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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LOCKAWAY STORAGE, et al.,
Plaintiffs and Respondents,

vs.

COUNTY OF ALAMEDA, et al.,
Defendants and Appellants.

After A Decision by the Court of Appeal
First Appellate District, Division Three
Case Nos. A130874, A132768

PETITION FOR REVIEW

Jill Sazama, SBN: 214215
BOORNAZIAN, JENSEN & GARTHE
P.O. Box 12925
Oakland, CA 94604-2925
Telephone: (510) 834-4350

Brian E. Washington, SBN: 146807
Office of the County Counsel
COUNTY OF ALAMEDA
1221 Oak Street, Suite 450
Oakland, CA 94612-4296
Telephone: (510) 272-6700

*Rick W. Jarvis, SBN: 154479
Andrea J. Saltzman, SBN: 54482
JARVIS, FAY, DOPORTO & GIBSON, LLP
492 Ninth Street, Suite 310
Oakland, California 94607
Telephone: (510) 238-1400
rick@jarvisfay.com

Attorneys for Defendants and Appellants
COUNTY OF ALAMEDA, et al.

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ISSUES PRESENTED

1. *Landgate, Inc. v. California Coastal Commission* (1998) 17 Cal.4th 1006, holds that "a legally erroneous decision of a government agency during the development approval process resulting in delay" does not constitute "a temporary taking of property" unless the agency's "position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it." (*Id.* at 1018, 1024-1025.) Did the Court of Appeal err when it concluded in this case that *Landgate* does not remain good law after *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528?

2. May a county be found liable for a temporary regulatory taking for delay resulting from the erroneous denial of a development permit, where the trial court expressly found that the agency's denial was not arbitrary or capricious, and where the only basis for liability was that planning staff changed its interpretation of a recently-adopted complex initiative measure upon legal advice of county counsel?

REASONS FOR REVIEW

The Court of Appeal's opinion in this case ("Opinion," published at 216 Cal.App.4th 161) incorrectly answers a critical question important to every county, city, State agency and developer in the State: Does a mistake during the permitting process that temporarily delays the development of property constitute a "taking" requiring compensation? This Court concluded in *Landgate* that "a regulatory mistake resulting in delay does ***not***, by itself, amount to a taking of property," and then held that a two-year delay in a developer's ability to proceed with a project, during which the developer successfully challenged the defendant State agency's erroneous assertion of regulatory authority over the project, did not render the agency liable for a temporary regulatory taking, because the developer did not establish that the delay "was due to anything other than a bona fide dispute." (17 Cal.4th at 1018-1019, 1031.)

The Opinion mistakenly concludes that this Court's 1998 decision in *Landgate* is no longer good law in light of the United States Supreme Court's 2005 decision in *Lingle*, *supra*, 544 U.S. 528. Based on this mistaken conclusion, the Opinion erroneously affirms the trial court's decision that defendant Alameda County was liable for $989,641 in damages to plaintiffs for a 30-month delay in developing their RV storage

facility "Project" based on the County's good faith belief that a newly-enacted initiative ("Measure D") precluded renewal of their expired use permit–a belief the trial court determined was wrong. Specifically, relying on *Lingle*, the Opinion states this Court applied the incorrect test in *Landgate* for determining whether a regulatory taking occurs. (OP:27-28.) The Opinion also asserts – incorrectly – that "since *Lingle* was decided, several courts have questioned whether the *Landgate* rule remains viable." (*Id*., at 28.) In fact, only ***one*** other published decision questions (but expressly declines to decide) whether *Landgate* is still good law. (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 263-264.) And, in fact, in *Landgate*, this Court properly applied the test reaffirmed in *Lingle*.

Lingle actually reduced the scope of public agency action that can be found to constitute a "regulatory taking" of property. In *Lingle*, the U.S. Supreme Court confronted its prior precedent that suggested two different "independent" "stand-alone" tests for determining whether a regulatory taking could be found. Under the first test, courts apply the factors set forth in *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104, which require consideration of "the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as of "the character of the governmental action." (*Lingle*, *supra*, 544 U.S. at 538-539.) Under the second test, set forth in *Agins v. City of Tiburon* (1980) 447 U.S. 255, a taking could ***also*** be found based upon the application of a regulation to particular property if the regulation "does not substantially advance legitimate state interests." (*Id.* at 540.) *Lingle* held that this so-called "'substantially advances' formula announced in *Agins* is not a valid method of identifying regulatory takings for which the Fifth Amendment

requires just compensation." (*Id*. at 545.) *Lingle* thus held that the *Penn Central* factors provide the exclusive standard for determining whether a regulatory taking occurs (with exceptions not here relevant).

The Opinion asserts – with no supporting analysis – that *Landgate* did not apply the *Penn Central* test and instead only applied *Agins*. (OP:27-28.) However, *Landgate* ***did*** apply the *Penn Central* test as well as the *Agins* test. In holding that agency legal error resulting in development delay does not constitute a temporary regulatory taking, *Landgate* clearly held that there could be no such taking under ***either*** *Penn Central* or *Agins*. Indeed, the dissent in *Landgate* criticized the majority for "fall[ing] back on *Penn Central's* squishy 'multi-factor' test, a standard so amorphous it is capable of producing virtually any result." (*Id*., at pp. 1036-1037.)

Furthermore, the Opinion ignores – and contradicts – the holding in *Loewenstein v. City of Lafayette* (2002) 103 Cal.App.4th 718, 736-737, that *Landgate* ***is*** consistent with *Penn Central*. *Loewenstein* involved a challenge to a city's legally erroneous denial of an application for a lot-line adjustment, which resulted in a two-year delay in development while the developer successfully challenged the denial. The developer in that case expressly argued that, even if there was no taking under *Landgate*, there still was a taking under application of the *Penn Central* factors. In rejecting this argument, *Loewenstein* expressly held that "the *Penn Central* factors are resolved by the analysis in *Landgate*," and supported this holding with a detailed analysis of why a developer cannot have a "reasonable expectation" under *Penn Central* that there will not be "a *Landgate* delay." (*Id*., at pp. 736-737.) While the County extensively relied on *Loewenstein* in its briefing below, the Opinion summarily rejected *Loewenstein* solely on the ground that it was decided before *Lingle*, without considering

Loewenstein's relevant analysis. (OP:28.)

The Opinion also holds that, "even assuming *Landgate* remains good law," the County should still be found liable for a temporary taking. (OP:29-30.) Yet nowhere in the actual analysis of this question – encompassing less than a page and a half – does the Opinion directly address the question mandated by *Landgate* – was the County's legal error "so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it"? Rather, after briefly summarizing the County's argument, the Opinion simply asserts: "The most obvious problem with this argument is the County's position that its 2002 interpretation of Measure D was legally correct. It was not." (OP:29.) However, under *Landgate*, the fact that the County's interpretation was not "legally correct" is far from dispositive – rather, the question is whether the interpretation was "so unreasonable" that it was a sham. On this point, the trial court (in rejecting plaintiffs' substantive due process claim) expressly found that "the record does not support a finding of arbitrary or capricious behavior." (AA III:45:734.) And, while the Opinion asserts that the County's interpretation of Measure D was "unreasonable and unjust" in one regard (OP:2), the Opinion never considers one of the County's primary arguments (raised in both the administrative and trial court process, and briefed on appeal) as to why Measure D prohibited Lockaway's Project in another regard.[1]

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[1]Specifically, the trial court criticized County staff for not considering or discussing in the administrative review process,"Section 22(b)" of Measure D which the trial and appellate courts both interpreted as a "grandfather clause" allowing development to proceed despite a conflict with Measure D if it had received all the necessary discretionary approvals before Measure D was adopted. However, the use permit for the Project

Similar to *Landgate* and *Loewenstein*, plaintiffs here (collectively "Lockaway") experienced a delay in developing their Project after the County interpreted the recently-adopted and extremely complicated Measure D to prohibit such development. The trial court initially determined that the County's interpretation of Measure D was in error and issued a writ of mandate allowing the project to be constructed. In later finding the County liable for damages for a temporary taking, the trial court primarily criticized County planning staff for changing its mind as to whether and how Measure D should apply. This change was due to legal advice from the County's in-house legal counsel – the County's planning staff and its legal counsel had simply reached differing interpretations of Measure D. Nevertheless, the trial court found that County staff's change in how it interpreted Measure D was not sufficiently explained in the record and further that it represented a "doctrinal shift" which took "the case out of the 'normal-if-mistaken-regulatory activity' paradigm and [turned] it into a taking." (OP:29.) However, in light of the trial court's express findings that there was no evidence that the County acted in bad faith or was arbitrary and capricious in its actions, *Landgate* mandated denial of Lockaway's temporary taking claim. As in *Landgate* and *Loewenstein*, the development delay in this case was the result of a bona fide legal dispute.

The *Penn Central* factors are intended to be applied "to identify regulatory actions that are functionally equivalent to the classic taking in

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had an expiration date, and the County determined that, after this date, the County needed to approve a new or renewed permit–either of which would be a new "discretionary" approval prohibited by Measure D. Neither the trial court nor the appellate court considered this argument. The County raised this argument yet again in its Petition for Rehearing, which was summarily denied.

which government directly appropriates private property or ousts the owner from his domain." (*Lingle*, *supra*, 544 U.S. at 539.) The lower courts here mis-applied the *Penn Central* factors by finding a temporary regulatory taking based solely upon perceived legal errors made by the County's planning staff and legal counsel. The facts of this case demonstrate no County action "functionally equivalent" to direct appropriation or ouster.

There is obviously confusion as to how to apply *Landgate* following *Lingle*, with the appellate courts having reached directly conflicting conclusions on whether *Landgate* properly applied the *Penn Central* factors. Review by this Court is thus necessary, both to secure uniformity of decision and to settle this important question of law.

STATEMENT OF FACTS

1. The Lockaway Project

In August, 2000, Lockaway Storage ("Lockaway") purchased an undeveloped 8.45-acre parcel ("the Property"), which was last used as a construction and dumping site for the I-580 freeway, and which is in an unincorporated area of Alameda County, surrounded by similarly undeveloped property. (AA I:3[STIP]:26-27.)[2] The Property was then within an area of the County zoned "agriculture," but in 1989, the County had approved a special overlay zoning for the Property authorizing the "open storage of recreational vehicles and boats" ("RV storage") as a "Conditional Use," subject to numerous specified conditions, including obtaining a conditional use permit ("CUP"). (AA I:3[ExA]:43-45.)

[2]The Appellants' Appendix is cited "AA #:#:#," with the numbers, respectively, the volume; the tab (which designates trial exhibits in volumes VI and VII); and any page[s].

And, in September 1999, the County had approved the fourth CUP for RV storage on the Property ("C-7479," referred to in the Opinion as "the 1999 CUP") subject to numerous specified conditions in addition to those in the zoning ordinance. (AA I:3[ExD]:72-80.)[3] Lockaway purchased the Property with the sole intent of developing an RV storage facility in accordance with C-7479, and, prior to close of escrow, Lockaway's representatives met with County Zoning Administrator Darryl Gray to confirm they could so use the Property and to review the conditions in C-7479. (1RT-L:23-24, 34.)[4]

Like the three previous CUPs, C-7479 explicitly provided it would expire unless it was "implemented" in three years and that it was "valid" for only three years, but, unlike the three previous CUPs, C-7479 also expressly provided that it would expire on a specific date: September 22, 2002. (AA I:3[ExD]:73, 75.) When they purchased the Property, the Lockaway partners were aware of this specific expiration date in C-7479 as well as the condition that C-7479 had to be implemented in three years. (1RT-L:24, 28-29, 58-59, 61.)

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[3] The first two CUPs (issued in 1990 and 1994) had expired when they were not implemented within three years pursuant to explicit language in the CUPs and the express language of Section 17-52.050 of the Alameda County Zoning Ordinance. (AA I:3[Exs.A-C]:34, 36, 48, 50, 60-64.) The third CUP, issued in 1997, was superseded by C-7479. (AA I:3[Ex.D]:72.)

[4] The Reporter's Transcripts for the various hearings over the lengthy course of this litigation and the bifurcated trial are not consecutively paginated. Hence, the Transcript for the liability phase of the bifurcated trial will be cited, as above, as "#RT-L:#," with the first number the volume for the Transcript for this phase of the trial only.

2. Measure D

In November 2000, the voters of Alameda County adopted a ballot measure ("Measure D"), a densely-worded 40-page, single-spaced, growth control initiative that, among many other amendments to the County's General Plan, redesignates the area where the Property is located to permit agricultural, recreational and compatible uses, but not RV storage–even as a conditional use. (AA I:3[ExE]:81-127; *see also,* I:3[STIP]:27.) Because Measure D amended the County's General Plan, under the explicit language of Section 19 of Measure D–as well as long-standing law–any County "zoning regulation, or other ordinance, resolution or policy . . . is ineffective" if it is "inconsistent" with Measure D," and no "inconsistent" CUP or other "discretionary administrative or quasi-administrative action . . . may be granted, approved, or taken." (Measure D, §19(b) & (c) [AA I:3[ExE]:107]; see also *Citizens of Goleta Valley v. Board of Supervisors of County of Santa Barbara* (1990) 52 Cal.3d 553, 570-571 [holding that "the propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan"].) However, Measure D protects certain rights to develop property inconsistently with its terms. In particular, under the heading "Application," Section 22 provides:

> "(a) This ordinance does not affect existing parcels, development structures, and uses that are legal at the time it became effective. However, structures may not be enlarged or altered and uses expanded or changed inconsistent with this ordinance, except as authorized by State law.
>
> "(b) Except to the extent there is a legal right to development, the restrictions and requirements imposed by this ordinance shall apply to development or proposed development which has not received all discretionary County and other approvals and permits prior to the effective date of the ordinance." (*Id.*

at 108.)

Likewise, Section 3 protects judicially recognized "legal rights" to develop property inconsistently with Measure D's terms (such as where developers have acquired vested rights), "to the extent, but only to the extent, that courts determine that if they were applied they would deprive any person of constitutional or statutory rights or privileges . . . ." (*Id.* at 89.)

3. The expiration of C-7479

Both before and after Measure D was adopted, Lockaway proceeded with implementation of the Project, although not as quickly as County planning staff had originally envisioned. For example, in October, 2000, County planning staff reported to the Castro Valley Municipal Advisory Council ("CVMAC," which advises County staff and the County Board of Supervisors ("the Board") on issues relating to the area of the County where the Property is located) that "C-7479 will likely be implemented by the new property owner next spring 2001." (AA VI:Ex6:1105.) However, Lockaway did not hire a Project manager until "April, May, maybe June of the year 2001" (1RT-L:35) and when he was hired, the manager (David Michael) was told Lockaway's "objectives" were to "begin grading of the project in the summer of 2002 and . . . to be open for operation by the summer of 2003." (*Id.* at 36.)

The full "Lockaway team" for the Project was finally hired and "in place in September of 2001." (AA VI:Ex26:1181; 2RT-L:87-88.) That month, a Project manager for Lockaway's newly-hired engineering firm (Gonzales) met with Gray and reported to Lockaway that the "general status" for the Project is good," but warned that C-7479 is only "valid for about one more year." (AA VII:ExM:1466.) Indeed, Gonzales' letter said "the C-7479 expiration date," was "[b]y far the most important issue"

discussed with Gray, who "strongly cautioned that should the permit expire, it is very unlikely [Lockaway] would be given an extension" because of Measure D and who "made it clear" that, to avoid the application of this measure, "not only should permits for building and grading be in hand but that substantial construction be underway by September 22, 2002," that is, the expiration date of C-7479. (*Ibid*.) (The trial court's factual findings acknowledge this September 2001 warning by planning staff (AA III:45:714-715) but the Opinion disregards it.)

Despite Gray's warning, Lockaway's two main Project managers did not start putting substantial time into the Project until "late January/early February '02," and, not until "some point in July or August" were both "working almost exclusively full-time." (1RT-L:89-90.) Lockaway submitted a "preliminary" application for a grading permit and a grading plan in February, 2002, which the County treated as a final but "incomplete" application. (AA I: 3[STIP]26, VI:Ex8, VI:Ex26:1182; 2RT-L:4-5.) Lockaway than "proceeded to make the application complete" (2RT-L:5-6), but, at the same time, it was making various changes to the Development Plan that were being discussed with and reviewed by Gray. (AA VI:Ex9; [letter]; *see also*, 2RT-L:1-3, 23.) Ultimately, the grading permit was not issued until September 19, 2002, 3 days before C-7479's expiration date. (2RT-L:2-5, 8-9; AA I:3[STIP]:27; I:Ex26:1182 & VI:Ex11.)

Lockaway did not apply for a building permit before C-7479 expired, but in, July 2002, it submitted drawings for "building plan check." (3RT-L:346, 355; AA I:3[STIP]:27.) Also in July, Lockaway's two main Project managers consulted with Gray via telephone about various issues, including the progress on the grading permit, and were allegedly told by

Gray that "we had made substantial progress for the implementation of our Use Permit," and "should we not receive a grading or building permit by our September 22, 2002 deadline, [Gray] would be willing to issue a letter saying we were in compliance with the Use Permit." (AA VI:Ex10:1115 & VII:Ex54; 2RT-L:10-12.)[5]

The two Project managers met with Gray on August 30, 2002 and were told that C-7479 "was expiring on September 22, 2002 regardless of implementation." (2RT-L:12-13, 15-16.) That day, Lockaway submitted a "formal request" for an "extension" of C-7479, making this request under protest since Lockaway believed C-7479 was implemented. (AA VI:Ex10; 2RT-L:11, 14.) After Lockaway was told an application for a new CUP was required rather than an extension, Lockaway submitted a formal application for a new CUP on September 3, 2002, also under protest, and this application (for "C-8080") went to the CVMAC for review on September 23, 2002, one day after C-7479 expired. (AA I:3[STIP]:28, I:3[ExF] [minutes of CVMAC meeting]; 2RT-L:14.)

4. The administrative review of Lockaway's application for C-8080

In the staff report for the CVMAC review of C-8080 and at the CVMAC hearing, planning staff took the position, consistent with its prior position, that C-7479 was no longer effective because it had "not been implemented" within three years of its issuance and further, it expired on

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[5] As stated in the Opinion, Gray "denied making these assurances" at trial, but the Opinion apparently accepts, not only that they were made but also that C-7479 was actually implemented. (OP:4.) As noted in the Petition for Rehearing, no mention is made in the Opinion of Gray's warning in September 2001, that, in order to avoid the application of Measure D after the expiration of C-7479, both a building and grading permit had to "be in hand" and "substantial construction" had to be "underway."

September 22, 2002 regardless of any implementation. (AA VI:Ex12:1119.) Thus, Lockaway was required to submit and had submitted an application for a new CUP, and Measure D applied to this application. but Measure D prohibited the approval of this application. (*Id*. at 1119-1120.)

Additionally, for the first time, planning staff took the position that C-7479 "became ineffective" when "Measure D became effective" in December 2000 because the special overlay zoning allowing the Property to be used for RV Storage with a CUP was inconsistent with the General Plan designation of the Property effected by Measure D and, in December 2000, Lockaway had not acquired any "vested right to develop the property" under C-7479. (AA VI:Ex12:1120 & I:3[ExF]:131.) Senior County Counsel Chambliss similarly explained this position at the hearing. (AA I:3[ExF]:131.)

Lockaway's representatives at the hearing disagreed with the staff's position that C-7479 has expired and they needed to apply for a new CUP, explaining that, in their view, Lockaway had implemented C-7479, having spent "a lot of money" on planning for the Project, "clearing the site" and "storm drainage, easements and other permits." (AA I:3[Ex.F]:132-134.) Lockaway's Project manager also complained about staff's new position that C-7479 became ineffective when Measure D became effective in December 2000, explaining Lockaway's representatives had been meeting and closely worked with County planning staff, particularly Gray, "in regards to the terminology, expiration, and implementation" of C-7479 after December 2000, but had never been told C-7479 became ineffective until they were told in August 2002 that Lockaway needed to apply for a new CUP after the expiration of C-7479 on September 22, 2002 and that Lockaway's "interpretation" of the implementation that would avoid

expiration of C-7479 "was wrong." (*Id*. at 132.)

In response to questions, Gray acknowledged that planning staff had recently changed its position on the effect of Measure D on the Project and C-7479, but explained the County Counsel's office was first consulted about the Project in August, 2002 and Chambliss disagreed with–and corrected–planning staff's opinion that Measure D did not apply to the Project until C-7479 expired. (AA I:3ExF[STIP]:133.)

CVMAC voted 5/1 to "recommend approval" of C-8080, and, at an October 2002 meeting, a County zoning board considered this recommendation and a revised staff report, which repeated and expanded upon the view of County staff and County Counsel that C-7479 had expired in September 2002 and also was rendered ineffective by Measure D in December 2002. (AA I:3[STIP]:28 & VI:Ex14 [staff report].) The zoning board denied the application, and Lockaway appealed to the Board of Supervisors (that is, the "Board"). (AA I:3[STIP]:28.)

At the Board's hearing on Lockaway's appeal, staff reiterated that, "[a]ccording to County Counsel, when Measure D became effective in December of 2000," C-7479 "became ineffective." (AA VI:Ex26:1174.) Chambliss explained this position, stating the conditional use of the Property for RV Storage "was authorized by the zoning," which "became ineffective" in December 2000, and, thus, C-7479 "had become a nullity." (AA VI:Ex26:1194.) Moreover, Chambliss explained that, "even assuming that were not the case," C-7479 expired on September 22, 2002, and "so the matter before the Board today is an application for the Board to issue a discretionary permit" whether it is characterized as the renewal of the old permit or the grant of a new one ("it doesn't matter really how you characterize it"). (*Ibid.*) And, he explained:

> "***Measure D prohibits the Board from issuing discretionary permits that are inconsistent with it.*** To issue this permit would be to issue a permit to authorize a use that's illegal under the terms of Measure D. So the Board cannot legally issue such a permit." (*Ibid.*)

Apparently agreeing with Chambliss, in March 2003, the Board voted unanimously to deny Lockaway's appeal on the ground that "Measure D was applicable" to Lockaway's application for C-8080. (AA I:3[STIP]:29 & VI:26:1199-1202.)

Less than a month later, Lockaway filed a complaint combined with a petition for writ of mandate ("Complaint") against the County, the Board and six individual County staff members or consultants, seeking a writ ordering the County to allow Lockaway to continue with the Project, as well as damages under several theories. (AA I:1.)

PROCEDURAL HISTORY

1. The writ of mandate

Agreeing that the "facts are not in dispute" on the Complaint's seventh cause of action for a writ of mandate, the parties filed "joint motions for summary adjudication" on the writ (and only the writ) "based on stipulated facts." (AA I:3:25.) Relying solely on the "so-called grandfather clause" in Section 22 of Measure D, and reasoning that C-7479 remained valid notwithstanding the adoption of Measure D because "Lockaway *had* received all discretionary permits prior to the effective date of Measure D," in November 2004, the trial court issued a decision granting Lockaway's motion and denying the County's motion. (AA I:7:184, 186; italics in original.) The decision did not address the separate question of whether C-7479 had expired because Lockaway had failed to "implement"

it within three years after of its issuance or because it expired regardless of its implementation on its specific expiration date of September 22, 2002.

In February 2005, the court denied the County's motion for reconsideration and ordered the issuance of a writ of mandate compelling the County "to recognize C-7479 as a valid conditional use permit which is vested in Petitioners and to allow construction to proceed on Petitioners' property pursuant to said conditional use permit." (AA I:11, 13.)

Following renewal of C-7479, Lockaway applied for and received grading and building permits (AA VII:Ex48) and completed construction of the Project.

2. The trial

Lockaway's various damage claims remained. In August, 2008, following substantial pretrial proceedings, the parties entered into a partial Settlement Agreement which narrowed the issues. (AA VII:ExL.) Following this settlement, the only damage claims that remained for trial were for damages due to delays in developing the Project from September 22, 2002 (when C-7479 expired) to April 15, 2005 (soon after the writ was served), based on inverse condemnation and substantive due process theories.

The court bifurcated the trial into separate liability and damage phases, and the liability phase was tried in March 2009. (AA III:545, V:64:1041.) Following extensive post-trial briefing, the court issued a decision, finding the County liable for damages for a "temporary taking," but rejecting Lockaway's substantive due process claim. (AA III:45:708-735.)

In finding the County liable for a temporary regulatory taking, the trial court applied the three factors identified in *Penn Central, supra*, 438

U.S. 104, finding: (1) that the County's actions "materially interfered with Plaintiff's distinct, investment-backed expectations" of developing under C-7479; (2) that "Measure D, as applied, had a substantial, negative economic impact on Plaintiff's use of the Property"; and (3) that the "Character of the Government Action" factor supported a finding of a taking based solely on the fact that County staff changed its position on how Measure D affected the Project and that staff did not adequately advise the Board about Section 22. (AA III:45:726-732.)

As to the last factor, the court stressed that County staff originally informed Lockaway in 2000 and 2001 that Measure D did not affect the validity of C-7479, but then – in September 2002, took the different position that Measure D invalidated C-7479 at the time it took effect in December 2000. (*Id*. at 728-732.) The court characterized this change in staff's position as "unique – and frankly, mystifying" and a "showstopping U-turn" (*Id*. at 728), and further criticized County staff for failing "to analyze, account for, or even mention, the safe harbor language in Section 22 of [Measure D]," concluding that "[t]his unexplained – and inexplicable – doctrinal shift put Plaintiffs into a box from which they could not extricate themselves. More to the point, it takes the case out of the 'normal-if-mistaken-regulatory-activity' paradigm and turns it into a taking." (*Id.* at 729.) However, the trial court stressed it did not find the County was "ill-motivated" in its actions, finding that "[t]he record is devoid of evidence that Defendant harbored animus of any kind towards Plaintiffs, that Defendant was under the sway of groups or entities opposed to Plaintiff's interests, or even that Defendant somehow lacked moral fiber." (*Id*. at 730.)

While finding the County liable for a "taking," the trial court also

expressly found that the County did ***not*** violate Plaintiff's substantive due process rights, and specifically that "the record does not support a finding of arbitrary or capricious behavior." (*Id.* at 732-734.)

Following the damages phase of the trial in September 2010, the trial court issued a decision finding that the County was liable to Lockaway for $504,175 in lost profits and $324,954 in increased construction costs due to the approximately 30 months' delay caused by the County's application of Measure D to Lockaway's application for a new or renewed CUP plus pre-judgment interest, for total damages of **$989,640.96**. (AA IV:52:882-896.)

Final judgment was entered in November 2010 (AA IV:54), and the County timely appealed (AA IV:56).[6]

3. The County's appeal

The County's appeal from the judgment was based on two primary theories. First, the County argued it correctly interpreted Measure D as prohibiting development of the Project—either because C-7479 became ineffective in December 2000 or because C-7479 expired in September 2002; thus, the trial court erred in granting the writ of mandate and, rather, than suffering from any temporary taking of its property, "Lockaway experienced a windfall insofar as it was allowed to proceed with development that Measure D prohibited." (AOB:3, 33-51; ARB:16-35.)[7]

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[6] The County also timely appealed from the post-judgment order awarding $728,015.50 in attorneys fees to Lockaway under Code of Civil Procedure section 1036, but does not address the fee award in this Petition—except to note that, if the judgment finding the County liable for a temporary taking is reversed, the fee award should likewise be reversed.

[7] References to "AOB" and "ARB" are, respectively, to the appellant County's Opening and Reply Brief while references to "PR" are to the County's Petition for Rehearing.

Second, the County argued that, even assuming *arguendo* it incorrectly interpreted Measure D, the trial court erred in awarding damages for a temporary regulatory taking under the *Penn Central* standards without considering the *Landgate* and *Loewenstein* holdings and the County's reasonable, good faith basis for its interpretation of Measure D. (AOB:3-4, 51-61; ARB:35-44.)

In support of both these theories, the County proffered various arguments as to why Section 22(b) of Measure D should not be interpreted as a grandfather clause (or at least why it was objectively reasonable for the County to not so interpret it) and why Lockaway did not have vested rights to develop the Project despite its prohibition by Measure D. (AOB:34-48; ARB:17-31.) But the County also argued that, even if Section 22(b) was interpreted as a grandfather clause, it did not apply to the Project after C-7479 expired because Lockaway needed a new discretionary approval (whether to extend C-7479 or to issue C-8080), and, even under Lockaway's and the courts interpretation of Section 22(b), it only applies to projects that have all the necessary discretionary approvals. (AOB:48-51; ARB:31-35.)

Rejecting–or ignoring–the County's arguments, the Court of Appeal affirmed the judgment for damages.[8] The Opinion asserts (incorrectly) that

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[8] The Opinion concludes the County's "appeal of the writ is moot" given that the Project was completed and Lockaway's RV storage facility was operating, but nonetheless reviews "the trial court's finding [in issuing the writ] that Measure D use restrictions did not apply to the Lockaway project" (stating the Court was "perplexed as to why the County has so aggressively sought reversal of the writ") (OP:12.) Of course, as the County had explained, "the award of nearly $1 million in damages for a temporary taking is predicated on" the order issuing the writ and the County asked the Court of Appeal to reverse this order to ensure review of the

the County's various legal arguments on the interpretation of Section 22 were all "new legal theories" raised for the first time on appeal, but also addresses and rejects them on the merits, concluding Section 22 gave Lockaway a grandfathered right to develop the Project based on C-7479. (OP:12-18; *see also,* ARB:20-25 [explaining most of these arguments were consistent with the position taken by the County's trial counsel].) The Opinion does not even mention the County's argument that, even if Section 22 grandfathered Lockaway's right to develop under C-7479, Lockaway needed a new discretionary approval after C-7479 expired, which Measure D barred the County from granting.

The Opinion also rejects the County's takings argument, mischaracterizing the County's argument that *Landgate* establishes ***how*** the *Penn Central* factors apply in this type of case as an argument that whether there was a taking should be "decided by application of the rule" in *Landgate* "rather than" the *Penn Central* factors.(OP:20; *see also,* OP:28 [incorrectly asserting the County was arguing *Landgate* "establishes an independent test"].) The Opinion then upheld the trial court's application of the *Penn Central* factors, finding that "the County's regulatory about face was manifestly unreasonable" and emphasizing the alleged failure of County staff "to analyze, account for, or even mention, the safe harbor language in Section 22." (OP:21.) The Opinion acknowledges the County's arguments on the interpretation of Section 22 in its appellate briefs "arguably in hindsight could support the County's decision to block the Lockaway project," but found that "each of these interpretations is based on a strained reading of Measure D" and that "there is nothing in the

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finding on which they were based. (ARB:6-16, quoted language at 7-8.)

record to suggest anyone at the County thought of these reasons." (OP:25-26.) Again, the Opinion never mentions that C-7479 expired in September 2002, and that planning staff and County Counsel consistently maintained Section 22 was inapplicable because a new discretionary approval was needed for a new or renewed CUP.

Finally, and most important, the Opinion rejects the applicability of *Landgate*, asserting (incorrectly) that *Landgate* "relied on a different test" than the *Penn Central* factors which was "evolved from language" in *Agins v. City of Tiburon*, *supra*, 447 U.S. 255, and suggesting that, since *Lingle* rejected the *Agins* test, it is questionable "that the *Landgate* rule remains viable." (OP:28.) The Opinion goes on to hold that, "even assuming *Landgate* remains good law," it does not apply here. After briefly summarizing "the County's version of events," including that the County "reasonably relied on the advice of legal counsel when it adopted a new and allegedly correct interpretation of Measure D which precluded Lockaway from completing its project," the Opinion explains that this new interpretation of Measure D was not "legally correct" and that the evidence cited by the County neither establishes "the basis for the County's about face" nor supports a "conclusion that the County made an honest and reasonable mistake that led to normal delay." (OP:29-30.) To the contrary, the Opinion states the evidence "supports the trial court's finding that the timing and nature of the County's change of position takes this case outside of the *Landgate* rule" and that the County's "dogmatic interpretation of Measure D adopted in August 2002 deprived Lockaway of a meaningful opportunity to protect its property rights." (OP:30.) Again the Opinion ignores that there was no change of position by staff that Measure D applied in September 2002, after the expiration of C-7479–and that

Lockaway was told of this position in September 2001, when Lockaway had a meaningful opportunity to protect its property rights, but did not do so.

The County filed a timely Petition for Rehearing, pointing out the Opinion's failure to recognize a "key" argument "the County consistently raised in the proceedings below and extensively briefed in this Court," specifically, its argument that C-7479 "expired on September 22, 2002 (regardless of whether it was 'implemented' prior to that date) and thus the project required a new 'discretionary' approval by the County prohibited by Measure D, even under the 'grandfather' provisions in Section 22(b) of Measure D." (PR:1.) This argument, moreover, establishes the County "had a plausible, good faith legal basis for finding that Measure D barred Lockaway from proceeding with the Project" and should have precluded the trial court's conclusion "that the County was liable for a regulatory taking." (PR:2-3.) The Court of Appeal summarily denied the Petition for Rehearing without modifying the Opinion.

ARGUMENT

A. *Landgate's* holding that development delay resulting from a bona fide legal dispute does not constitute a temporary regulatory taking is consistent with *Penn Central* and remains good law following *Lingle*.

As demonstrated below, contrary to the Court of Appeal's conclusion here, *Landgate* properly applied the *Penn Central* factors when it held that development delay resulting from a bona fide legal dispute does not constitute a temporary regulatory taking. Indeed, in *Loewenstein*, the same district of the Court of Appeal concluded after a detailed analysis that "the *Penn Central* factors are resolved by the analysis in *Landgate*."

(*Loewenstein, supra*, 103 Cal.App.4th at 736-737.) Thus, also contrary to the Court of Appeal's conclusion here, the fact that *Lingle* later held that the *Penn Central* factors provide the exclusive test (outside of narrow exceptions) for assessing whether a regulatory taking occurs in no way undermines *Landgate's* holding. Review of the Opinion is required to remove any doubt or confusion as to the continuing viability of *Landgate*– and to resolve the direct conflict between this case and *Loewenstein.*

As *Lingle* explains, the federal Constitution prohibits the taking of private property "for public use, without just compensation." (*Lingle*, *supra*, 544 U.S. at 536.) The California Constitution similarly provides. (*Shaw v. County of Santa Cruz*, *supra*, 170 Cal.App.4th at 260 [also stating the takings clause in the California Constitution is "construed congruently with the federal clause"].) "The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." (*Lingle*, *supra*, 544 U.S. at 537.) The courts have recognized, however, "that government regulation of private property may, in some instances, be so onerous that its effect it tantamount to a direct appropriation or ouster," thus constituting a "regulatory taking" requiring compensation. (*Ibid*.) There are "two categories of regulatory action that generally will be deemed *per se* takings, specifically, a regulatory action which "requires an owner to suffer a permanent physical invasion of property–however minor," and a regulation that completely deprives an owner of "*all* economically beneficial" use' of property." (*Id*. at 538.)

"Outside these two relatively narrow categories (and the special context of land-use exactions . . .), regulatory takings challenges are governed by the standards set forth in [*Penn Central*, *supra*, 438 U.S. 104]." (*Ibid*.) *Penn Central* requires an ad hoc factual inquiry that "weighs

several factors for evaluating a regulatory taking claim." (*Penn Central*, *supra*, 438 U.S. at 124; *Lingle*, *supra*, 544 U.S. at 538.) "Primary among these factors are '[t]he economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations," as well as "the 'character of the governmental action'–for instance whether it amounts to a physical invasion or instead merely affects property interests though 'some public program adjusting the benefits and burdens of economic life to promote the common good.'" (*Lingle*, *supra*, 544 U.S. at pp. 538-539; quoting *Penn Central*, *supra*, 438 U.S. at 124.) These factors are intended "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." (*Id*., at 539.)

However, in *Agins*, *supra*, 497 U.S. 255, and other cases, the U.S. Supreme Court identified another separate test for ascertaining a regulatory taking. Specifically, *Agins* holds the "application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . ***or*** denies an owner economically viable use of his land [citing *Penn Central*]." (*Lingle*, *supra*, 544 U.S. at 540.) As *Lingle* explained, "[b]ecause this statement is phrased in the disjunctive, *Agins* 'substantially advances' language has been read to announce a stand-alone regulatory takings test that is wholly independent of *Penn Central* or any other test." (*Ibid*.) *Lingle* thus held "that this formula prescribes an inquiry in the nature of a due process, not at takings, test, and thus it has no proper place in our takings jurisprudence." (*Ibid*.)

However, when *Landgate* was decided, *Agins* was still considered binding precedent, and *Landgate* thus included extensive discussion and

application of *Agins*' "substantially advances" test. (See, e.g., *Landgate*, *supra*, 17 Cal.App.4th at pp. 1016, 1019-1020, 1021, 1022.) However, *Landgate's* analysis shows that this Court was also applying and considering the *Penn Central* factors and, in fact, the entire decision analyzed the extent of the economic impact of the delay on the developer applicant, the extent of interference with the applicant's legitimate investment-backed expectations, and the character of the challenged action. For example, the ultimate holding is stated in the following terms:

> "In sum, Landgate has not demonstrated that the development delay between February 1991 and February 1993 was due to anything other than a bona fide dispute over the legality of Landgate's lot and the Commission's jurisdictional authority over the lot line adjustment. ***Such delay is an incident of property ownership and not a taking of property.***" (*Id*. at 1031, emphasis added; see also 1030 ["a judicial determination of the validity of certain *preconditions to development* is a normal part of the development process, and the fact that a developer must resort to such a determination does not constitute a per se temporary taking."].)

Landgate's analysis reflects its determination, consistent with the *Penn Central* factors, that an applicant has no legitimate investment-backed expectation that there will be no delays in the development process due to bona fide legal disputes, and that the "character of the government action" for these types of delays does not support a finding that a regulatory taking occurred.

Or, as *Loewenstein* cogently explained:

> "[T]he *Penn Central* factors are resolved by the analysis in *Landgate*. Once a court determines that a governmental entity engaged in decision-making whose purpose is not delay for delay's sake but legitimate oversight, the question of whether a landowner has a reasonable investment-backed expectation that is impacted in a manner requiring compensation is, of necessity, answered in the negative. A

> landowner can have no reasonable expectation that there will be no delays or bona fide differences of opinion in the application process for development permits. Sometimes the application process must detour to the court process to resolve a genuine disagreement. Because such delay comes within the *Landgate* category of normal delays in the development approval process, there is no taking even if the value of the subject property is diminished in some way." (*Loewenstein, supra*, 103 Cal.App.4th at 736-737.)

Thus, "[t]he temporary economic impact on a landowner caused by a *Landgate* delay is considered a normal incident of property ownership, and as such, does not figure in the weighing process against the government in a *Penn Central* analysis. In short, the analysis stops when *Landgate* forecloses its." (*Id.* at 737.)

The Opinion offers no analysis in support of its conclusion that *Landgate* is no longer good law – it simply asserts that *Landgate* "relied on a different test evolved from language in [*Agins*]" and then cites to certain pages of the *Landgate* case that mentions the *Agins* test. (OP:27-28.) The Opinion also asserts that, "since *Lingle* was decided, several courts have questioned whether the *Landgate* rule remains viable," and then cites to *Shaw, supra*, 170 Cal.App.4th at 264 ("and authority cited there") as well as *Los Altos El Granada Investors v. City of Capitola* (2006) 139 Cal.App.4th 629, 651. (OP:28-29.) However, the latter case simply restates *Lingle*'s holding without making any reference to *Landgate*. *Shaw*, on the other hand, does have dicta suggesting (but expressly declining to decide) that *Landgate* might no longer be good law, insofar as it "used the *Agins* 'substantially advances' standard in addressing whether an agency's erroneous land-use decision constituted a temporary taking entitling the landowner to compensation or whether the agency's action amounted

instead to non-compensable normal delay in development."[9]

Obviously, the effect of *Lingle* was to reduce, not expand, the scope of government activity which can be challenged as a "regulatory taking" – activity which was not a regulatory taking under *Landgate* before *Lingle* should continue to be found not to be a taking after *Lingle*. As *Loewenstein* expressly holds, *Landgate* properly considered the *Penn Central* factors. The direct conflict between *Loewenstein* and the Opinion (as well as the dicta in *Shaw*) illustrates the important need for this Court to accept review to secure uniformity of decision and to, once again, settle this important question of law.

B. The actions of the County and its staff did not "take" Lockaway's property, especially in light of the County's good faith determination that Lockaway's use permit had expired, requiring Lockaway to obtain a new discretionary approval which should have been found subject to Measure D.

After holding that *Landgate* is not good law and not applicable, the Opinion briefly turns the question whether it would preclude a finding of a regulatory taking "even assuming *Landgate* remains good law." (OP:29-30.) However, in doing so, the Opinion side-steps the central question that

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[9]Puzzlingly, *Shaw* cites to various federal cases in its dicta that *Lingle* "undercuts or even eviscerates prior takings jurisprudence that had applied, as *Landgate* did, a test emphasizing the legitimacy of the governmental purpose when determining whether there has been a compensable taking" (*Shaw, supra*, 170 Cal.App.4th at 264-265), but none of the cited federal cases contain any suggestion that *Lingle* actually broadened potential takings claims. Rather, they instead focused on how *Lingle* broadened the scope of substantive due process claims. (See, e.g., *Crown Point Development, Inc. v. City of Sun Valley* (9th Cir. 2007) 506 F.3d 851, 855-856, and *North Pacifica LLC v. City of Pacifica* (9th Cir. 2008) 526 F.3d 478, 484-485.)

Landgate requires to be answered: Whether the County's "position was so unreasonable from a legal standpoint as to lead to the conclusion that it was taken for no purpose other than to delay the development project before it." (*Landgate*, *supra*, 17 Cal.4th at 1024-1025.) This central "test" can easily be understood in the context of the *Penn Central* factors – Lockaway may well have a "distinct investment-backed expectation" that the County would not take an position that was "so unreasonable from a legal standpoint" that the only conclusion was that the County was trying to delay the Project, but it had no legitimate expectation that there would not be a "bona fide" disagreement as to the interpretation and application of Measure D. Under both *Landgate* and *Loewenstein*, "the character of the [County's] action" here cannot be found to constitute a taking if it was based on a bona fide legal dispute, and not taken for arbitrary or capricious reasons (as the trial court ultimately found they were not).

As explained in the County's Petition for Rehearing, the Opinion never even considers the legal reasonableness of County staff's position – taken consistently throughout all of the proceedings below and argued in both the County's trial court papers (see AA III:38:603) and its appellate briefs (AOB:48-51; ARB:31-35) – that, following the expiration of the C-7479, Lockaway would need a new "discretionary approval" which would be barred by Measure D. Thus, in September 2001, a year before C-7479 expired, Gray warned Lockaway about the expiration date, and "strongly cautioned that should the permit expire, it is very highly unlikely that [Lockaway] would be given an extension" due to Measure D, and Gray "made it clear that not only should permits for building and grading be in hand, but that substantial construction be underway by September 22,

2002." (See AA III:45:714-715 [trial court findings]; VII:ExM:1466.)[10] Consistent with this prior advice, during the County's administrative proceedings which followed the expiration of the C-7479, staff continued to take the position that Lockaway required a new discretionary approval. (See, e.g., AA VI:Ex14:1126 & Ex26:1194.) Thus, under the plain terms of Section 22(b), it clearly was at least objectively reasonable for the County to conclude that Measure D applied to the Project following C-7479's expiration. And, under *Penn Central*, Lockaway thus had no legitimate "investment-backed" expectation that the County would not continue to take the position announced by its staff in September 2001.

Thus, it should be irrelevant (at least for the purpose of a regulatory takings analysis) that, in September 2002, based upon advice by legal counsel, County staff ***also*** took the additional "new" position that Measure D should have been interpreted to prevent the Project from proceeding all along. While ignoring the interpretation of Measure D consistently taken by the County below, the Opinion does address other, alternative interpretations of Section 22 posited in the County's appellate briefs for the purpose of illustrating Measure D's complexity and to support the County's ultimate interpretation. (OP:13-18.) The Opinion acknowledges that they "arguably in hindsight could support the County's decision to block the Lockaway project," but finds that "each of these interpretations is based on

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[10]As discussed at length in the County's Opening Brief (see AOB:42-47), this advice by staff was consistent with well-established caselaw that a developer does not obtain a vested right to proceed under prior law until after it has "(1) obtained a building permit for an identifiable structure, and (2) has performed substantial work in reliance thereon." (*Hafen v. County of Orange* (2005) 128 Cal.App.4th 133, 143, summarizing the holding of *Avco Community Developers, Inc. v. South Coast Regional Comm.* (1976) 17 Cal.3d 785, 793.)

a strained reading of Measure D." (OP:25-26.) Again, that is not the standard inquiry required under *Lockaway*. Given its length and complexity, it was not unreasonable for County staff to have some confusion as to how Measure D should be interpreted.[11] Thus, under proper application of the *Penn Central* factors, Lockaway had no reasonable investment-backed expectation that there would not be any confusion over how to apply Measure D, and the character of the County's actions cannot be found to constitute a regulatory taking.

CONCLUSION

The County respectfully requests that the Court grant this petition for review.

JARVIS, FAY, DOPORTO & GIBSON, LLP

Dated: June 18, 2013

By:_____
Rick W. Jarvis
Attorneys for Defendants and Appellants
COUNTY OF ALAMEDA, et al.

[11]Indeed, the amount of litigation generated by Measure D is further evidence of its complexity. The Opinion is the fifth published decision interpreting its various terms. (See also, *Shea Homes Ltd. Partnership v. County of Alameda* (2003) 110 Cal.App.4th 1246; *Save Our Sunol, Inc. v. Mission Valley Rock Co.* (2004) 124 Cal.App.4th 276; *County of Alameda v. Superior Court* (2005) 133 Cal.App.4th 558; *Ideal Boat & Camper Storage v. County of Alameda* (2012) 208 Cal.App.4th 301.) Obviously, at the time it considered the Lockaway project, the County did not have the benefit of the guidance provided by any of these cases.

CERTIFICATE OF WORD COUNT

I, Rick W. Jarvis, certify that this petition contains a total of **8,392 words** as indicated by the word count feature of the Word Perfect computer program used to prepare it (not including the cover page, tables, signature block, or this certification).

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Rick W. Jarvis