Supreme Court Case No.: S213468

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF PERRIS,

Petitioner,

v.

RICHARD C. STAMPER, et al.,

Respondents.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION TWO

CASE NO. E053395

ON APPEAL FROM SUPERIOR COURT OF RIVERSIDE COUNTY,

THE HONORABLE DALLAS HOLMES, JUDGE

CASE NO. RIC524291

PETITIONER'S OPENING BRIEF ON THE MERITS

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State Rules

I. ISSUES PRESENTED FOR REVIEW

1. Is the constitutionality of an otherwise reasonably probable dedication requirement that a governmental entity claims it would have required in order to grant the property owner permission to put his or her property to a higher use a question that must be resolved by a jury pursuant to Article I, Section 19 of the California Constitution?

2. Was the dedication requirement claimed by Petitioner City of Perris a "project effect" that the eminent domain law requires to be ignored in determining just compensation?

II. INTRODUCTION

Plaintiff/Petitioner City of Perris ("City") seeks to acquire 1.66 acres ("Subject Interests") across a vacant, unimproved 9.11-acre property ("Property") owned by Defendants/Respondents Donald Dean Robinson, LLC, a limited liability company, Donald D. Robinson, and Richard Stamper (collectively, "Owners") to construct a much-needed public right-of-way, Indian Avenue ("Project"), in an unimproved but rapidly growing part of town. Construction of Indian Avenue will greatly benefit Owners, or any future property owner, as well as the general public, because, without same:

1. Owners cannot develop their Property to its highest and best use (it is undisputed the Subject Interests must be dedicated at the time of development, and Owners would have to construct Indian Avenue at their own expense), and

2. Owners would not have the necessary traffic going to this part of the City to have a successful development of any sort.

It is safe to assume that Owners are not happy about: (i) the size of the dedication requirement,[1] (ii) the fact that it crosses their Property,[2] and (iii) the way the City's planning evolved, leading up to the 2005 adoption of the current City General Plan Circulation Element placing Indian Avenue in its current configuration through the Property.[3]

Hence, at trial, Owners raised every argument they could to convince the court to ignore the City's dedication requirement, arguing: the dedication requirement is a "project effect"; the dedication requirement is unconstitutional; the dedication requirement is not reasonably probable; and the jury should decide the reasonable probability that the City would impose the dedication requirement. Notably, despite all that, even Owners never asked the jury to decide the constitutionality of the dedication requirement. In fact, Owners agreed that the court must decide the constitutionality issue. (*See* Section VI(B)(1) of this Brief.) The lower court, however, reached the opposite conclusion *sua sponte* when it held that a jury must decide the constitutionality of a dedication requirement,

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[1] The size of the take, although not typical, is not unique or uncommon in underdeveloped cities. City staff undisputedly testified the City required similar dedication sizes for this and other projects. (Owners'/Appellants' Appendix ("AA") [volume:page] 5:1052-1071, 7:1724.)

[2] The fact that Indian Avenue crosses the Property will benefit Owners by providing frontage upon a major road, which the Property previously did not have. The frontage is highly desirable, for it will allow for successful commercial development in a zone which lacks any meaningful commercial development to support the area, and will bring higher values per square foot than industrial uses. (Reporter's Transcript ("RT") [page:line] 143:23 – 144:2.)

[3] The fact that the City amended and updated its Circulation Element is irrelevant to the project effect doctrine. Nor does this fact render the dedication requirement imroper or illegal. (*See* Section VIII(C) of this Brief.)

and did so without providing the City a fair opportunity to brief the issue in violation of Government Code Section 68081.

III. SUMMARY OF ARGUMENTS

A. There Is No Guaranteed Right To A Jury Trial Under California Constitution Article I, Section 19 To Determine The Constitutionality Of An Otherwise Reasonably Probable Dedication Requirement That A Governmental Entity Claims It Would Have Required In Order To Allow A Property Owner To Put His Or Her Property To A Higher Use.

A jury is not equipped, and should not be allowed, to determine the ***constitutionality*** of a governmental act. It appears the lower court holds that because the constitutionality issue involves a determination of facts, a jury must decide the ultimate issue of constitutionality. In Justice King's words, "a jury must be allowed to determine whether, and to what extent, the [] take ... is roughly proportionate to the Stamper Property's anticipated impacts on area traffic if and when the Stamper Property is developed." A jury would then determine "whether all or any part of the 1.66-acre take could be constitutionally imposed as a dedication condition on development." (Court of Appeal's Slip Opinion dated August 9, 2013 ("Opinion"), p. 34.)

The lower court is mistaken in its analysis on which principles trigger a right to a jury trial. The inquiry is not whether the constitutionality issue "involves additional factual questions for a jury to determine." (Opinion, p. 33). Rather, the correct inquiry is whether, historically, the underlying cause of action is one of law or equity and whether there is a right to a jury trial. Not once in its 48-page Opinion does the lower court discuss law versus equity principles, nor does it analyze the

historical cases cited by the City during oral argument or the limited briefing allowed by the lower court on this issue.

Clearly this Court already established that eminent domain cases are special proceedings in equity; thus, there is no inherent right to a jury trial. Only through an amendment in the California Constitution in 1879 did the right to a jury trial arise in eminent domain, and only with respect to "just compensation."

Historically, a judge (not a jury) decides whether an uncompensated taking is permissible (even if there is a mixed question of fact and law), and in an appropriate case looks at (among other things) the rough proportionality between a particular development and the governmental requirements for that development. It is possible a jury may be permitted to make underlying predicate findings of fact, but generally, in ***all*** precedential cases involving constitutionality, a judge (rather than a jury) makes those predicate factual findings as part of its constitutionality analysis. In almost 100 years of takings and eminent domain cases, the court decides ***all*** questions of law or mixed fact and law.

In a challenge to the constitutionality of an otherwise reasonably probable dedication requirement, whether a set of facts satisfies the nexus standard of *Nollan* or the rough proportionality test of *Dolan* is purely a question of law. The lower court errs when it holds that the dispositive legal issue, to wit, whether a dedication requirement as an uncompensated taking is constitutional, must be decided by a jury.

In deciding if the constitutionality issue goes to a jury, the lower court's analysis of whether a legal question "involves additional factual questions for a jury to determine" is a dangerous one that can have unintended consequences. Under the lower court's analysis, no

constitutional question will ever go to a judge again, unless the facts are undisputed by the parties. That cannot be.

B. The Dedication Requirement In This Case Is Not A "Project Effect" That Eminent Domain Law Requires To Be Ignored In Determining Just Compensation.

With respect to the project effect doctrine, the Opinion is correct in its holding that Code of Civil Procedure Section 1263.330[4] ***does not apply*** to the Indian Avenue dedication requirement. Application of Section 1263.330 to any dedication requirement is improper and would result in the reversal of over four decades of well-settled case law regarding the valuation of claimed dedication requirements in eminent domain.

Under the project effect doctrine of Section 1263.330, any increase or decrease in the value of property based on the project for which the property is taken, or a regulation enacted related ***specifically*** to the taking, must be excluded from valuation of a property. In this case, however, the dedication requirement exists independently of, and cannot be attributable to, the City's Project (i.e., the construction of Indian Avenue). In fact, the applicable regulation on dedication requirements in the City was adopted in 1981 by ordinance and codified in the Perris Municipal Code. Such law applies upon development of ***any*** property within the City and is a condition of approval commonly imposed on development throughout the City.

No regulations were enacted or imposed in connection with the Project that would make the dedication requirement a project effect. The

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[4] All Section references are to the Code of Civil Procedure, unless stated otherwise.

City adopted its General Plan Circulation Element in 2005, which, when read with the Perris Municipal Code, imposes a dedication requirement of all unbuilt streets within the City, including Indian Avenue. Years later, the City sought to acquire the Subject Interests. The City did not intend to construct Indian Avenue at the time the 2005 Circulation Element was adopted. This claimed dedication requirement is no different than any garden variety dedication requirement analyzed in the seminal eminent domain cases discussed in Section V(B) of this Brief.

Since every dedication requirement is part of the project for which property is being acquired under eminent domain, if this Court reverses the lower court on this issue, then ***every*** condemnation case involving a dedication requirement would be overruled.

A reversal of the Opinion on this issue would also significantly reduce a public agency's police powers and its ability to use dedication requirements as a valid planning tool authorized under the Government Code and local regulations.

IV. FACTUAL BACKGROUND

A. The Property and the City's Project

Approximately 50% of the City is undeveloped (RT 110:27-28), and the City is transitioning from an agricultural community to a more diverse economic base (AA 7:1473 [Tab 50]). The Property, also vacant and undeveloped, contains 9.11 acres located at the southwest corner of Perry Street and Barrett Avenue, just north of Ramona Expressway. (AA 7:1451 [Tab 50].)

The area surrounding the Property is also undeveloped and has no permanently paved roads. (AA 2:0299-0302 [Tab 10].) The record is

undisputed that the area, including the Property, cannot be developed to its highest and best use until roads are constructed. (RT 99:7-100:5; 108:8-12; 188:16-23.) Here, the City is acquiring a 1.66-acre portion of the Property to construct Indian Avenue to facilitate development in the area. (City's/Respondent's Appendix ("RA") [volume:page] 2:0464 [Tab 19]; RT 99:18-28, 108:8-12.) As set forth in the City's Resolution of Necessity, the Project is defined clearly as an "acquisition of the Subject Interests for the Construction of Indian Avenue Improvements." (AA 5:0980 [Tab 39].) Although the Property is at the corner of Perry Street and Barrett Avenue, which are not permanently paved, the City intends to vacate the Perry and Barrett dedications. (RA 1:0138-0139 [Tab 4]; AA 2:0299-0302 [Tab 10].)

The Property is zoned industrial, but once Indian Avenue is constructed, it can be developed with either industrial or commercial uses. (RA 2:0294-0296 [Tabs 8-10].) Once Indian Avenue is completed, the Property will then have the necessary frontage on a major road in an area lacking the necessary commercial development in an industrial zone, allowing development of the Property with commercial uses and bringing higher prices per square foot than industrial uses for the Property. (RT 143:23-144:2.) Owners have owned the Property since 1985 (RA 1:0092 [Tab 4]), but have not proposed development on the Property.

B. Dedication Of Right-Of-Way Under The Perris Municipal Code

The Subdivision Map Act regulates planning and development and authorizes cities to enact local ordinances imposing dedication requirements on development of property. (Gov. Code §§ 66477, 66479.) These ordinances allow municipalities to require a property owner to "dedicate," or give, certain property to the municipality for specified public

uses. (Gov. Code § 66475.) In dedicating property, an owner is ***not*** compensated for this taking because the government is merely exercising its police power to regulate land use. (*Grupe v. Cal. Coastal Comm'n* (1985) 166 Cal.App.3d 148, 172-173.)

The City enacted ordinances imposing dedication requirements pursuant to the Government Code. Several provisions of the Perris Municipal Code require all development in the City to conform to the City's General Plan. (RA 2:0266-0268 [Tab 7].) Perris Municipal Code Sections 18.08.040 and 18.24.020 require, at the time unimproved property is developed, dedication of any portion of property designated on the Circulation Element[5] or a parcel map as a right-of-way, as a condition of approval of the development. (RA 2:0268, 2:0270 [Tab 7]; RT 95:11-96:24.) Given that Indian Avenue is part of the Circulation Element, the Subject Interests must be dedicated upon development of the Property. This is an undisputed fact. (RT 95:18-25, 186:25-187:11.)

C. <u>Indian Avenue And Its History</u>

Indian Avenue runs north-south from Harley Knox Boulevard to the I-215 frontage road. ***South*** of Ramona Expressway, an east-west highway, Indian Avenue is fully developed to Morgan Street. (AA 7:1564 [Tab 51].) ***North*** of Ramona Expressway, and at the time this lawsuit was filed, Indian

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[5] A Circulation Element is a required element of a city's general plan and consists of the general location and extent of existing and proposed major roads, transportation routes, and other local public utilities and facilities. The circulation element is required to be modified from time to time for a balanced, multimodal transportation network that meets the needs of all users, including pedestrians, trucks, trains, and bicyclists, of streets and highways. (Gov. Code §§ 65302(b), 65358.)

Avenue was completely undeveloped to Markham Street and partially developed to Harley Knox Boulevard.[6]

1. The 1999 General Plan Circulation Element Update

Over a decade ago in 1999, simultaneously with an unrelated development (Lowe's Distribution Center), the City amended its General Plan and designed the alignment of Indian Avenue ***south*** of Ramona Expressway such that Indian Avenue would curve to the east in a half-bell shape and meet Barrett Avenue, a parallel road east of Indian Avenue. (AA 7:1566-1569 [Tab 51].) According to the Resolution approving the amendment, the alignment accommodated transportation goals by creating a circulation of city streets capable of "serving existing traffic and expected future increases in traffic" in the surrounding area. (AA 7:1567 [Tab 51].)

2. The 2005/2008 General Plan Circulation Element Update

In June, 2005 (and later in August, 2008), as required by law under Government Code Sections 65302 and 65358, the City updated its Circulation Element, placing Indian Avenue in its current configuration. (AA 7:1571-1577 [Tab 51].) The City aligned Indian Avenue ***north*** of Ramona Expressway to mirror the southern alignment so that Indian Avenue became a connected road, therefore creating a vertical bell curve shape in the alignment.

In doing so, the City conducted extensive traffic studies to determine the best location with least private injury. (RA 1:0235-0265 [Tab 6]; RT 139:7-141:16.) In his deposition, City Engineer Habib Motlagh

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[6] Construction of Indian Avenue was completed in February 2012. Indian Avenue is now open to the public.

unequivocally testified that, if the alignment of Indian Avenue were shifted north to avoid the Property, then existing developments such as a residence or office structure would have to be demolished and taken, and existing, entitled projects would have to be relocated. (AA 7:1589 [Tab 51].) He further testified during trial that the current alignment of Indian Avenue was chosen based on traffic safety, logical connection, and least private injury. (RT 139:15-140:2.)

3. Traffic Studies Related To The Property And Subject Interests

The alignment of Indian Avenue was based on substantial traffic studies. (RT 139:13-14.) The traffic study used a transportation model to make development projections based on factors such as zoning, common uses, and history of development on ***every*** parcel of land -- including the Property -- to analyze the roadways necessary to address existing and future traffic concerns. (RA 1:0235-0265 [Tab 6]; RT 183:2-28.) These projections then relate back to the properties studied, including the Property. (RA 1:0235-0265 [Tab 6]; RT 183:17-20.) Based on the projections, the roads are placed on the Circulation Element and become the basis on which the City will require dedications for road purposes from each property. (RA 1:0235-0265 [Tab 6].)

The Circulation Element traffic studies were circulated, studied in workshops (where members of the public participated), and became part of an environmental impact review process. (AA 7:1571-1572 [Tab 51].) After all comments were addressed, the traffic studies were approved by the City at public hearings. (*Id.*)

4. Owners' Failure To Object To The Indian Avenue Alignment

Owners could have objected to the Indian Avenue alignment in 1999. They made no objections. Owners again could have objected to the Indian Avenue alignment between 2003 through 2005 at various Circulation Element planning workshops, or when the current Circulation Element was adopted in 2005 and updated in 2008. Again, they made no objections. Therefore, they forever waived their right to object to the alignment of Indian Avenue under Government Code Section 65009.[7] (RT 180:22-26, 262:17-263:1.)

D. Offer To Purchase The Subject Interests And Adoption Of The Resolution Of Necessity

To construct Indian Avenue, the City was required to acquire 12 properties, of which 11 were dedicated by owners in recognition of the benefits that a fully-constructed Indian Avenue would bring to their properties. (RT 111:1-8.) Owners' Property was the final piece. (*Id.*)

On October 14, 2008, the City made a Government Code offer to purchase the Subject Interests for $54,400.00, based on an independent appraiser's valuation of the Property. (AA 1:0031 [Tab 2].) On or about January 9, 2009, the City sent a revised offer letter for $54,800.00. (*Id.*)

On February 19, 2009, the City sent correspondence to Owners advising them of the City Council meeting on March 10, 2009, during which the City Council was to consider the adoption of a Resolution of

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[7] Owner Donald Robinson testified during trial that he made objections to the adoption of the Circulation Element, but it was clarified during cross-examination that neither he nor his representative made objections upon its adoption. (RT 261:4-16.)

Necessity to acquire the Subject Interests. (AA 1:0032 [Tab 2].) Owners never showed up at or objected to the Resolution of Necessity hearing. (*Id.*) Without any objections, the City Council adopted the Resolution of Necessity on March 10, 2009. (*Id.*)

V. OVERVIEW OF DEDICATION REQUIREMENTS IN EMINENT DOMAIN JURISPRUDENCE

A. Valuation Of Property In Eminent Domain Cases

The City's power to exercise eminent domain flows directly from Article I, Section 19 of the California Constitution and statutory law. (Section 1230.010, *et seq.*) The owner of property acquired by eminent domain is entitled to just compensation. (Section 1263.010.) "Just compensation" is defined as the "full monetary equivalent of the property taken", and is measured by the value of what the property owner has lost, rather than what the condemning agency has gained. (*Redevelopment Agency of the City of Concord v. Tobriner* (1989) 215 Cal.App.3d 1087, 1098.) Compensation must be "just" to the public entity acquiring the property, as well as to the property owner. (*City of Fresno v. Cloud* (1972) 26 Cal.App.3d 113, 123 ("*Fresno*").)

The property owner is to be put in the same position monetarily as he would have been had his property not been taken, but he should not receive an undue windfall. To determine such monetary equivalence, the U.S. Supreme Court established the concept of "fair market value"; the owner is entitled to the fair market value of his property at the time of the taking. (*New York v. Sage* (1915) 239 U.S. 57, 61.)

Fair market value is defined as "the highest and best price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell,

and a buyer, being ready, willing and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available." (Section 1263.320(a).)

B. Valuation Of Property Subject To Dedication In Eminent Domain

Fair market value requires considering the cost of preparing property for development to its highest and best use.[8] (Evid. Code § 821; *Los Angeles v. Cole* (1946) 28 Cal.2d 509, 518.) When portions of property being acquired are the areas that a property owner would have to dedicate to a city to secure necessary permits to develop the property at its highest and best use (i.e., a dedication requirement), the court must determine the value of the area taken on the basis of the highest and best uses permitted by the existing zoning, because this land could never be used for any other purpose. (*Fresno, supra,* 26 Cal.App.3d at 123.)

When development is conditioned on dedication of a road, ***the portion subject to the dedication should be valued based on the existing use of the undeveloped property***, not on its highest and best commercial/industrial use, as developed. (*City of Porterville v. Young* (1987) 195 Cal.App.3d 1260, 1269 ("*Porterville*").) This is also known as the *Porterville* doctrine.

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[8] The Real Estate Appraisal Institute defines the "highest and best use" of condemned property as a use that is: (1) physically possible, (2) legally permissible [e.g. in conformance with the general plan and zoning], (3) financially feasible and (4) maximally productive [i.e. giving the highest rate of return on investment]. (*See* the Dictionary of Real Estate Appraisal, Third Edition, Appraisal Institute, 1993.)

In *Porterville*, *supra*, a portion of property was being acquired for a public roadway. (195 Cal.App.3d at 1262.) The city's appraiser appraised the acquired portion based on its agricultural rather than commercial use, even though the property was zoned commercial. The court held:

> Although the parcel was zoned for commercial purposes, it could not be adapted and developed for such purposes without a dedication of frontage to widen the east side of Prospect Street to its ultimate planned width. . . The take is the very frontage owner would have had to dedicate to city to secure the building permits or conditional use permit needed to develop the parcel to its highest and best commercial use. The trial court should have determined the value of the take on the basis of its agricultural use, because it could never be used for any other purpose.

(*Id.* at 1269.)

The *Porterville* doctrine evolved further through the years, when courts began requiring a finding that claimed dedication requirements in eminent domain be both reasonably probable and constitutional (this requirement being added after the U.S. Supreme Court cases of *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 ("*Nollan*") and *Dolan v. City of Tigard* (1994) 512 U.S. 374 ("*Dolan*") were decided). (*See Contra Costa County Flood Control & Water Conserv. Dist. v. Lone Tree Invs.* (1992) 7 Cal.App.4th 930, 937 ("*Contra Costa*"); *City of Hollister v. McCullough* (1994) 26 Cal.App.4th 289, 297 ("*Hollister*").)

The most recent and clear seminal case regarding the *Porterville* doctrine, which also addresses the constitutionality of a dedication requirement, is *State Route 4 Bypass Authority v. Superior Court* (2007) 153 Cal.App.4th 1546 ("*State Route 4*"). *State Route 4* holds that for a dedication requirement to be valid, such that it triggers a lower agricultural valuation, the dedication requirement must be both:

(i) reasonably probable, and

(ii) constitutional, that is:

a. substantially further a legitimate government objective (the nexus standard under *Nollan*), and

b. roughly proportional to the impacts of development (the rough proportionality standard under *Dolan*).

(153 Cal.App.4th at 1551.)

VI. RELEVANT PROCEDURAL HISTORY

A. Relevant Pre-Trial Proceedings And Appraisal Exchange

On April 21, 2009, the First Amended Complaint was filed. The parties exchanged appraisals of the Property in July, 2010. (AA 3:0477-0612 [Tab 27]; AA 4:0702-0721 [Tab 29].) The City's appraiser valued the Subject Interests using agricultural values, pursuant to the *Porterville* doctrine. (AA 3:0517-0522, 3:0534-0537 [Tab 27].) Owners' appraiser, on the other hand, valued the Subject Interests using industrial values, making the legal conclusion himself, without any evidentiary support, that the dedication requirement was invalid. (AA 4:0705-0709 [Tab 29].)

B. Trial Proceedings

Trial was set for November 1, 2010. Prior to trial, the City filed a Motion to Determine the Legal Issue of the Validity of a Dedication Requirement. (AA 2:0463-0466 [Tab 23]; RA 1:0051-0141 [Tab 4].) The City's Motion was made pursuant to Section 1260.040, which provides that if there is a dispute by the parties over a legal issue affecting the determination of compensation, either party may move the court for a ruling on the issue prior to trial. The Court, on its own, continued the City's Motion to the first day of trial.

1. Motion *In Limine* To Bifurcate Trial

As its first of seven motions *in limine*, the City filed a Motion *in limine* to Bifurcate the Legal Issue of Validity of the Dedication Requirement. (AA 8:1740-1787 [Tab 55].) In their ***Partial*** Opposition to the City's Motion to Bifurcate, Owners expressly agreed with the City that "the Court does need to determine certain issues related to the City's claimed dedication requirement up front, ***before*** a jury is empanelled. Specifically, at the onset ***the Court*** needs to determine: ... Whether the City's claimed dedication requirement is unconstitutional because it flunks the U.S. Supreme Court's *Nollan/Dolan* essential nexus and rough proportionality tests:" (AA 6:1386 [Tab 40] [emphasis added]; *see also* RT 43:1-7 ["[B]ecause it's the City's ... burden of proof on the constitutionality issue, I don't think there's a real dispute ... . I think that ***the Court*** would rule on the papers against the City."] [emphasis added].) Owners opposed the City's Motion ***only*** with respect to the reasonable probability of a dedication requirement being decided by a court instead of a jury. (AA 6:1386 [Tab 40].)

The trial court granted the City's Motion and ruled that both the reasonable probability and constitutionality of the dedication requirement were issues for the court, rather than a jury, to decide. (RT 48:16-25.)

2. The Bench Trial

The City presented testimony from Mr. Belmudez, the City's former planning director/current City Manager, who testified on the following:

- Dedication requirements as conditions of approval under the Perris Municipal Code (RT 95:9-96:24);

- The Project and passage of the Resolution of Necessity (RT 97:6-99:15);
- Update of the Circulation Element in 2005 and 2008 (RT 99:18-103:8); and
- Realignment of Indian Avenue north and south of Ramona Expressway (RT 103:13-105:20).

The City also presented testimony from Mr. Motlagh, the City Engineer, who testified on the following:

- Dedication requirements as commonly imposed conditions of approval (RT 138:19-139:3);
- The City's flexibility to alter dedication requirements on a case-by-case basis, depending on the development and traffic impacts (RT 153:6-16); and
- Realignment of Indian Avenue and the supporting traffic studies provided to the City (RT 139:10-141:3).

For their case in chief, Owners presented testimony from an alleged planning expert, Tom Merrell, on the reasonable probability and constitutionality of the dedication requirement, as well as its exclusion as an alleged project effect. The trial court warned Mr. Merrell that it would hear testimony on reasonable probability but not constitutionality, since that is a legal question within the purview of the trial court. Nonetheless, Mr. Merrell continued to make legal conclusions that the dedication requirement was unconstitutional. (RT 190:21-24.) Michael Waldron, Owners' valuation expert, also testified extensively regarding the project effects theory and made legal conclusions that he believed the dedication requirement was neither reasonably probable nor constitutional. (RT 279:6-284:1, 284:8-294:3.) The City objected. (RT 284:14-27.)

At the close of the bench trial, the trial court ruled, based on substantial evidence, that it was reasonably probable that the City would impose the dedication requirement at the time of development and that the dedication requirement was constitutional: that is, the dedication requirement had a nexus to the legitimate government interest of traffic control and was roughly proportional to the impacts of any proposed development. (AA 9:2155-2156 [Tab 94].) The trial court then held that, based on the *Porterville* line of cases, the proper valuation of the Subject Interests was agricultural. (AA 9:2156 [Tab 94].)

3. Motion *In Limine* To Exclude The Dedication Requirement As A Project Effect

Owners also filed, among others, a Motion *in limine* to Exclude Any Evidence of the City's Claimed Dedication Requirement as Being Project Related. (AA 4:0912-0923 [Tab 35].)

The trial court ruled that Section 1263.330 and the cases cited by Owners did not apply to the facts of the case and that the dedication requirement for Indian Avenue would not be excluded from valuation. (AA 9:2158-2159 [Tab 94].)

4. Stipulation Of The Subject Interests At Agricultural Values

After the ruling on the bench trial and motions *in limine*, the trial court was ready to commence the valuation phase of trial before a jury. Owners informed the trial court, however, that they did not have valuation evidence for agricultural values and requested that the trial court enter judgment using the agricultural value of $44,000.00 for the Subject Interests, based on an updated appraisal by the City for trial. (RT 312:4-13.) Owners also forewent a trial on severance damages. (RT 315:5-20.)

The trial court, as well as the City, offered additional time for Owners to obtain a revised appraisal. Owners declined. (RT 314:21-316:1.) The parties stipulated to judgment which was entered on February 23, 2011. (RT 312:16-21; AA 9:2178-2192 [Tab 98].)

C. Appellate Proceedings

On April 22, 2011, Owners filed a Notice of Appeal of the Final Judgment, challenging the trial court's ruling on several matters, including: (i) the dedication requirement is not a project effect; and (ii) the court, not a jury, determines the ***reasonable probability*** of the dedication requirement.

After the case was fully briefed by the parties on March 12, 2012, the lower court issued a tentative decision on November 30, 2012, which did not address many of the Owners' argument, but held that references to the dedication requirement should have been excluded under the project effect doctrine.

Following a lengthy oral argument on February 5, 2013, the lower court, realizing the error and the danger in its tentative decision on the project effect issue, withdrew its initial tentative opinion. The court issued a ***revised*** tentative opinion in May, 2013, reversing its initial holding and concluding that the project effect doctrine is not applicable to the dedication requirement in this case.

The lower court, however, reversed the trial court on another ground, that a jury – not a court – should determine *both* the reasonable probability and the ***constitutionality*** of a dedication requirement. The lower court did this *sua sponte*, even though the City and Owners both agreed that the constitutionality of a dedication requirement is an issue for the court and disagreed only with respect to the reasonable probability issue.

Additionally, the lower court, in violation of Government Code Section 68081, never allowed the City to meaningfully brief this issue.

During oral argument on June 25, 2013, the City urged the Court to consider carefully the implications of sending complicated legal constitutional questions to the jury, and cited several supporting cases. The lower court issued its (final) Opinion on August 9, 2013.

The City filed a Petition for Rehearing. The Petition for Hearing was denied on September 5, 2013.

On September 19, 2013, the City filed a petition for review with this Court. On November 13, 2013, review was granted on the two issues cited in Section I of this Brief.

VII. THERE IS NO GUARANTEED RIGHT TO A JURY TRIAL PURSUANT TO ARTICLE I, SECTION 19 OF THE CALIFORNIA CONSTITUTION TO DETERMINE THE CONSTITUTIONALITY OF AN OTHERWISE REASONABLY PROBABLE DEDICATION REQUIREMENT THAT A GOVERNMENTAL ENTITY CLAIMS IT WOULD HAVE REQUIRED IN ORDER TO GRANT THE PROPERTY OWNER PERMISSION TO PUT HIS OR HER PROPERTY TO A HIGHER USE.

A. The California Constitution Provides A Right To A Jury Trial *Only* In Determining The Issue Of Just Compensation; No Right Exists On The Issue Of Whether There Has Been A "Taking," Or In Other Words Whether A Dedication Requirement Is Unconstitutional.

The right to a jury trial in takings and eminent domain actions is not inherent. Such right was created in 1879 through an amendment to the California Constitution and is permitted only with respect to the issue of just compensation.

The inherent right to a jury trial guaranteed under Article I, Section 16 of the California Constitution is the right as it existed for cases at

common law in 1850 when the California Constitution was adopted. (*Koppikus v. State Capitol Commissioners* (1860) 16 Cal. 248, 253.) The right applies only to civil and criminal actions, but not to equitable actions. (*People v. One 1941 Chevrolet Coupe* (1941) 37 Cal.2d 283, 287.) Thus, a right to a jury trial cannot be claimed in equitable actions unless specifically authorized by the court or statute. (*Koppikus, supra,* 16 Cal. at 254.)

"Whether a cause of action is in law or equity is determinable from a consideration of the common law as it existed at the time of its adoption by this State, and 'in the light of such modifications thereof as have taken place under our own system.'" (*Paularena v. Superior Court* (1965) 231 Cal.App.2d 906, 911-12 [quoting *Philpott* v. *Superior Court* (1934) 1 Cal.2d 512, 516].)

As of 1850, there was no inherent right to a jury trial under the California Constitution or in common law for "just compensation" issues in eminent domain cases, which are equitable in nature. As stated in *Koppikus, supra,* 16 Cal. at 254:

> The proceeding to ascertain the value of plaintiff's property, and the compensation to be made to him when taken, is not an action at law: it is an inquisition on the part of the State for the ascertainment of a particular fact, as preliminary to future proceedings, and it is only requisite that it be conducted in some equitable and fair mode, to be provided by law, either with or without the intervention of a jury, opportunity being allowed to the owners or parties interested in the property to present evidence respecting its value, and to be heard thereon.

Further, this Court reaffirmed that there is no inherent right to a jury trial in takings and eminent domain actions in its 1862 decision of *People ex rel Heyneman v. Blake* (1862) 19 Cal. 579, 596.

Only through an amendment in the California Constitution did the right to a jury trial arise in eminent domain, and ***only*** with respect to just compensation. In 1879, Article I, Section 14 (now Section 19) of the California Constitution was adopted, stating, in pertinent part:

> Private property shall not be taken or damaged for public use without just compensation having been made to, or paid into Court for the owner ... which compensation shall be ascertained by a jury, unless a jury be waived as in other civil cases in a court of record, as shall be prescribed by law.
>
> (*See also Weber v. County of Santa Clara* (1881) 59 Cal. 265, 266.)

In addition, the relevant inquiry is not the claim or cause of action itself, but the constitutional issue to be decided; if a portion of a claim involves a legal issue, then the legal issue gets decided by a court while the remainder goes to the jury. (*People v. One 1941 Chevrolet Coupe, supra,* 37 Cal.2d at 299 ["In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case -- the *gist* of the action."].)

Here, the lower court failed to analyze the relevant and historical context of Article I, Sections 16 and 19 of the California Constitution, and erroneously concluded that a jury must decide whether the dedication requirement in this case "could be constitutionally imposed as a dedication condition on development." (Opinion, p. 34.)

The constitutionality of a dedication requirement is analogous to the question of whether a taking has occurred and is, therefore, not an issue of just compensation. However, the lower court expands the purview of a jury beyond just compensation, based on the erroneous standard that "the nature and extent of the traffic and other impacts of the property development are

factual determinations" and, therefore, "based on the evidence presented during the bench trial, reasonable jurors could differ on whether all or any part of the 1.66 acre take could be constitutionally imposed as a dedication requirement." (Opinion, p. 34.) The lower court's reasoning is flawed and creates real danger that, going forward, litigants will be able to argue that all mixed questions of law and fact must be submitted to a jury. As will be discussed fully in Section VII(B) of this Brief, mixed questions of fact and law are routinely submitted to the court for consideration when they are legal in nature, and this Court has upheld decisions where lower courts have decided mixed questions of law and fact.[9]

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[9] Perhaps a jury might be called upon to make certain findings of fact relevant to a legal determination. For example, a jury might be asked, "How much traffic will development of the Stamper Property cause?" and/or "What percentage of the traffic on the road that runs through the Stamper Property will consist of traffic generated by the Property itself, as opposed to traffic from some other sources?" Those are factual questions relevant to whether there is rough proportionality between the taking and the approval of the development.

However, whether those predicate facts satisfy the constitutional requirement is purely a question of law. Even if the jury decides those facts (which, again, is not necessarily for a jury to decide, as courts have historically decided mixed questions of law and fact), a jury does not decide the law. A jury should not be "allowed to determine whether, and to what extent, the [] take is roughly proportionate" or whether the take "could be constitutionally imposed as a dedication condition on development." (Opinion, pp. 33, 34.) That ultimate task is for the judge.

B. Historically, In Eminent Domain Cases Juries Determine The Amount Of Just Compensation *Only*; Courts Determine *All* Other Issues.

1. For Almost 100 Years, Courts Have Decided *All* Issues Other Than Compensation, Even If Those Issues Involve Questions Of Fact And Law.

In the history of eminent domain jurisprudence, all issues, including mixed questions of fact and law, must be determined by the trial court; ***only*** the amount of the award of compensation has ever gone to the jury.

This precedent was set almost 100 years ago by this Court in *Vallejo & Northern RR Co. v. Reed Orchard Co.* (1915) 169 Cal. 545 ("*Vallejo*"). In *Vallejo,* this Court recognized that eminent domain actions are special proceedings in the court of equity and have no inherent right to a jury trial. (*Id.* at 555.) Therefore, this Court concluded that the right to a jury trial guaranteed by Article I, former Section 14 (now Section 19) of the California Constitution cannot extend to any matters beyond "just compensation" enumerated therein. (*Id.*) This Court opined:

> It is evident that this amendment made a radical change regarding the right to a jury trial. Under its provisions, ***in all actions except those enumerated in the opening clause, the issues of fact are to be tried by the court.*** ... A condemnation suit is a special proceeding. ... It follows that, ***except those relating to compensation, the issues of fact in a condemnation suit, are to be tried by the court***, and that if the court submits them to a jury it is nevertheless required to make findings either by adopting the verdict thereon or by making findings in its own language.
>
> (*Id.* at 556 [emphasis added].)

Shortly afterwards, in *Oakland v. Pacific Coast Lumber & Mill Co.* (1915) 171 Cal. 392, 397 this Court reaffirmed that "compensation" refers to the ***monetary award*** only, and "***all other questions of fact, or of mixed***

fact and law, are to be tried, as in many other jurisdictions they are tried, without reference to a jury." (Emphasis added.)

This Court further decided in *People v. Ricciardi* (1943) 23 Cal.2d 390, 403-04 ("*Ricciardi*") that, consistent with the California Constitution, a court decides whether access impairment to existing streets constitutes compensable severance damages, but a jury decides ***how much*** access impairment damages to award, if any. Although damages from access impairment are related to the monetary award of compensation, this Court decided that whether access impairment exists is a preliminary question of fact and law for the court.

This Court's holding in *Ricciardi* has since been applied to several cases for the proposition that, in eminent domain, any preliminary question of mixed fact and law related directly to value is decided by the Court. "The court, rather than the jury, typically decides questions concerning the preconditions to recovery of a particular type of compensation, even if the determination turns on contested issues of fact." (*Emeryville Redevelopment Agency v. Harcros Pigments, Inc.* (2002) 101 Cal.App.4th 1083, 1116 ("*Harcros*") [issue involving good will]; *see also Pacific Gas & Electric Co. v. Peterson* (1969) 270 Cal.App.2d 434; *Housing Authority v. Forbes* (1942) 51 Cal.App.2d 1, 8 [issue of public use, necessity, and least private injury are issues for the judge alone to decide]; *Escondido Union School Dist. v. Casa Suenos De Oro, Inc.* (2005) 129 Cal.App.4th 944 [whether fixtures pertain to realty is an issue for the court]; *Redevelopment Agency v. Contra Costa Theater, Inc.* (1982) 135 Cal.App.3d 73 [liability for precondemnation damages].)

That Courts decide all questions of law in eminent domain cases is even supported by statute. Under Section 1260.040, if there is a dispute

over a legal issue affecting the determination of compensation, either party may move ***the court*** for a ruling on the issue 60 days ***prior to trial on the compensation issue***. Use of this procedure is limited to the resolution of legal issues that may affect compensation; it may not be used to ascertain just compensation.

In *Dina v. People ex rel. Dept. of Transportation* (2007) 151 Cal.App.4th 1029, 1043 (*"Dina"*), the court of appeal held that the trial court may determine the legal issue of liability pursuant to the motion procedure set forth in Section 1260.040. The court construed Section 1260.040 as authorizing the department to move for a ruling on liability in that case because it was a legal issue affecting the determination of compensation. The court reasoned that construing Section 1260.040 broadly to permit the court to determine the legal issue of liability in an inverse condemnation action comported with the purpose of the bill enacting Section 1260.040. (*Id.*) Determining the constitutionality of an otherwise reasonably probable dedication requirement is no different.

2. Courts – Not Juries – Have Always Decided The Validity/Constitutionality Of Dedication Requirements.

The question of whether the dedication requirement is constitutional (i.e., whether the government regulation with respect to the property is constitutional) is a preliminary and solely a legal question for the court to decide, before the court determines whether the jury (or court) decides if it is reasonably probable that the dedication requirement will be imposed.

This procedure comports with well-established case law set almost 100 years ago and followed by courts statewide. ***No court to date*** has allowed a jury to determine the constitutionality of a dedication requirement in eminent domain. (*See, e.g., Contra Costa, supra,* 7

Cal.App.4th at 937; *Fresno*, *supra*, 26 Cal.App.3d 113; *Porterville*, *supra*, 195 Cal.App.3d 1260; *Hollister*, *supra*, 26 Cal.App.4th 289, *State Route 4, supra*, 153 Cal.App.4th at 1551.) The lower court's holding otherwise is reversible error.

In *Contra Costa*, *supra*, 7 Cal.App.4th 930, a water district acquired a portion of an undeveloped commercial parcel, subject to a dedication requirement, for a flood control project. The parties tried the issue of reasonable probability of dedication ***before the court*** without challenging the court's right to make that ruling. The trial court found a reasonable probability that dedication would be required by the city of Antioch as a condition of development. (*Id.* at 932.)

During the jury trial to determine the amount of compensation, the jury instruction requested by the district was as follows:

> There is a reasonable probability that the subject property cannot be developed to its highest and best use without a dedication to the City of the parcel being condemned in this action. Therefore, the condemned parcel shall be valued on the basis of the use that can be made of the parcel without such dedication. ***That use is agricultural.***
>
> (*Id.* at 933 [emphasis added].)

The trial court deleted the last sentence regarding the agricultural use.

The appellate court ruled that the trial court properly decided the question regarding the reasonable probability of the dedication requirement, but erred by omitting the last sentence regarding agricultural use. The appellate court reasoned that "failure to give the jury instruction as requested ... confused the jury and was prejudicial." (*Id.* at 937.) Clearly, the appellate court agreed that the validity of the dedication requirement is for the court to decide.

In *State Route 4*, the trial court also decided the issue of constitutionality as a matter of law and stated the following:

> Essential to the determination that a dedication condition is reasonably probable is a finding that such a requirement would be legally permissible: "[P]roof that a conditional dedication is a 'reasonable probability' requires a showing not only that plaintiff would probably have imposed the dedication condition if defendants had sought to develop the property, but also that the proposed dedication requirement would have been constitutionally permissible. ... [I]t is not a 'reasonable probability' that a governmental entity would actually succeed in imposing an unconstitutional dedication requirement.

(153 Cal.App.4th at 1551 [citation omitted].)[10]

Neither Owners nor the lower court properly cite to any case to support the proposition that there is a right to a jury trial on the determination of the validity or constitutionality of an otherwise reasonably probable dedication requirement.

3. Owners' And The Lower Court's Reliance On *Campus Crusade* For The Proposition That A Jury Decides The Constitutionality Of A Dedication Requirement Is Misplaced.

The lower court mistakenly relies on *Metropolitan Water Dist. of So. Calif. v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954 ("*Campus*

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[10] Even though *State Route 4* is the most recent, on point case on this issue, the lower court dismissed the City's position during oral argument that *State Route 4* supports the proposition that the constitutionality of a dedication requirement is determined by the court, not a jury. The lower court's only reasoning for this was that perhaps these issues were decided by the trial court in *State Route 4* because the parties had stipulated to a bench trial. Yet, here, as explained above, Owners ***expressly*** agreed with the City's position that the trial court should determine the constitutionality of the dedication requirement. (AA 6:1386 [Tab 40]; RT 43:1-7.) Furthermore, the lower court is wrong in its criticism of the *State Route 4* court on the rough proportionality issue. (Opinion, p. 39.)

Crusade") for the proposition that the ***constitutionality*** of a dedication requirement is an issue for the jury. At the trial court, however, Owners cited to *Campus Crusade* only for the proposition that the ***reasonable probability*** of a dedication requirement is an issue for the jury. (AA 6:1386 [Tab 40].)

In *Campus Crusade,* an organization owned property in a low density residential zone. (*Campus Crusade, supra*, 41 Cal.4th at 966.) The organization had retained a developer to assist with plans to create a residential development and other commercial uses on the property, which the city supported. (*Id.* at 962.) A water district, however, sought to acquire the property to lay pipelines before the zone could be changed to support the residential development and commercial uses. (*Id.*) The district filed a motion *in limine* to exclude any evidence of a future zone change because it was not "reasonably probable" that the property would be rezoned in the near future. (*Id.* at 967.) The trial court agreed and excluded the evidence. The appellate court reversed, holding that the question of the reasonable probability of a zone change should go to the jury. (*Id.* at 964.)

This Court agreed, holding that ***case law is well-settled*** that the reasonable probability of a zone change is a question of fact for the jury, and the court's role is merely as a gatekeeper of the sufficiency of evidence. (*Id.* at 967-68.) Underpinning this Court's holding is the reasoning that, under Section 1263.320:

> ...fair market value of property taken has not been limited to the value of the property as used at the time of the taking, but has long taken into account the 'highest and most profitable use to which the property might be put in the reasonably near future, to the extent that the probability of such a prospective use affects the market value.
>
> (*Id.* at 965.)

According to well-settled case law and Section 1263.320, the reasonable probability of a zone change ***has always been a question for the jury*** because it is a purely factual analysis which impacts the value of property under Section 1263.320. (*See, e.g., City of San Diego v. Neumann* (1993) 6 Cal.4th 738 ("*Neumann*"); *Community Redevelopment Agency v. Henderson* (1967) 251 Cal.App.2d 336, 345.) Zoning has always been a question for the jury because it is ***not legal in nature***, and courts routinely allow juries to decide reasonable probability of zone changes. (*See, e.g., Neumann, supra*, 6 Cal.4th 738.) This case, however, does not involve the reasonable probability of a zone change. It involves the constitutionality of a dedication requirement, which historically has been decided by the courts ***because it requires a legal analysis.***

There are no facts in dispute here as to whether the City would have allowed development of the Subject Interests for anything other than Indian Avenue. Unlike the *Campus Crusade* facts, no one here retained any consultants to see if the City was willing to revise its Circulation Element to change the alignment of Indian Avenue to allow for other developments. But even if such facts were at dispute, these distinctions would not play a role in the question of whether the dedication requirement is constitutional. Whether an otherwise reasonably probable dedication requirement is constitutional is solely a legal question, making *Campus Crusade*, which involves a purely factual analysis on the value of property, inapposite, as discussed in the next section of this Brief.

C. Under Regulatory Takings And Inverse Condemnation Cases, The Constitutionality Of A Taking, Or In Other Words The Constitutionality Of A Dedication Requirement, Has Historically Been A Question Of Law, Or Question Of Fact And Law, To Be Decided By The Court.

Characterization of an issue as one of law means that the issue is to be decided by a ***court*** and not a jury; to the extent an issue is one of law and fact, the ***court's*** determination is to be sustained if it is supported by substantial evidence. (*San Diego Metropolitan Transit Development Bd. v. Price* (1995) 37 Cal.App.4th 1541, 1548.) Even this Court has stated that "the issues we have 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, even if there are also underlying disputes of fact -- antecedent to the valuation of the property..." (*Campus Crusade, supra,* 41 Cal.4th at 973 [emphasis added].) Whether a certain set of facts suffices to satisfy the dictates of the Constitution is purely a legal issue, subject to initial determination by a trial court and, thereafter, *de novo* review on appeal. Juries should not get deference on that issue; nor should they decide the issue in the first instance.

The constitutionality of a claimed dedication requirement in eminent domain stems from the U.S. Supreme Court cases of *Nollan*, *supra*, 483 U.S. 82, and *Dolan*, *supra*, 512 U.S. 374. (*State Route 4, supra*, 153 Cal.App.4th at 1551.) As stated in *State Route 4,* a constitutional dedication requirement must (i) substantially further a legitimate government objective (the nexus standard under *Nollan*), and (ii) be roughly proportional to the impacts of development (the rough

proportionality standard under *Dolan*). In both *Nollan* and *Dolan,* the court, rather than the jury, determined the constitutionality of the takings.

In *City of Monterey v. Del Monte Dunes* (1999) 526 U.S. 687, 721 ("*Del Monte Dunes*"), the U.S. Supreme Court explained that whether a land-use decision substantially advances legitimate public interests, also known as the *Nollan* standard, is "probably best understood as a ***mixed question of fact and law.***"[11] Moreover, in *Koontz v. St. Johns River Water Management District* (2013) 133 S. Ct. 2586, 2595 ("*Koontz*"), the property owner filed suit in state court under a state statute allowing owners to recover monetary damages for takings without just compensation. The court, rather than a jury, determined the constitutional issues under *Nollan* and *Dolan.* (*Id.*) The *Koontz* case was ***not*** brought as a writ of mandate, but the trial and appellate courts nonetheless determined the constitutionality of the exaction under the *Nollan/Dolan* requirements. (*Id.* at 2595-96.)

The distinction that constitutionality standards set under *Nollan* and *Dolan* are typically used in inverse condemnation cases rather than eminent domain cases is also unimportant. Inverse condemnation actions are

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[11] The lower court is mistaken in its reading of the U.S. Supreme Court's holding in *Del Monte Dunes, supra*, 526 U.S. 687, a 42 U.S.C. § 1983 case, which is wholly distinct from an eminent domain or a takings case. (Opinion, p. 31.) In fact, the Supreme Court expressly distinguished its holding from takings cases. In reaching its decision that a jury trial was appropriate, the U.S. Supreme Court clearly stated that the rough proportionality standard under *Dolan*, a Fifth Amendment issue, did not apply to the *Del Monte Dunes* case. (*Id.* at 702-03 ["We believe, accordingly, that the rough-proportionality test of Dolan is inapposite to a case such as this one."][emphasis added].) Rather, the Supreme Court held that in federal court, a plaintiff bringing a suit under 42 USC § 1983 making an "as applied" challenge to an exaction as a taking may be entitled to a jury trial because "claims brought pursuant to 42 U.S.C. § 1983 sound in tort" and tort claims are in the purview of the jury. (*Id.* at 709-710.)

analogous to eminent domain actions, and courts have often drawn analogies between the two to determine an issue of law. (*See, e.g., Marshall v. Dept. of Water and Power* (1990) 219 Cal.App.3d 1124, 1140.)

Like eminent domain actions, inverse condemnation cases are typically bifurcated into two phases. California courts hold that there can be no decision by a jury on the first phase regarding liability, even when disputed factual issues are involved. (*See, e.g., San Diego Gas & Electric v. Superior Court* (1996) 13 Cal.4th 893, 951 ["Plaintiffs complain they were denied their right to jury trial, apparently referring to their right to receive 'just compensation, ascertained by a jury unless waived . . .' (Cal. Const. art. I § 19.) But as we reaffirmed in *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 15, 'the right to a jury trial applies in inverse condemnation actions, but ***that right is limited to the question of damages***.' ***There is no right to jury trial on the issue whether there has been a taking in the first instance***."] [emphasis added].)

Even "in an inverse condemnation proceeding where liability is completely a ***factual*** question, does the plaintiff have a right to a jury trial on the issue of liability? We answer, 'No.' ... Time and again, our trial courts act capably and fairly as triers of fact." (*Marshall v. Dept. of Water and Power*, *supra*, 219 Cal.App.3d at 1140 [emphasis added]; *see also Redevelopment Agency v. Tobriner, supra,* 153 Cal.App.3d at 376 ["The determination of whether an inverse taking has occurred is a nonjury question, even when there are ***factual*** questions involved."] [emphasis added]; *Orpheum Bldg. Co. v. San Francisco Bay Area Rapid Transit Dist.* (1978) 80 Cal.App.3d 863, 868 [holding that even where the determination of liability involves ***factual*** questions, the only issue to be determined by the jury is compensation]; *Mt. San Jacinto Community College Dist. v.*

Superior Court (2004) 117 Cal.App.4th 98, 103 [holding that the issue of just compensation is tried by a jury; all other ***issues of fact and of mixed questions of law and fact*** are tried by a court].)

VIII. THE DEDICATION REQUIREMENT CLAIMED BY THE CITY IS NOT A "PROJECT EFFECT" THAT THE EMINENT DOMAIN LAW REQUIRES TO BE IGNORED IN DETERMINING JUST COMPENSATION -- REVERSAL OF THE LOWER COURT'S HOLDING ON THIS ISSUE WILL UNDO OVER 40 YEARS OF EMINENT DOMAIN CASE LAW AND WILL GREATLY REDUCE A PUBLIC AGENCY'S POLICE POWERS AND CRIPPLE THE USE OF DEDICATION REQUIREMENTS AS VALID PLANNING TOOLS.

The Opinion is correct in its holding that Section 1263.330 does not apply to the Indian Avenue dedication requirement. Application of Section 1263.330 to exclude the Indian Avenue dedication requirement from valuation is entirely improper and directly conflicts with decades of well-established case law on valuing dedication requirements in eminent domain cases. A reversal of the Opinion on this issue would also significantly reduce the ability of public agencies to use dedication requirements as valid planning tools authorized under Section 66475 of the Government Code and local ordinances.

A. <u>The Project Effect Doctrine Is Inapplicable To The Indian Avenue Dedication Requirement.</u>

1. Definition Of A Project Effect Under Code of Civil Procedure Section 1263.330.

Under Section 1263.330, fair market value 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; or

(c) any preliminary actions of the plaintiff relating to the taking of the property.

In other words, if a proposed project affects the value of a property to be acquired in eminent domain, the effect of the project on the value of the property must be ignored. Application of Section 1263.330 is very straightforward: for example, if vacant property is being acquired to construct a shopping center and the proposed shopping center increases the value of the acquired property for same by 20%, then the 20% increase in value must be excluded from the jury in determining the property's fair market value. The reverse is true: for example, if a property is being acquired for a municipal waste site and the proposed waste site decreases the value of the property by 20%, then the 20% decrease in value must be excluded from the jury in determining the property's fair market value.

On the other hand, valuation of property subject to a dedication requirement requires a different methodology in eminent domain jurisprudence, which is the *Porterville* doctrine discussed in Section V(B) of this Brief. An express outcome of applying the *Porterville* doctrine is the inclusion, ***not*** the exclusion, of a claimed dedication requirement in valuing property. The lower court understood the mutual exclusivity of these two doctrines and correctly ruled that the project effect doctrine under Section 1263.330 does not apply to dedication requirements.

2. The Dedication Requirement Is Not A Project Effect Because It Exists Independently Of The Project To Construct Indian Avenue And Applies Generally To All Properties Affected By The Circulation Element -- *Rancho Penasquitos* And *Barratt American* Are Not Applicable.

Owners cite to *City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal.App.4th 1013 ("*Rancho Penasquitos*"), and *City of San*

Diego v. Barratt American, Inc. (2005) 128 Cal.App.4th 917 ("*Barratt American*") as legal authority to exclude the Indian Avenue dedication requirement from valuation. Yet those two cases do not even involve dedication requirements (they are change of zoning cases) and are factually distinguishable from the case at hand.

In both of those cases, zoning restrictions were ***solely*** enacted by the City of San Diego as part of the highway construction project to specifically restrict development and depress property values in areas where the city knew it would later acquire property for the proposed highway project.[12]

Owners argue that the realignment of Indian Avenue as part of the 2005 update to the Circulation Element was somehow an action under Section 1263.330, and that the hypothetical dedication of Indian Avenue is therefore part of the project to construct Indian Avenue. According to Owners, any decreased valuation to the portion of property being acquired as a result of the dedication requirement must therefore be excluded under Section 1263.330 as a project effect. Frankly, as the trial court stated,

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[12] The appellate court in *Rancho Penasquitos* held that evidence of the zoning restriction was rightfully excluded from the jury under Section 1263.330 as a project effect because the restriction was enacted by the city ***solely*** as a result of the project to construct the highway. The effect of the zoning restriction was to freeze property values so the city could later acquire property at lower prices for the highway. (*Rancho Penasquitos, supra,* 105 Cal.App.4th at 1038-39.) In *Barratt American*, the parties agreed that the project effect should be excluded, but differed on ***how*** the project effect should be excluded. The owners argued the property should be valued as if the highway construction project were never conceived or planned. The city argued the property should be valued as if the highway construction project were suddenly abandoned on the date of value of the property. The appellate court agreed with the owners and held that the city's theory did not fully exclude the project's effects because abandonment of the project assumed the zoning restriction was still in place. (*Barratt American, supra,* 128 Cal.App.4th at 937-38.)

Owners' argument is "clever and beguiling", but nonetheless nonsense and mistaken. (AA 9:2157 [Tab 94].)

Unlike in *Rancho Penasquitos* and *Barratt American*, the City here did not enact the dedication requirement ***solely*** for the purpose of the Project in this case -- the construction of Indian Avenue. In fact, it is undisputed that at the time the dedication requirements were imposed years earlier, the City had no plans of constructing Indian Avenue ***north*** of Ramona Expressway. The PMC authorizes the City to require dedication of rights of way upon development of any property, not just for the Indian Avenue project. (RA 2:0268, 0270 [Tab 7]; RT 95:11-17.) The ordinance that adopted the use of dedication requirements was enacted long ago in 1981 and applies to all properties to be developed in the City. (RA 2:0266-0270 [Tab 7].) The PMC authorizes dedication requirements upon development of ***any*** property within the City.[13] The use of dedication requirement is part of a city's planning tools under Government Code Sections 66477 and 66479. Here, the City presented undisputed testimony that dedication requirements are conditions of approval commonly imposed on development projects throughout the City, not just along Indian Avenue (RT 95:9-96:24, 138:19-139:3) and that when the Circulation Element was updated and adopted in 2005, it dealt with the entire City and not just Indian Avenue. (RA 1:0142-0234 [Tab 5].) Again, at that time the City did not have any plans whatsoever of constructing the Project.

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[13] Specifically, the City would require the dedication requirement under Perris Municipal Code Sections 18.08.020, 18.08.040 and 18.24,020. (RA 2:0266-68, 2:0271 [Tab 7].)

The appellate court here correctly ruled, "While certainly there would be no requirement of a dedication of property for Indian Avenue, if the Indian Avenue project did not exist, the imposition of a dedication is nonetheless not attributable to the project within the confines of the statute" as "dedication requirements exist independent of any specific project." (Opinion, p. 40.) The dedication requirement "applied across the board to all development within the community ... [and] was not a governmental action designed to be applied solely to the Indian Avenue project." (Opinion, p. 45.) The lower court's opinion on this issue comports with over 40 years of jurisprudence regarding the proper method of valuing dedication requirements in condemnation cases. (*See, e.g., Fresno, supra,* 26 Cal.App.3d 113; *Porterville, supra,* 195 Cal.App.3d 1260; *Contra Costa, supra,* 7 Cal.App.4th 930; *Hollister, supra,* 26 Cal.App.4th 289; and *State Route 4, supra,* 153 Cal.App.4th 1546.)

3. The Project Effect Doctrine Is Incompatible With Decades Of Precedent Under The *Porterville* Doctrine.

Furthermore, application of Section 1263.330 to claimed dedication requirements is inimical to the *Porterville* doctrine and the constitutionality test adopted by *State Route 4.* Finding that a dedication requirement is constitutional means a public agency can validly require said dedication upon development. As such, the *Porterville* doctrine applies, and under *Porterville,* provided it is reasonably probable that the dedication requirement will be imposed at the time of development, then the property to be acquired would be valued under agricultural valuation. (*See* Section V(B) of this Brief). How could Section 1263.330 then apply to exclude the dedication requirement from valuation as a project effect?

Also, conversely, a dedication requirement found to be unconstitutional or not reasonably probable to be imposed on a property cannot be considered during the valuation trial anyway, so application of Section 1263.330 to the dedication requirement is moot. Simply put, the *Porterville* doctrine and constitutionality test under *State Route 4* for dedication requirements will "weed out" improper preliminary actions of any condemning agency. That is why the use of the project effect doctrine does not have a place in dedication cases.

B. A Reversal Of The Lower Court's Holding Regarding The Applicability Of The Project Effects Doctrine To Dedication Requirements Will Undo And Render Bad Law Over 40 Years Of Established Case Law.

The Opinion comports with ***over 40 years*** of jurisprudence regarding the proper method of valuing dedication requirements in condemnation cases. (*See, e.g., Fresno, supra,* 26 Cal.App.3d 113; *Porterville, supra*, 195 Cal.App.3d 1260; *Contra Costa, supra,* 7 Cal.App.4th 930; *Hollister,* 26 Cal.App.4th 289; and *State Route 4, supra,* 153 Cal.App.4th 1546.) If this Court were to reverse the appellate court, then ***all*** condemnation jurisprudence involving dedication requirements would be turned on its head. Under Owners' logic, ***every*** condemnation case involving a dedication requirement would be overruled, because every dedication requirement would become a project effect. The dedication requirement would be required to be excluded from valuation, since every dedication requirement is acquired for construction of some road which is typically the project for which property is being acquired.

Owners argued at the appellate court that this case is not the typical dedication requirement in a condemnation case because the City updated its General Plan in 2005, changing the location of Indian Avenue to cross

Owners' property. Following Owners' deeply flawed logic, the ***only*** time a right-of-way dedication requirement is ***not*** ignored as a "project effect" in eminent domain is when a road is acquired as part of an ***initial*** adoption of a general plan or circulation element.

According to Owners, if the City updates or amends its Circulation Element to change the alignment of a road, then the City cannot later acquire that road by eminent domain at agricultural values under the *Porterville* doctrine because the dedication requirement is a project effect of the amendment changing the road alignment. Such a conclusion is completely illogical and unsupported by case law.

The facts of this case are no different from the seminal condemnation cases dealing with dedication requirements. After several public hearings where Owners could have, but failed to, object to the realignment of Indian Avenue, the City adopted Indian Avenue in its current alignment as part of its 2005 update to the Circulation Element. Four years later, the City began implementing its updated Circulation Element to build out its roadway system and commenced this case.

In ***all*** seminal condemnation cases with dedication requirements, the projects were acquisition of property for right-of-way as part of the implementation of a general or specific plan:

1. In *Fresno, supra,* to implement its ***master plan***, a city acquired strips of property abutting two streets that were subject to dedication requirements to build out those streets. (*Fresno, supra,* 26 Cal.App.3d at 115-16.)

2. In *Porterville, supra,* as part of its ***general plan***, a city acquired a commercially zoned strip of property to widen a street to full width. (*Porterville, supra*, 195 Cal.App.3d at 1263.)

3. In *Contra Costa, supra,* a flood control district was building a flood control channel per its ***specific plan*** and acquired 5 acres of a 38-acre property. (*Contra Costa, supra,* 7 Cal.App.4th at 932, 937.)

4. In *Rohn v. Visalia* (1989) 214 Cal.App.3d 1463, a city ***amended*** its ***general plan*** to connect a street at an intersection.

5. In *State Route 4, supra,* a bypass authority constructed a highway as part of its transportation plan. (*State Route 4, supra,* 153 Cal.App.4th at 1553.)

Precedent clearly establishes that hypothetical dedication requirements in the context of condemnation cases ***must be considered*** rather than ignored in valuation. On this issue, the appellate court's ruling is therefore perfectly in line with historic and current case law.

C. Holding The Dedication Requirement Is A Project Effect Will Cripple The Police Powers Of Public Agencies To Regulate Land Use And The Use Of Dedication Requirements As Valid Planning Tools.

If this Court reverses the appellate court on this issue and determines that the dedication requirement is a project effect, this Court will curtail a public agency's police powers to regulate land use and dramatically cripple its use of dedication requirements as valid planning tools.

Statutory law authorizes public agencies to enact local ordinances that impose dedication requirements on the development of property within its jurisdiction. (Gov. Code §§ 66477, 66479.) These ordinances allow the agencies to require a private property owner to dedicate private property to the agency for specified public uses. (Gov. Code § 66475.) Moreover, placement of streets does not have to be related to development of a vacant, unentitled property. Regulation and control of the design, which includes street alignments, grades and widths, and improvements of subdivisions is

vested in local governments. (Gov. Code §§ 66411, 66418.) Therefore, the City has discretion in placing its streets. (*See* Gov. Code § 65009.)

In this case, as part of the placement of Indian Avenue in its current configuration in connection with the City's 2005 Circulation Element update, the evidence is undisputed that the City conducted a series of studies to find the proper placement of Indian Avenue with the least private injury. (RT 139:10-141:3.)

Owners never challenged the realignment of Indian Avenue in its current configuration despite receiving notice of same in 2005 and again in 2008. (RT 180:22-26, 262:17-263:1.) They failed to object to the alignment at the numerous public workshops and public hearings regarding Indian Avenue. (*Id.*) They also failed to object to the acquisition of the Subject Interests prior to the hearing. (*Id.*) Essentially, Owners are now trying to challenge the realignment of Indian Avenue in 2005 by arguing that they should be compensated at industrial values rather than agricultural values, because in 2005, four years before the City sought to acquire the Subject Interests, the City changed the realignment of Indian Avenue as part of a city wide analysis on the City's Circulation Element.

Owners simply cannot take a another bite at the apple now, years later, when they missed numerous chances to do so. Laws regarding general plan updates and amendments, including any street alignments, have strict noticing requirements and may only be challenged within a very specific timeframe (usually 90 or 120 days). (*See, e.g.,* Gov. Code § 65009.) They ensure public agencies have certain finality in their regulations without constantly being subject to the whims of the populace or disgruntled citizens. (*See, e.g., Garat v. City of Riverside* (1991) 2 Cal.App.4th 2.) Otherwise, agencies could never develop streets or

require dedications, as every property owner subject to the dedication could object and file a lawsuit to hold up the development.

If this Court determines that the project effect doctrine applies to a claimed dedication requirement, reference to the dedication requirement would be ignored during valuation and the City could not pay the lower agricultural values that would otherwise be permitted under the *Porterville* doctrine. Requiring public agencies to pay higher prices for the acquisition of rights of way subject to otherwise valid, constitutional dedication requirements simply because the right-of-way was realigned in an update or amendment of a public agency's general plan circulation element will cripple the public agency's authority to effectively and safely plan the community.

Knowing that any realignment would require payment of the highest values in eminent domain, public agencies would be incredibly reluctant to change the alignments of any right of way on a circulation element due to the higher costs of land acquisition, even if the realignment is the safest, economically efficient route. Also, due to the great expense of constructing rights-of-way under Owners' theory, public agencies would be slow to condemn property for necessary rights-of-way, resulting in less roadways, more traffic congestion, and unsafe traffic controls.

Public agencies would simply wait for each property owner to come in with a development application and, at the time of that development, would require dedication of the land and for the owner to pay for construction of the road. This would be an absurd result as it may take decades for roads to be built out in under-developed cities such as Perris.

Moreover, if the necessary infrastructure, such as roads in under-developed parts of communities, are not built out by municipalities, then in

most circumstances it would result in an ultimate overall depression of property values and it would slow, if not completely stop, growth in such communities. If the necessary roads are not there to support the traffic necessary for a meaningful development in a part of the City, then it might not be economically viable for many property owners to develop their properties. It becomes circular and it adversely affects local communities.

IX. CONCLUSION

It is clear that the California Constitution and almost a century of well-settled law do not provide a guaranteed right to a jury trial on the constitutionality of an otherwise reasonably probable dedication requirement. This Court must ***reverse*** the lower court's erroneous holding on that issue. At worst, if there are any disputed predicate facts in relation to the constitutionality issue, the jury perhaps could determine those predicate facts, but never the ultimate legal question.

With respect to the project effect doctrine, case law is well-settled that the dedication requirement claimed by the City is not a project effect that Section 1263.330 requires to be ignored in determining just compensation. Further, public policy suggests that a ruling holding that otherwise valid dedication requirements are project effects would cripple a public agency's critical land use power and would ultimately have an adverse effect on local communities.

In making its final decision in this case, the City urges this Court to preserve the fine balance between the rights of the private landowner with the needs of the public community in general.

Dated: January 15, 2014 ALESHIRE & WYNDER, LLP

By: _____
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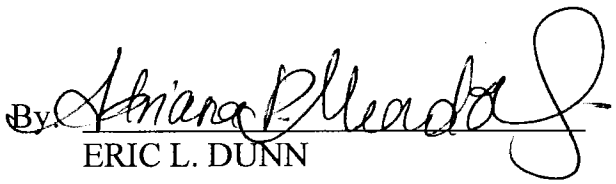
CERTIFICATE OF WORD COUNT

I certify that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the attached Petitioner's Petition for Review was produced on a computer and contains 13,900 words, as counted by the Microsoft Word 2010 word-processing program used to generate Petitioner's Petition for Review.

Dated: January 15, 2014 ALESHIRE & WYNDER, LLP

By: 

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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 18881 Von Karman Avenue, Suite 1700, Irvine, CA 92612.

On **January 15, 2014**, I served the within document(s) described as: **PETITIONER'S OPENING BRIEF ON THE MERITS** on the interested parties in this action as stated on the attached mailing list.

☐ **(BY MAIL)** By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Irvine, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **(BY OVERNIGHT DELIVERY)** I deposited in a box or other facility regularly maintained by NORCO Overnight Delivery, an express service carrier, 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 a sealed envelope or package designated by the express service carrier, addressed as set forth on the attached mailing list, with fees for overnight delivery paid or provided for.

☐ **(BY FAX)** By transmitting a true copy of the foregoing document(s) via facsimile transmission from this Firm's sending facsimile machine, whose telephone number is (949) 223-1180, to each interested party at the facsimile machine telephone number(s) set forth on the attached mailing list. Said transmission(s) were completed on the aforesaid date at the time stated on the transmission record issued by this Firm's sending facsimile machine. Each such transmission was reported as complete and without error and a transmission report was properly issued by this Firm's sending facsimile machine for each interested party served. A true copy of each transmission report is attached to the office copy of this proof of service and will be provided upon request.

☐ **(BY E-MAIL)** By transmitting a true .pdf copy of the foregoing document(s) by e-mail transmission from hyurek@awattorneys.com to each interested party at the e-mail address(es) set forth above. Said transmission(s) were completed on the aforesaid date at the time stated on declarant's e-mail transmission record. Each such transmission was reported as complete and without error.

☐ **(BY PERSONAL SERVICE)** I caused to be delivered a true copy of the foregoing document(s) in a sealed envelope by hand to the offices of the above addressee(s).

Executed on **January 15, 2014**, at Irvine, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Helen B. Yurek
(Type or print name)

Helen B. Yurek
(Signature)

Richard C. Stamper, et al. v. City of Perris
California Court of Appeal, Fourth Appellate District, Division Two – Case No. E053395;
Supreme Court Case No.: S213468
City of Perris v. Richard C. Stamper, et al.
Riverside Superior Court, Central District – Case No. RIC524291

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