis original.) The Court also explained that, absent the "essential nexus," the purpose of the dedication becomes "the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of 'legitimate state

interests' in the takings and land-use context, this is not one of them. In short, . . . [it is] but 'an out-and-out plan of extortion.'" (Id. at p. 837.)

As detailed above, Indian Avenue had always been planned as a straight, north/south road, and the City **already** had the right-of-way for this straight alignment. The road was only moved to cross the Stamper/Robinson property to make way for the massive Lowe's distribution facility. In short, the "nexus" is between the previous, massive developments and realigned Indian Avenue. No nexus exists between that realignment and future development of the Stamper/Robinson property. As in Nollan, this is a situation where a property owner is improperly "being singled out to bear the burden of the [City's] attempt to remedy these [traffic] problems, although they ha[ve] not contributed to it more than other . . . landowners." (Id. at p. 835, fn. 4.) None of these facts are in dispute, and the City designated no valuation witness on this issue, so this Court could rule on it as a matter of law.

B. The City's Claimed 20-Percent Dedication Requirement Lacks Rough Proportionality To The Impacts From Any Potential Development On The Stamper/Robinson Property.

At trial, the City failed to present the required evidence that the **combination** of the City's claimed dedication **and** the fees Stamper/Robinson will pay do **not** exceed Messrs. Stamper and Robinson's proportionate share. State Route 4 teaches how this should have been calculated (id., at pp. 1553-1554 & fn. 4): add (1) the **value** of the taking to (2) the **fees** to be charged. If the total is **less** than the proportionate share owed, then the dedication is okay. But the City offered **no** evidence of the

part-taken's value **or** of the fees. The City avoided this evidence because it proves **dis**proportionality.

Under the North Perris Road and Bridge Benefit District, 100 percent of the cost of Indian Avenue, including the cost of right of way, will be paid with the fees collected. (See Trial Exh. 116, pp. 13, 23.) Since Messrs. Stamper and Robinson will pay 100 percent of their fair-share fees (plus "donate" the nine-foot strips for Perry and Barrett), any amount they "donate" for the 1.66 acres is necessarily **beyond** their proportionate share. And under the Benefit District (id., pp. 19), if, for example, their 7.45-acre remainder is developed with the allowed floor area ratio of 40 percent, their fair-share fees will be $644,231 (7.45 acres x 40,560 sq.ft./acre x .40 [FAR] x $5.33 [industrial building fee per sq.ft.]). In sum, the City has, in effect, asked that Messrs. Stamper and Robinson pay **triple**: ($715,023 [severance damages] + $597,911 [part-take value: $8.25/sq.ft. x 72,474 sq.ft. (or 1.66 acres)] + $644,231 [Benefit District fee] = $1,957,165).

Again none of this is disputed, and again, the City did not designate any valuation witnesses on rough proportionality. Accordingly, this Court can and should decide this issue as a matter of law and find that the City's claimed dedication flunks the Nollan/Dolan tests.

8. CONCLUSION.

The City's Petition for Review is just another volley in the City's five-year-long campaign to pummel Messrs. Stamper and Robinson into foregoing their constitutional right to just compensation. The City's Petition is without merit. The Court of Appeal got it right with respect to the jury's role in determining the reasonable probability of the City's claimed dedication and got it right in declaring that the City cannot ignore the pretrial, valuation exchange rules of the Eminent Domain Law.

Accordingly, this Court should deny the Petition. Nonetheless, if this Court concludes that this case is worthy of review, the issues the Court should review are (1) whether claimed dedication requirements are exempt from the rule requiring the exclusion of project influences on the valuation of property and (2) whether, as a matter of law, the City's claimed dedication flunks the Nollan/Dolan tests.

Dated: October 9, 2013

ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS LLP
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By: _____
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CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.520(c))

Pursuant to Rule 8.504(d) of the California Rules of Court, the undersigned, counsel of record for Defendants, Appellants, and Respondents Richard C. Stamper, Donald D. Robinson, and Donald Dean Robinson, LLC certifies that, based on the word count of the computer program used to prepare this answer to petition for rehearing, it contains 8,224 words.

Dated: October 9, 2013

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 1900 Main Street, Fifth Floor, Irvine, California 92614-7321.

On October 9, 2013, I served the within document described as ANSWER TO PETITION FOR REVIEW BY RICHARD C. STAMPER, DONALD D. ROBINSON, AND DONALD DEAN ROBINSON, LLC on the interested parties in this action as stated on the attached mailing list:

☒ **BY OVERNIGHT DELIVERY:** I deposited in a box or other facility regularly maintained by FedEx, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in sealed envelopes or packages designated by the express service carrier, addressed as indicated in the attached Service List on the above-mentioned date, with fees for overnight delivery paid or provided for.

Executed on October 9, 2013, at Irvine, California.

SHERYL L. PORTWOOD
(Type or print name)

(Signature of Declarant)

Richard C. Stamper, et al. v. City of Perris; California Court of Appeal, Fourth Appellate Dist., Div. 2 -- Case No. E053359

City of Perris v. Richard C. Stamper, et al.; Riverside Superior Court Central District, Case NO. RIC524291

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