

Supreme Court Case No. S213468

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF PERRIS

Plaintiff and Respondent,

vs.

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

Defendants and Appellants.

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 BRIEF ON THE MERITS

K. ERIK FRIESS (Bar No. 149721)
ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
1900 Main Street, Fifth Floor
Irvine, California 92614-7321
Phone: (949) 553-1313 Fax: (949) 553-8354
E-Mail: rfriess@allenmatkins.com

Attorneys for Defendants and Appellants
RICHARD C. STAMPER, DONALD D. ROBINSON,
and DONALD DEAN ROBINSON, LLC

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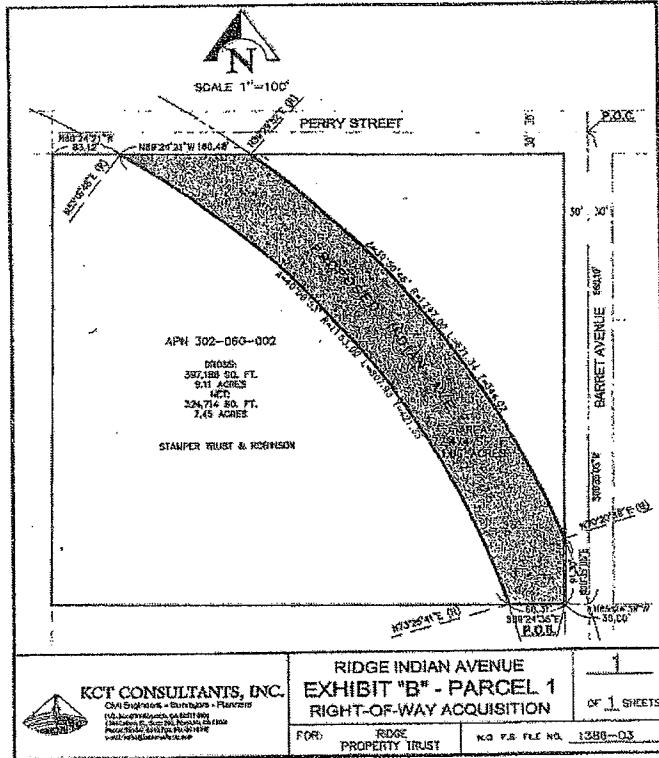
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1. INTRODUCTION.

This eminent domain action grows out of plaintiff and respondent City of Perris' successful effort to lure a massive Lowe's distribution facility into the City, bringing with it jobs and taxes. To accommodate Lowe's, the City had to realign a long-established road, Indian Avenue, which was part of the City's decades-old, north-south/east-west grid street system. To reconnect Indian Avenue with its original alignment north of the Lowe's site, the City decided to cut the road across a property co-owned by defendants and appellants Richard C. Stamper and Donald D. Robinson/Donald D. Robinson, LLC. The City picked the Stamper/Robinson property because, unlike their neighbors, Messrs. Stamper and Robinson did not have a development in process.

To cut Indian Avenue across the Stamper/Robinson property, the City had to condemn about 20 percent of the property, ripped from its middle:



The condemnation's impact on the property is dramatic. Before the City's condemnation, Messrs. Stamper and Robinson owned a square, flat, easily developable property with industrial zoning and frontage on two paved roads. And their property was located in a rapidly developing, large-footprint industrial area.

Even the City's appraiser agreed the property was worth at least \$2,780,000 before the condemnation. But after the City's condemnation, Messrs. Stamper and Robinson are left with two oddly shaped, small remnant parcels, neither of which is big enough to accommodate the large warehouse and distribution facilities being built in the area. According to Messrs. Stamper and Robinson's appraiser, this severing of their property has resulted in their losing \$584,977 in property (the almost 20 percent taken) and \$715,023 in severance damages to the remnant parcels, a total loss of \$1,300,000.

But the City persuaded the trial court that just compensation was a mere \$44,000. The City argued, and the trial court accepted, that the City could require Messrs. Stamper and Robinson to dedicate the roadway for free since the City had amended its general plan (after Lowe's was built) to show Indian Avenue as reconnecting to its pre-Lowe's route by running across the Stamper/Robinson property. And the City persuaded the trial court that, because this dedication requirement limited the use of the Stamper/Robinson property, the City only had to pay them agricultural value for the 20 percent taken, with no severance damages.

The trial court accepted this \$44,000 valuation despite Messrs. Stamper and Robinson's objections that the City's claimed dedication requirement had two fundamental legal defects. First, the claimed dedication requirement is "project influenced" in that, absent the City's realignment project, the City would have no basis for claiming a dedication, and eminent domain law thus required that the claimed

dedication be ignored in determining just compensation. Second, the claimed dedication requirement violates the basic constitutional standards established by the U.S. Supreme Court in its *Nollan* and *Dolan* decisions.

On appeal, the Court of Appeal overturned the trial court and ordered the case remanded for a jury trial. Among the bases for overturning the trial court, the Court of Appeal concluded that determining the reasonable probability that the City would succeed in requiring the dedication it claims, including whether it meets the *Nollan* and *Dolan* tests, is a valuation issue to be decided by the jury. However, the Court of Appeal also ruled that claimed dedication requirements are always exempt from the "project influence" rule, meaning the jury could consider evidence of the City's claimed dedication requirement here, even though the Court of Appeal found "certainly there would be no requirement of a dedication of property for Indian Avenue, if the [City's] Indian Avenue project did not exist"

This Court accepted review of those last two issues.

2. SUMMARY OF ARGUMENT.

A. *The Project-Influence Rule Properly Applies To Claimed Dedication Requirements.*

Eminent domain law has long mandated that project influences be ignored in valuing condemned property. (*Merced Irrigation Dist. v. Woolstenhulme* (1971) 4 Cal.3d 478, 489-490.) Thus, 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 Inc.* (2005) 128 Cal.App.4th 917, 938.) And "

'changes in land use, to the extent they were influenced by the proposed improvement, [are] properly excluded" (*City of San Diego v. Rancho Penasquitos Partnership, supra*, 105 Cal.App.4th at p. 1028.) This rule excluding project influence is codified in Code of Civil Procedure section 1263.330. And that statute has *no* exception for project-influenced dedication requirements. Likewise, before the Court of Appeal opinion in this case, no case had held that project-influenced dedication requirements are exempt from the project-influence rule.

Here, the very project for which the City brought this condemnation action – the extension and realignment of Indian Avenue as depicted on the City's amended General Plan – is the *only* reason that the City would ever even consider such a dedication requirement; if the City's realignment project did not exist, no dedication requirement would exist. The Court of Appeal specifically found this. It is thus not a coincidence that the right-of-way being condemned and the right-of-way the City claims must be dedicated are identical.

This is in stark contrast to the dedication requirements that the Stamper/Robinson property would have been subject to absent the City's realignment project: nine-foot strips to allow the widening of the existing, and long-established grid streets that border the Stamper/Robinson property. Just as Messrs. Stamper and Robinson's appraiser had no trouble here distinguishing between the project-influenced Indian Avenue dedication claim and the ordinary nine-foot dedications for the other two streets, the trier of fact in other cases will have little difficulty parsing (1) those dedication requirements that would be imposed whether or not a condemnor pursues a project and (2) those, like the claimed dedication requirement here, that exist only because of the project.

B. Whether A Claimed Dedication Requirement Meets The Nollan And Dolan Constitutionality Tests Is Properly Part Of The Jury's Determination Of Value Because The Legality Of The Claimed Dedication Requirement Is A Factor A Buyer Would Consider In Setting A Purchase Price.

Under California's Constitution, the jury determines valuation issues in an eminent domain case. (*Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 965.) More specifically, as this Court has explained: "The fair market value of a property is a fact to be determined by the jury. [Citations.] 'The jury is entitled to and should consider those factors which a buyer would take into consideration in arriving at a fair market value, were [the buyer] contemplating a purchase of the property.' [Citation.]" (*Id.* at p. 972.) Among the factors that a buyer would take into consideration in arriving at fair market value is whether a reasonable probability exists that the zoning or other use restrictions on a property may be changed – and whether the potential "cost" necessary to get the land use restrictions changed is that a portion of the property might have to be dedicated. (See *id.* at p. 967; *People ex. rel. Dept. of Public Works v. Investors Diversified Services, Inc.* (1968) 263 Cal.App.2d 367, 372-376 [explaining the potential for a dedication requirement may be the cost, or "burden," that comes with the "benefit" of a zone change].)

Since, as this Court has held, the reasonable probability of a zone change is a compensation issue that must be determined by the jury (*Campus Crusade, supra*, 41 Cal.4th at pp. 966-974), the interconnected issue of the reasonable probability that a dedication requirement will be a "burden" that comes with the "benefit" of a zone change is also necessarily an issue for the jury to decide as part of determining what a buyer will

consider in setting a purchase price. And a sub-issue for the jury in deciding the value impact of a claimed dedication requirement (or other use restriction) is the probability that the restriction will not be imposed because it would be illegal (for example, because it is unconstitutional), since, if illegal and thus unenforceable, a buyer would not consider the restriction to reduce the value of the property.

Further, determining whether a claimed dedication serves the same purpose as the denial of a development permit (the *Nollan* "nexus" test) or determining whether the impact of a development is roughly proportional to the dedication claimed (the *Dolan* test) is no more complicated than other issues that juries are called upon to decide in valuation cases, such as deciding the reasonable probability of a zone change. A properly instructed jury can handle these largely factual issues just as well as a jury can handle any other valuation issue. And, not surprisingly, courts frequently allow juries to determine "mixed questions of law and fact . . . if they are essentially factual, even if they implicate constitutional rights." (*Del Monte Dunes v. City of Monterey* (9th Cir. 1997) Cir. 95 F.3d 1422, 1428; *Skoro v. City of Portland* (D. Or. 2008) 544 F.Supp.2d 1128, 1131-1133 [determining that a jury can and should decide whether a dedication requirement was a taking under *Nollan* and *Dolan*].)

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, planning to utilize it, eventually, for their respective 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.

The City adopted a resolution of necessity to authorize this condemnation action, and in it the City described its project as the "Indian Avenue right-of-way improvements." (See AA 5:39:0967, 0979-1010.) The testimony of the City's City Engineer, along with a declaration he gave in support of the City's motion for prejudgment possession, provide background and history regarding the City's Indian Avenue project. (AA 5:39:0968, 1011-1045.)

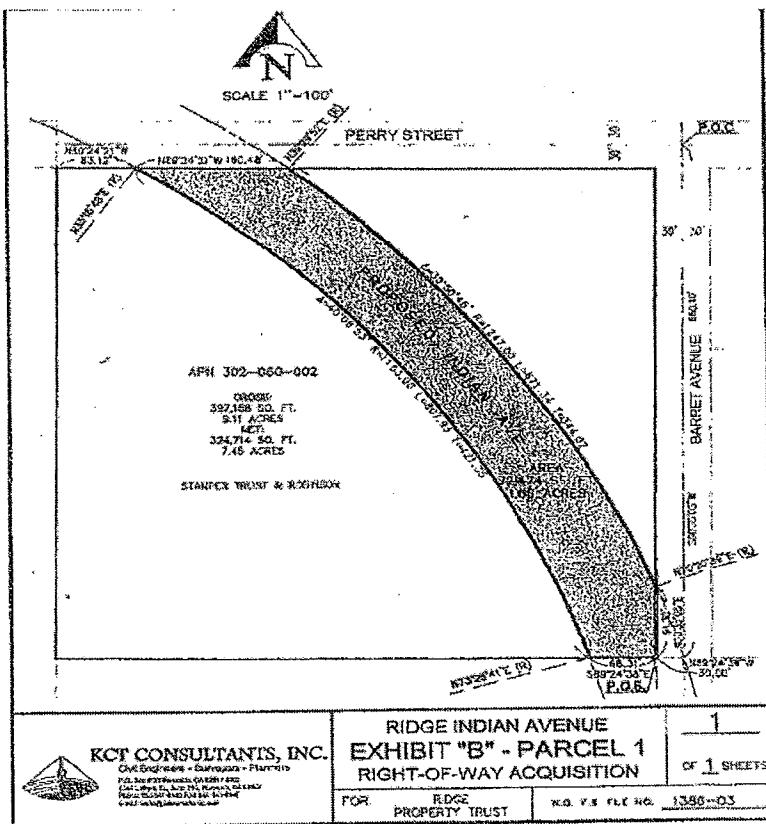
Decades ago, the City's roads were laid out in a typical north-south/east-west grid pattern, and the City Engineer explained that Indian Avenue had always been planned as one of those straight, north-south roads and that the right-of-way already existed so that Indian Avenue could be built on that straight 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 nearly two acres – about 20 percent – of the Stamper/Robinson property, ripped from its middle. The 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 City 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 concluded, "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 Massive Ridge Commerce Center's Development Condition Requiring Acquisition Of The Right-Of-Way For, And Construction Of, Indian Avenue.

Before the City filed this condemnation action (and following development of Lowe's), the enormous Ridge Commerce Center development (almost 2 million square feet) was approved by the City of Perris, and the City specifically conditioned that development with the acquisition of right-of-way for, and construction of, Indian Avenue. (AA 5:39:0968, 1028.) To the extent that Ridge Commerce Center pays more for this acquisition and construction than is its fair share, it will be reimbursed by other developers through the North Perris Road and Bridge Benefit District (the impact-fee program, as explained below, into which Messrs. Stamper and Robinson will pay if they ever develop). (*Id.* at 1029.)

***D. The Limited Dedication Required From The
Stamper/Robinson Property Absent The City's Realignment
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, Messrs. Stamper and Robinson would have continued to own a nine-acre, easy-to-develop, and square property after the nine-foot dedications. (*Ibid.*)

Consistent with this small dedication requirement, the City only conditioned the massive Lowe's facility and the massive Ridge Commerce Center (both of which included millions of square feet of buildings) with dedicating thin roadway strips along the edges of their properties. For instance, Ridge Commerce Center only had to dedicate 1.66 acres of its 90-acre site; this equates to less than two percent of that property.

(AA 5:39:0968, 1036-1038; see also 1024-1027.) (Coincidentally, the City's claimed 1.66-acre dedication requirement from the Stamper/Robinson nine-acre property is exactly the same amount of land that the City exacted from Ridge's 90-acre property.)

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.)

E. *The Requirement That Messrs. Stamper And Robinson 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. And, as noted, the Ridge Commerce Center is conditioned with acquiring this right-of-way and building the road.

According to the City's City Engineer, in order to develop their property 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 several 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. Furthermore, assuming development fee credit is available, there is no

project agreement or proposed development, and thus no credit or reduction can be provided at this time." (AA 5:39:0969, 1055-1056; RT 1:158:12-23.)

F. The City's Condemnation Action To Allow Ridge Commerce Center To Meet Its Condition To Acquire The New Indian Avenue Right-Of-Way.

To allow the Ridge Commerce Center to acquire right-of-way through the Stamper/Robinson property (and thereby meet its development condition), the City authorized the filing of this condemnation action. (See RT 1:154:1-14.)

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 instruction 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.*; see also 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 the U.S. Supreme Court's *Nollan* and *Dolan* decisions and had to be disregarded. (*Ibid.*)

The original trial judge assigned to this case, Judge John D. Molloy, agreed. (AA 2:19:0438-0440; RT 1:9:1-15:9.) And, based on the City's

own appraisal, Judge Molloy ordered the City to increase its deposit nearly ten-fold to \$511,062 (the amount of the City's appraisal of the part taken alone, without severance damages). (*Ibid.*)

G. Messrs. Stamper And Robinson's Motion For Release Of The Augmented Deposit.

The City complied with Judge Molloy's 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 objected, including objecting that another party had an interest in the deposit (a paid-off lender, whom the City had already sought to default). (AA 2:25:472; 3:28:0613-0626.) This maneuver meant that Messrs. Stamper and Robinson had to await a hearing to get the deposit released. And because of continuances and a reassignment of the judge, that hearing did not occur until the first day of trial. (AA 4:31:0894.)

H. The Expert Witness Exchange.

As required by the special eminent domain expert exchange rules (Code Civ. Proc., §§ 1258.210 et seq.), Messrs. Stamper and Robinson and the City exchanged expert witness lists and 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.) And 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 essential nexus and rough proportionality tests established in the U.S. Supreme Court's *Nollan* and *Dolan* opinions. (*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, including 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 and will be subject to mitigation fees). (*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. (*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.*)

I. Trial.

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

(1) The motion to withdraw the increased deposit.

Because of the City's objections to Messrs. Stamper and Robinson's withdrawal of the deposit, the trial court had to first rule on the motion to release the increased deposit, which the trial court granted. (AA 9:73:2099; RT 1:39:4-41:28.) But, the court conditioned its order by requiring that Messrs. Stamper and Robinson immediately redeposit the money if the court ruled against them on the dedication issue. (*Ibid.*) Ultimately, this

meant that Messrs. Stamper and Robinson could not withdraw the increased deposit ordered by Judge Molloy. (See AA 9:100:2196-2202.)

(2) The motions in limine.

The trial court then turned to a series of motions in limine. Messrs. Stamper and Robinson's motions raised a number of issues, including:

- Whether the City's claimed dedication requirement was project influenced (AA 4:35:0912-0923);
- Whether the City's claimed dedication requirement was (1) reasonably probable and (2) unconstitutional under *Nollan* and *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 expert testimony from its City Manager and City Engineer, neither of whom the City had designated as experts (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.*)

(3) 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 expert testimony, even though neither had been designated or deposed as an expert 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.)

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.*)

Nonetheless, the trial court precluded testimony from Messrs. Stamper and Robinson's experts that was crucial to the determination of the nexus and rough proportionality issues. This evidence included 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.) It also included testimony regarding the value of the claimed dedication requirement and the severance damages. (See, e.g., RT 2:294:13-19.) This evidence would have shown the value of the taking/dedication, which would have allowed

the trial court to measure the exaction and to compare it to the adverse impacts of potential development on the Stamper/Robinson property, allowing a determination of proportionality. (*Ibid.*)

(4) The trial court's rulings on the dedication issues.

After the presentation of testimony, the trial court ultimately issued a tentative ruling finding the City's claimed dedication to be reasonably probable and constitutional. (AA 9:91: 2138-2143.) Messrs. Stamper and Robinson requested a statement of decision (AA 9:88:2128-2130; 89:2131-2134; 93:2151-2154), which the trial court issued (AA 9:88:2128-2130; AA 9:94:2155-2161).

In particular, in its statement of decision (AA 9:94:2155-2161), the trial court ruled:

- *Reasonable Probability:* The trial court found "based on the credible testimony of plaintiff's City Manager and City Engineer as well as the current status of the City's Indian Avenue project, it is reasonably probable that the right-of-way dedication across defendants' property would be imposed as an exaction when defendants bring in a development proposal for their parcel."
- *Nexus:* The trial court reasoned: "this conditional exaction substantially advances the legitimate governmental objectives of control and mitigation of traffic congestion on the subject property and its surroundings as set forth in the City's recently amended and regularly observed General Plan, and has an essential nexus to that objective which will allow defendants to develop their property when they decide they want to." (Note: The U.S. Supreme Court in *Lingle v. Chevron U.S.A* (2005) 544 U.S. 528 held that the "substantially advances" test used by the trial court is not the correct test under *Nollan*, and the trial court provided no explanation of how the claimed dedication across the Stamper/Robinson

property tied in any way to future development of that property as required by *Nollan*.)

- *Rough Proportionality*: The trial court reasoned: "as far as we can tell, the dedication at issue is roughly proportional to the impacts of future development of the subject property. It is too early for the sort of individualized determination that the court could make in *Dolan v. The City of Tigard* (1994) 512 U.S. 374, but the exaction is not too excessive to meet the legal standards for hypothetical developments under the *State Route 4* case. (*State Route 4 Bypass Authority v. Superior Court* (2007) 153 Cal.App. 4th 1546.) If it turns out that the development project the defendants actually submit generates less traffic than the 2005 Circulation Element and the Municipal Code contemplate, the City can negotiate concessions with a development agreement or otherwise to assure that what appears today to be at least rough proportionality is maintained through buildout so that another *Dolan* case is avoided. On the stand the City Engineer testified that such negotiation was City practice, and no evidence was offered to the contrary." (Note: The trial court made no finding of what the scale of adverse impacts of future development of the Stamper/Robinson property would be or of the value of the dedication the City was extracting [whether or not coupled with future fees].)

- *Project Influence*: The trial court did not find whether the City's project influenced the claimed dedication requirement. Instead, the trial court described Messrs. Stamper and Robinson's argument as "a clever and beguiling legal theory, but upon closer examination turns out to be a misunderstanding of this now statutory limitation on project enhancement valuations in eminent domain proceedings." The trial court went on to reason that: "Adopting defendants' legal theory here would lead to absurd results. If the Plaintiff cannot tell the jury why it needs this right-of-way, why would the jury support a taking even with just compensation over the

objections of the property owners? This is not a right-to-take challenge, but even when presented with a straight valuation case no fair-minded juror is going to worry much about gouging a rogue public agency which says we just want this chunk of defendants' property but won't say why. 'What do you need the property for?' would be the juror's question, and if unanswered because the judge instructs something like, 'We can't tell you that,' who knows what caprice or anger could be engendered in an otherwise sensible and compliant jury, or what effect those emotions could have on a dollar verdict? No city in California could use eminent domain to build out its Circulation Element if this were the law." (Note: The trial court did not explain why the claimed dedication requirement could not be excluded from evidence while still allowing the City to tell the jury that it was condemning to acquire right-of-way for its Indian Avenue project.)

(5) *The stipulation regarding evidence of agricultural value and the judgment.*

The City and Messrs. Stamper and Robinson agreed that in situations where a valid dedication requirement exists, the property taken must be valued for a use that does not trigger a dedication, typically an existing agricultural use. (See *Contra Costa County Flood Control Dist. v. Lone Tree Investments* (1992) 7 Cal.App.4th 930, 937.) In light of this, the parties recognized that the trial court's ruling on the dedication issue meant that the Stamper/Robinson property could only be valued for an agricultural use. And because the City's appraiser was the only appraiser to have valued the property at an agricultural value, the City and Messrs. Stamper and Robinson stipulated that there would be no other valuation testimony offered at trial. (AA 9:98:2179-2180; RT 2:311:11-317:25.) Based on this, the trial court determined the value to be \$44,000 for the nearly two acres taken and entered judgment accordingly. (AA 9:98:2178-2192.)

J. The Appeal.

Messrs. Stamper and Robinson appealed from both the judgment and from the post-judgment order allowing the City to receive back the increased deposit. (AA 9:101:2203-2205.)

On appeal, the Court of Appeal issued a tentative ruling that initially concluded 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, despite finding 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), the Court of Appeal's final ruling concluded that the project-influence rule does not control claimed dedications.

The Court of Appeal also concluded that, consistent with *Campus Crusade*, 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, including the subsidiary issues of whether the claimed dedication is not reasonably probable because it flunks the *Nollan* and *Dolan* tests.

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. Also, the Court of Appeal held that the City cannot rely on non-binding promises that in the future it will grant development concessions to Messrs. Stamper and Robinson to make sure the City's claimed dedication requirement was, in hindsight, constitutional. Finally, the Court of Appeal overturned the order allowing the City to withdraw the increased deposit.

4. ARGUMENT: THE PROJECT-INFLUENCE RULE'S APPLICABILITY TO CLAIMED DEDICATION REQUIREMENTS.

A. *Eminent Domain Law Requires Project Influences To Be Ignored.*

Eminent domain law has long recognized an obvious fact: the very public project for which condemnation is taking place might itself have influences on the value of property being taken, both positively and negatively. (See 1 Matteoni & Veit, *Condemnation Practice in Cal.* (3d ed. 2012) *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.

This general rule has been further explained 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, supra*, 128 Cal.App.4th at p. 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.*

(Emphasis added.)

B. Project-Influenced Land Use Constraints Are Among The Project Influences That Must Be Ignored.

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

[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.) As another court put it:

". . . [C]hanges in land use, to the extent they were influenced by the proposed improvement, [are] properly excluded from consideration in evaluating the property taken."

(*City of San Diego v. Rancho Penasquitos Partnership, supra*, 105 Cal.App.4th at pp. 1028-1029.)

Applying this rule, courts have consistently excluded evidence of land-use-related project influences, including down-zoning of the subject

property predicated on the project (see, e.g., *ibid.*) 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 influenced by 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.

Similarly, in *City of San Diego v. Barrett American Incorporated, supra*, 128 Cal.App.4th 917, a city was precluded from taking advantage of its own project influence to lower the value of the property being taken. In that case, the city was precluded from using an "abandoned Project construct," which the Court of Appeal described as "rely[ing] on the value-depressing effect of project-predicated de facto restrictions on upzoning." (*Id.* at p. 938.)

C. No Law Exempts Claimed Dedication Requirements From The Project-Influence Rule, And No Reason Exists To Excluded Dedication From The Rule.

The Court of Appeal's opinion exempts all claimed dedication requirements from the project-influence rule. But no law creates this exemption. For example, the Legislature did not tack a subdivision (d) onto

Code of Civil Procedure section 1263.330 that reads: "except that project-influenced dedications may be considered."

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-influence rule did not apply to dedications, this analysis would not have been necessary.

Here, the Court of Appeal arrived at its holding that the project-influence rule does not apply to claimed dedication requirements with the following reasoning:

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 has been previously discussed, dedication requirements exist independent of any specific project. (See Gov. Code, § 7050 ["dedication of real property for any public purpose, including, but not limited to, streets, highways"].) The requirement of dedicating private property for public purposes has long been accepted as a proper exercise of a governmental power. Here, the decrease in value as argued by the owners is not attributable to the project, it is attributable to a free-standing dedication requirement.

(Opinion, pp. 40-41.)

Where the Court of Appeal went wrong is in distinguishing the dedication here as being "attributable to a free-standing dedication requirement." If that were the test, then the project-influence rule would *never* apply. For example, in *Rancho Peñasquitos* the City of San Diego had statutory authority authorizing it to establish zoning; thus under the

Court of Appeal's reasoning, the City of San Diego's project-influenced restrictive zoning should have been "attributable to" the City of San Diego's free-standing zoning power and accordingly exempt from the project-influence rule. But that is opposite of the holding in *Rancho Penasquitos*.

Moreover, short of the actions of some rogue agency, *all* actions of a condemning agency – including "preliminary actions of the plaintiff relating to the taking of the property" (Code Civ. Proc., § 1263.330, subd. (c)) – are necessarily undertaken pursuant to – and thus "attributable to" – some free-standing authority the condemning agency has. Thus, under the Court of Appeal's reasoning, an agency could *always* dodge the project-influence rule by simply pointing to the statute authorizing the agency's particular action and "attributing" the action to that statute.

The correct test is for the trier of fact to look to whether the particular manner in which the condemning agency is applying its free-standing authority is being influenced by the agency's project. If it is being influenced, then that influence must be ignored. If not, then the jury should consider the valuation impact of how the agency is exercising its free-standing authority.

D. The City's Claimed Dedication Requirement Is Influenced By The City's Indian Avenue Extension/Realignment Project.

As the Court of Appeal found, 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. (See Opinion, p. 40.) The City's project is the extension/realignment of Indian Avenue as depicted in the City's amended General Plan. And the City's depiction of Indian Avenue in that location in its amended General Plan (according to the City) 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).) 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.) Under the law existing prior to the Court of Appeal's opinion in this case, 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.)

Of course, the very reason for the amendment to the City's General Plan (and the claimed dedication resulting from it) was the City's decision to realign the southerly portion of Indian Avenue to attract Lowe's, with its jobs and taxes. It is difficult to imagine a more classic project influence than this. If the City had not decided to realign Indian Avenue in the first instance, and taken the preliminary action of amending its General Plan, Indian Avenue would have stayed on its 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.

E. Applying The Project-Influence Rule To Dedication Requirements Does Not Mean That All Prior Eminent Domain Cases Addressing Dedications Are Wrong. Non-Project-Influenced Dedications Constitute Perfectly Appropriate Matters To Be Considered In Determining Value.

The City argues:

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 be 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 the property is being acquired.

(Opening Brief, p. 39, emphasis in original.) But the cases the City identifies are very different from the situation here. Each case involves typical dedications that would have been required regardless of the condemnor's project. Moreover, not one of those cases involved a situation, like this, where a property had already "donated" substantial roadway right-of-way in connection with an established grid of streets, only to have a city create a new alignment that requires an additional 20-percent dedication.

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 requirement applies to all similarly

situated owners, and it 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 the Stamper/Robinson property, Messrs. Stamper and Robinson would have no basis for arguing those dedications resulted from the City's project; the dedication requirement would be independent of the influence of the City's project. And Messrs. Stamper and Robinson would be in the same situation as all of their neighbors who have property with frontage on roads not built out to their full width.

In contrast, 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 has conceded – that but for the City's decision to lure Lowe's into the City by realigning Indian Avenue (and taking the preliminary action of amending its General Plan consistent with that realignment), the City would never have claimed a dedication requirement for this exact same Indian Avenue right-of-way. These were all preliminary actions of the City, and they are all pure project influence.

Notably, nothing about determining whether a claimed dedication requirement is project influenced makes that determination more difficult for a judge or jury than it is, for example, for a trier of fact to determine, whether a change in zoning or other land use restriction is project influenced. Thus, just as the court in *Rancho Peñasquitos* was able to look at the history and purpose of the City of San Diego's zoning of the property being condemned to determine that the zoning reflected project influence of the City of San Diego's State Route 56 freeway project, other triers of fact can look at the history and purpose of claimed dedication requirements and see whether they are, for example, a typical requirement placed on all similarly situated properties based on long-established plans, as compared

to a unique requirement growing out of the agency's project. (Cf. *Merced Irrigation Dist. v. Woolstenhulme, supra*, 4 Cal.3d at p. 478 [trial court can parse project influences that pre-date property's inclusion in the scope of the project with those after inclusion].)

One way for the trier of fact to decide the issue is to answer the question: "but for the project for which the property is being condemned would the dedication have been required?" If the answer is no, then the dedication is project-influenced. While there may be an occasional close case, more often it seems likely that project influence will be obvious, as it is here.

Indeed, Messrs. Stamper and Robinson's appraiser, Michael Waldron, had little trouble distinguishing between the project-influenced Indian Avenue dedication and the non-project-influenced Perry Street and Barrett Avenue dedications. Mr. Waldron has repeatedly faced project-influence situations in his condemnation appraisals. For example, he was the appraiser who "got it right" in one of the prominent project-effect cases. (See *City of San Diego v. Barratt American Inc., supra*, 128 Cal.App.4th at p. 930.) And in this case, the obvious jumped out at him: the City's claimed dedication grows out of the very Indian Avenue extension/realignment project for which the City brought this condemnation action. (RT 2:268:23-284:1.) Because of this, Mr. Waldron used the approach he always uses (and which the courts have consistently approved): when he appraised the Stamper/Robinson property, he ignored the project-influenced, 1.66-acre dedication requirement for Indian Avenue, while crediting the City with the non-project-influenced, nine-foot strips for Perry Street and Barrett Avenue. (*Ibid.*)

Notably, Mr. Waldron pointed out that: (1) *before* the City of Perris' General Plan amendment, the Stamper/Robinson property was zoned for industrial use, but was *not* subject to a dedication for Indian Avenue; and

(2) *after* the General Plan was amended, the Stamper/Robinson property retained exactly the same industrial zoning but now had *less* land to be developed (because 20 percent had be carved out for Indian Avenue). Yet, even though after the General Plan amendment the Stamper/Robinson property would have *less* development – and thus less impact on traffic – the property now had a huge, *additional* dedication requirement.

(RT 2:282:10-283:12.) In short, the City's claimed dedication requirement is exclusively "attributable to" the City's project.

Importantly, the condemning agency in *State Route 4 Bypass Authority v. Superior Court, supra*, 153 Cal.App. 4th at pp. 1551-1552 seemed to have had little trouble distinguishing between a project-influenced dedication requirement and a non-project-influenced dedication requirement. Specifically, that agency was acquiring 250-foot-wide strips, but never claimed it could require the dedication of all of that property. Instead, the agency claimed only a right to 150-foot strips, consistent with dedications required of others. Although not mentioned in the opinion, one might presume the agency knew the additional 100 feet of right-of-way grew directly from the agency's project, and therefore the agency did not claim a dedication requirement for all of it.

F. Precluding Claimed Dedications That Are Project-Influenced Will Not "Cripple The Use Of Dedications As A Planning Tool."

The City declares an exemption from the project-influence rule must be allowed for all claimed dedications and argues in apocalyptic terms:

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.

(Opening Brief, p. 41.) But no "crippling" will occur.

This case concerns *only* a claimed dedication requirement's effect *in an eminent domain valuation trial*. It has nothing to do with "the use of dedications as a valid planning tool." A rule that prohibits project-influenced dedication requirements from being admissible in a valuation trial would *not* prohibit cities from requiring a dedication as part of the land-use entitlement process (as long as the dedication meets the *Nollan* and *Dolan* standards). Cities would be free to impose proper dedication requirements. The only prohibition on cities would be on efforts to reduce the amount of compensation they must pay in an eminent domain action by claiming a dedication requirement that is influenced by the city's project.

G. Messrs. Stamper And Robinson Are Not Seeking To Invalidate The City's General Plan Amendment; They Do Not Contest The City's Power To Realign Indian Avenue. But They Do Contest The City's Power To Avoid Paying Just Compensation By The Simple Expedient Of Mapping A Road Across Their Property.

The City argues that Messrs. Stamper and Robinson had the opportunity to object to the realignment of Indian Avenue and, having failed to do so, "simply cannot take another bite at the apple now, years later, when they missed numerous chances to do so." (Opening Brief, p. 42.)

But the City's argument that the project-effect issue is a belated attack on its general plan amendment is easily answered by the case law. For instance, in *Rancho Penasquitos*, the City of San Diego made the same argument. (*City of San Diego v. Rancho Penasquitos Partnership, supra*, 105 Cal.App.4th at pp. 1032-1033.) In that case, San Diego's appraiser opined that the property being condemned did not have a reasonable probability of a change from an agricultural zoning to a residential zoning

"because [San Diego's] land use regulation . . . prohibited such rezonings until [the planned freeway for which the condemnation action was filed] was approved." (*Id.* at p. 1021.) When the property owner complained that this approach relied on project-influenced zoning, San Diego countered:

that in this case the zoning restriction was enacted in good faith and not to depress the land values In support of this contention, [San Diego] attempts to explain at length how the zoning restrictions were a valid exercise of its police power, "good planning," and a proper designation of land for future acquisition.

(*Id.* at p. 1033.) But the court disagreed:

This contention is unavailing. There is no need to find that [San Diego's] enactment of the zoning restriction was in "bad faith" or an unlawful exercise of its police power or zoning authority. [The property owner] was not in this case attempting to prove that the zoning restriction was invalid, but only that it could not be applied to a valuation of the property in this case because it was predicated upon the taking itself.

[Citation.] ¶ [San Diego's] focus upon its intent at the time the zoning ordinance was enacted and its assertion of necessary long-range planning is misplaced. Rather, the question is whether [San Diego], as both the zoning and condemning agency, could later use that restriction in the condemnation proceeding to attempt to limit the award of just compensation to the landowner. Our conclusion that [San Diego] cannot is not concerned with [San Diego's] good or bad faith at the time of enactment, but rather what is fair and just in calculating compensation to the landowner at the time of trial.

(*Id.* at pp. 1033-1034.)

Likewise, here Messrs. Stamper and Robinson are not contending that the City of Perris lacked the power to realign Indian Avenue by amending its General Plan. It had that power. But Messrs. Stamper and Robinson *are* arguing that the City cannot rely on its realignment of Indian Avenue across the Stamper/Robinson property as an excuse for not paying them just compensation.

City of Hollister v. McCullough (1994) 26 Cal.App.4th 289, 299-300, a dedication case which is factually very similar to this case, is informative on this issue. While the property owner in *City of Hollister* apparently did not argue that the claimed dedication was project-influenced, the court's analysis finding that the claimed dedication requirement was not reasonably probable echoes a project-influence analysis:

This evidence established that the dedication requirement utilized by plaintiff as a defense to defendants' claim for severance damages was unrelated to any proposed development of defendants' parcel. Plaintiff's own evidence showed that the purpose of such dedication would be merely to conform to the plan line map which showed a "planned street" through defendants' parcel. The fact that this map was adopted long before there was any proposed development of defendants' parcel or any positive steps taken to acquire the property by eminent domain further indicates that plaintiff's proposed use of a portion of defendants' parcel for street, sewer and utilities purposes was unrelated to defendants' potential development of their parcel.

(*Ibid.*)

In contrast to the City's claim that a rule excluding project-influenced dedications from the valuation trial would "cripple the use of dedications as a valid planning tool," what such a rule really does is prevent dedications from being used as an *invalid* planning tool. Specifically, it helps to prevent cities from overreaching and creating artificial dedication requirements in order to avoid compensation when they go to condemn land for a project. Applying the project-influence rule to dedications is consistent with the United States Supreme Court's admonition in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825, 841, that compliance with the Constitution requires "more than an exercise in cleverness and imagination" and that courts must:

be particularly careful [in their review] . . . when actual conveyance of property has been made a condition to the lifting of a land-use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.

5. ARGUMENT: THE JURY'S ROLE IN DECIDING THE CONSTITUTIONALITY, UNDER *NOLLAN* AND *DOLAN*, OF A CLAIMED DEDICATION REQUIREMENT AS PART OF THE JURY'S VALUATION DETERMINATION.

A. *In California Eminent Domain Cases, The Jury, Not The Judge, Decides Valuation Issues, Including A Property's Highest And Best Use.*

In eminent domain cases, California's Constitution, article I, section 19, subdivision (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 *Campus Crusade, supra*, 41 Cal.4th at p. 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."

Key among these mixed issues of law and fact is the need for a jury to determine a property's highest and best use. (*City of San Diego v. Rancho Penasquitos Partnership, supra*, 105 Cal.App.4th at p. 1028.) Thus, the determination of highest and best use is a core determination *for the jury*. In fact, it even warrants a CACI jury instruction (No. 3502) titled "Highest and Best Use Explained." This instruction is immediately followed by No. 3503, titled "Change in Zoning or Land Use Restriction," which reads:

A determination of the property's highest and best use is not necessarily limited by current zoning or land use restrictions. If you decide that as of [insert date of valuation] there was a reasonable probability of a change in zoning or other use restrictions in the near future, then you must determine the highest and best use of the property based on that change.

Moreover, as part of a highest-and-best-use determination, the reasonable probability of a dedication is often inextricably intertwined with the determination of the reasonable probability of a zone change. For instance, the *Investors Diversified* court explained:

In appraising the market value of a parcel of land as a basis for measuring the constitutionally required "just compensation," it is necessary to consider the existence of any zoning law which depresses value by limiting the use to which the property may be put. But if there is a reasonable probability that in the near future the zoning will change, then the effect of that probability upon the minds of purchasers generally may be taken into consideration. (*Long Beach City High School Dist. v. Stewart*, 30 Cal.2d 763, 768 [185 P.2d 585, 173 A.L.R. 249].) [¶] The Los Angeles zoning ordinance may have a double effect upon plaintiff's acreage which fronts on Devonshire Street. If there is a reasonable probability that its zoning may be changed in the near future from agricultural to residential, the value of the tract as a whole may be enhanced thereby. But if the city will condition any such change upon a dedication of the first 20 feet along the highway, that 20-foot strip will never become residential property at all. To value that 20-foot strip as potential residential property would be contrary to the assumed facts, for under the hypothesis stated the 20-foot strip would not become available for residential use.

(*People ex rel. Dept. Pub. Wks. v. Investors Diversified Services, Inc.*, *supra*, 262 Cal.App.2d at p. 372, emphasis added.) The court equated this to balancing the "benefit" of the zone change to the "burden" of the dedication. (*Id.* at p. 376.)

In other words, as *Investors Diversified* makes clear, the determination of the reasonable probability that a dedication requirement might be imposed is just a subsidiary issue within the larger issue of the reasonable probability of a zone change, which is a well-established jury issue. (It also stands to reason that, since project-influenced zoning restrictions must be ignored, and since dedication requirements are a subset of zoning restrictions, that project-influenced dedication requirements must likewise be ignored.)

B. This Court Has Ruled That Mixed Questions Of Fact And Law Related To Valuation Are Jury Issues.

As noted, as recently as 2007, this Court, in *Campus Crusade, supra*, 41 Cal.App.4th at pp. 972-973, clarified that: "'The jury is entitled to and should consider those factors which a buyer would take into consideration in arriving at a fair market value, were [the buyer] contemplating a purchase of the property.'" This Court went on to explain that "[b]y contrast, 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" (*Ibid.*)

Thus, while the jury's "box" in eminent domain cases is limited to valuation issues, that "box" is not nearly as tiny as the City of Perris argues.

C. Determining Whether A Claimed Dedication Meets The Nollan And Dolan Tests Is A Key Valuation Issue And Is Largely A Factual Issue, Which A Properly Instructed Jury Can Readily Handle.

Again, determining the constitutionality of a dedication requirement is a sub-issue within the larger issue of determining the reasonable probability of a dedication requirement. (See *City of Hollister v. McCullough, supra*, 26 Cal.App.4th at p. 297.) And the determinations

under *Nollan* and *Dolan* are primarily fact-based issues. Here, those issues are:

- 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 the potential impacts of any development of the Stamper/Robinson property and the claimed dedication requirement? In other words, will the same purpose be served by the City's claimed dedication requirement as would be served by prohibiting development of the Stamper/Robinson property altogether?
- With full fees still required and development limited by the small sizes and odd shapes of the two remnant parcels, is the claimed dedication requirement proportional to the impact created by any future development of the Stamper/Robinson property?

To answer these questions, the jury will necessarily need to hear evidence about (1) the potential development of the Stamper/Robinson property (after having 20 percent ripped from its middle) and the impact of such development on traffic and (2) what the cost of addressing any increased traffic will be. These are facts to be determined. And they are facts a jury can readily decide with proper jury instructions. Of course, the trial judge will retain the "gatekeeper" role to ensure that only those issues that are not conjectural, speculative, or remote go to the jury. Likewise, the trial judge will determine the law that applies and that will be stated in the jury instructions.

D. Courts Throughout The Country Have Regularly Held That Juries May Decide Fact-Based Constitutional Issues.

Importantly, this Court can hold that juries must decide the fact-based issues related to a claimed dedication requirement's constitutionality under *Nollan* and *Dolan* without sending juries into uncharted waters. To the contrary, courts have frequently held that juries can decided mixed questions of fact and law related to constitutional issues.

For example, the court in *Del Monte Dunes v. City of Monterey* (9th Cir. 1996) 95 F.3d 1422, 1428 (affirmed in *City of Monterey v. Del Monte Dunes* (1999) 526 U.S. 627) explained that "mixed questions of law and fact . . . may be submitted to the jury if they are essentially factual, even if they implicate constitutional rights." And the following cases provide just some examples:

- *Posey v. Lake Pend Oreille Sch. Dist. No. 84* (9th Cir. 2008) 546 F.3d 1121, 1129: in First Amendment analysis, determination whether certain speech was protected speech presented a mixed question of fact and law to be considered by the jury.
- *Menotti v. City of Seattle* (9th Cir. 2005) 409 F.3d 1113, 1149: in context of determining whether there was probable cause for an arrest, court found there was a factual dispute that could only be decided by a jury.
- *Chew v. Gates* (9th Cir. 1994) 27 F.3d 1432, 1443: the question of whether it was reasonable under the Fourth Amendment for a police officer to release a police dog is for the jury.
- *Hemphill v. Kincheloe* (9th Cir. 1993) 987 F.2d 589, 593: jury concluded that prison policy was not reasonably related

to a legitimate penological purpose, as required by the constitution.

- *Weaver v. Chavez* (10th Cir. 2006) 458 F.3d 1096, 1102: in First Amendment analysis, "[t]he factually-intensive question of disruption lent itself to jury resolution."
- *Taylor v. Brentwood Union Free Sch. Dist.* (2d Cir. 1998) 143 F.3d 679, 684: in equal protection case, whether two employees are "similarly situated" presented a question of fact for the jury.
- *Porth v. Farrier* (8th Cir. 1991) 934 F.2d 154, 156: "In cases involving mixed questions of fact and law, however, the jury may be the ultimate decision-maker as to whether a constitutional right has been violated. . . . The question of whether the eighth amendment has been violated is a mixed question of fact and law."
- *United States v. A Motion Picture Film, Etc.* (S.D.N.Y. 1969) 304 F.Supp. 197, 201: with respect to the elements of the obscenity analysis, "the presence or absence of such elements pose fact questions to be submitted to a jury."

Further, following *City of Monterey, supra*, courts have treated the *Nollan* and *Dolan* determinations as issues for the jury. (See, e.g., *Skoro v. City of Portland, supra*, 544 F.Supp.2d at p. 1131.) In *Skoro*, the court confirmed that the "relevant inquiries" under *Nollan* and *Dolan* are "mixed questions of law and fact." (*Id.* at p. 1132, fn. 1 [explaining that an analysis of precedent subsequent to the *City of Monterey* decision indicates that a jury determination is appropriate on *Nollan* and *Dolan* issues].) The court went on to specifically address both the "essential nexus" and "rough proportionality" prongs of the test in terms of whether a "reasonable jury" could make a finding that these requirements were met. (*Id.* at pp. 1137-

1138.) While the *Skoro* court was addressing a summary judgment, its analysis made clear that the *Nollan* and *Dolan* determinations should be made by a jury. (*Ibid.*)

E. The City Cites No Authority Holding That A Properly Instructed Jury Cannot Decide Nollan And Dolan Issues.

Notably, the City does not cite a single case that actually holds that *only* judges can decide constitutional issues. (See, e.g., Opening Brief, pp. 20-24.) For example, in *State Route 4 Bypass Authority v. Superior Court, supra*, 153 Cal.App.4th at p. 1552, which the City cites, the parties specifically stipulated to bifurcate the trial and to 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 could have been properly put to the jury if the parties had not wanted the trial court to decide the issue.

Of further note, all of the "dedication" cases the City cites in its Opening Brief (pp. 26-27) were decided *before* 2007, the year this Court issued its *Campus Crusade* opinion and clarified that, while trial courts have a gate keeping 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."

F. Judges, Not Juries, Decide Liability Issues In Inverse Condemnation Cases. And Nollan And Dolan Issues In Inverse Condemnation Cases Are Typically Liability Issues, Which Are, Thus, Decided By Judges. This Does Not Mean Only Judges Can Decide Nollan And Dolan Issues.

The City also tries to draw an analogy to inverse condemnation actions, but that analogy does not work. 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 the City is correct that liability in some inverse condemnation cases turns on the *Nollan* and *Dolan* tests. But the City's logic fails when the City jumps to the conclusion that this means *Nollan* and *Dolan* issues are *always* for the judge, including in eminent domain cases.

Instead, inverse condemnation cases put *Nollan* and *Dolan* issues to the judge because *in those cases* these are *liability* issues, which are for the judge – again, *in those cases*. This is very different than saying that *Nollan* and *Dolan* issues can *only* be decided by judges in *every* context.

6. **CONCLUSION.**

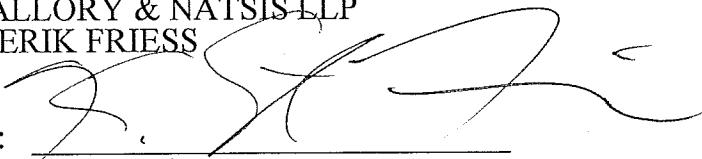
For the benefit of *both* condemning agencies and property owners, the law has long required that project influence on value be ignored in eminent domain cases. No exemption for project-influenced dedication requirements is found in the statute or the case law. And no reason exists for this Court to create such an exemption and thereby allow cities a special tool for lowering the value of an owner's property that a city plans to condemn. Accordingly, this Court should overturn the Court of Appeal's ruling that dedication requirements are exempt from the project-influence rule.

With regard to whether a jury should decide if a claimed dedication requirement passes the *Nollan* and *Dolan* tests, the answer is "yes." The only reason a claimed dedication requirement has any relevance in an eminent domain case is because a willing buyer would take the requirement into account in deciding how much to pay for property. Thus, a claimed dedication has the potential – if it is reasonably probable that it will be imposed – to impact the value of property. And determining the value of property is the core job of the jury in an eminent domain case. In turn, a key part of determining whether a buyer will give weight to a potential

dedication requirement is determining whether that dedication could be lawfully imposed under *Nollan* and *Dolan*. Thus, those are necessarily issues for the jury. Plus, those determinations – (1) the nexus between the impacts of a proposed development and the need for the dedication and (2) the rough proportionality of the amount of dedication required to the development's impacts – are predominately fact issues, issues which a properly instructed jury can certainly handle. Accordingly, this Court should uphold the Court of Appeal's ruling that these are valuation issues for the jury.

Dated: February 18, 2014

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
K. ERIK FRIESS

By: 

K. ERIK FRIESS
Attorneys for Defendants and
Appellants RICHARD C.
STAMPER DONALD D.
ROBINSON; and DONALD
DEAN ROBINSON, LLC

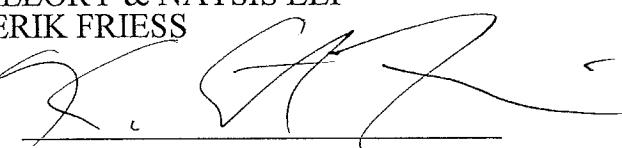
CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 8.520(c))

Pursuant to Rule 8.520(c) of the California Rules of Court, the undersigned, counsel of record for defendants and appellants 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 opening brief, it contains 11,800 words.

Dated: February 18, 2014

ALLEN MATKINS LECK GAMBLE
MALLORY & NATSIS LLP
K. ERIK FRIESS

By:



K. ERIK FRIESS
Attorneys for Defendants and
Appellants RICHARD C.
STAMPER DONALD D.
ROBINSON; and DONALD
DEAN ROBINSON, LLC

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 February 18, 2014, I served the within document described as ANSWER BRIEF ON THE MERITS 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.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 18, 2014, at Irvine, California.

SHERYL L. PORTWOOD

(Type or print name)

(Signature of Declarant)

SERVICE LIST

Eric L. Dunn, Esq. Attorneys for Plaintiff and
Sunny K. Soltani, Esq. Respondent, City of Perris
Pam K. Lee, Esq. **Via overnight mail (1 copy)**
Aleshire & Wynder
Tower 17
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612

Supreme Court of California **Via overnight mail (1**
Office of the Clerk, First Floor **original and 13 copies)**
350 McAllister Street
San Francisco, CA 94102

Hon. Dallas S. Homes **Via overnight mail (1 copy)**
c/o Clerk of the Court
Riverside County Superior Court
4050 Main Street
Riverside, CA 92501

Court of Appeal **Via overnight mail (1 copy)**
4th District Div. 2
3389 Twelfth Street
Riverside, CA 92501