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Court of Appeal of the State of California  
Second Appellate Division  
Division Six  
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**Re: Request for Publication (Rule 8.1120), *Brost, et al.*  
*v. City of Santa Barbara*, 2d Civ. No. B246153  
(Mar. 25, 2015)**

To the Honorable Judges of the Court of Appeal:

## **I. REQUEST FOR PUBLICATION**

Pursuant to California Rules of Court 8.1120 and 8.1105(c), the undersigned and the Owners' Counsel of America respectfully request this court order publication of the opinion in *Brost, et al. v. City of Santa Barbara*, 2d Civ. No. B246153, filed on March 20, 2015 (Gilbert, P.J., Perren, J., and Yegan, J.), which addressed regulatory takings and ripeness law.

## **II. INTEREST OF REQUESTERS**

I am a lawyer licensed in both Hawaii and California, and in addition to my practice which focuses on regulatory takings, inverse condemnation, eminent domain, and land use law, I write and publish *inversecondemnation.com*, a law blog that reports and analyzes significant developments from across the nation on these topics. Recently, I published a blog post about the *Brost* opinion, "*Cal App (Unpub): Temporary Prohibition on Rebuilding In A Landslide Zone Is A Taking*" (available at <http://www.inversecondemnation.com/inversecondemnation/2015/03/cal-app-unpub-moratorium-on-new-construction-is-a-taking.html>), which noted, "*Brost v. City of Santa Barbara*, No. B246153 (Mar. 25, 2015) is an unpublished opinion, but (1) we hope the property owners ask the court to publish it, and (2) even if it remains unpublished, it is worth reading, because the court correctly applies both *Williamson County*'s futility exception, and the 'background principles' exception to a *Lucas* 'wipeout' regulatory taking."

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I am also the Hawaii member of Owners' Counsel of America (OCA).

OCA is an invitation-only network of the nation's most experienced eminent domain and property rights attorneys. We have joined together to advance the law, and preserve and defend the rights of private property owners. OCA frequently files amicus briefs in eminent domain, land use, and regulatory takings cases in both federal and state courts, including, most recently, in *Property Reserve, Inc. v. Dep't of Water Resources*, No. S217738, currently awaiting argument in the California Supreme Court. OCA members and their firms have been counsel for a party or amicus curiae in many of the landmark property cases the courts have decided recently, including several of the cases relied upon by the opinion in *Brost*, such as *Williamson Cnty. Regional Planning Comm'n v. Hamilton Bank* (1985) 473 U.S. 172; *First English Evangelical Lutheran Church v. County of Los Angeles* (1987) 482 U.S. 304; *Lucas v. South Carolina Coast Council* (1992) 505 U.S. 1003; *Suitum v. Tahoe Regional Planning Agency* (1997) 520 U.S. 725; *Palazzolo v. Rhode Island* (2001) 533 U.S. 606; *Lingle v. Chevron, USA, Inc.* (2005) 544 U.S. 528; *Baker v. Burbank-Glendale-Pasadena Airport Authority* (1985) 39 Cal. 3d 862; and *Charles A. Pratt Construction Co., Inc. v. California Coastal Comm'n* (2008) 162 Cal. App. 4th 1068.

OCA members also frequently publish and speak about regulatory takings and ripeness law.

Both I and my OCA colleagues have a keen interest in seeing opinions like *Brost* that involve regulatory takings and ripeness, and which apply a thorough and correct analysis of the facts and the issues and provide guidance to other litigants, are published and may be cited as precedent in California and nationwide.

### III. STANDARDS FOR PUBLICATION

The court's opinion in *Brost* meets the following standards for publication set out in California Rules of Court 8.1105(c):

- It “[a]pplies an existing rule of law to a set of facts significantly

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different from those stated in published opinions.” As far as we are aware, no published California case involves similar facts (takings claims arising out of a municipality’s total but temporary prohibition on rebuilding homes justified by a nuisance-prevention rationale), or analyzes the futility exception to the takings ripeness doctrine so completely.

- It “[m]odifies, explains, or criticizes with reasons given, an existing rule of law.” Many aspects of existing regulatory takings doctrine are unsettled, including the two main issues analyzed by the opinion. The opinion clarifies when an ordinance that is supported by a nuisance-prevention rationale works a taking, and when pursuit of administrative relief is futile.
- It “[a]dvances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule.” The opinion correctly clarifies the application of the Fifth Amendment to the U.S. Constitution, and the takings clause of the California Constitution, to situations such as these.
- It “[i]nvolves a legal issue of continuing public interest.” The *Brost* case and the legal issues involved have generated substantial public interest. (See, e.g., “*Ruling Clears the Way for Santa Barbara Homeowners to Rebuild in Conejo Landslide Area*” (available at [http://www.noozhawk.com/article/012312\\_ruling\\_homeowners\\_conejo\\_landslide\\_area](http://www.noozhawk.com/article/012312_ruling_homeowners_conejo_landslide_area)); “Verdicts and Decisions,” in *Santa Barbara Lawyer* (Mar. 2013))
- It “[m]akes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law.” The opinion provides a careful and detailed analysis of two areas of law—regulatory takings, and the futility exception to ripeness—and if published, would represent a significant contribution to the development of both areas of law.
- It “[i]nvokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision.”

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Although the published opinion of the First Appellate District (Division Three) in *Lockaway Storage v. Cnty. of Alameda* (2013) 216 Cal.App.4th, involved claims of a regulatory taking and a municipal ordinance limiting development, that decision did not address the specific issues analyzed by the *Brost* opinion. As noted above, we are aware of no other recent reported California decision which presented and analyzed similar issues.

For the foregoing reasons, I and OCA respectfully request this court publish the opinion.

Very truly yours,

DAMON KEY LEONG KUPCHAK HASTERT



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