Supreme Court Case No.: S213468

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF PERRIS,
Plaintiff and Respondent,
v.
RICHARD C. STAMPER, et al.,
Defendants and Appellants.

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

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

PLAINTIFF/RESPONDENT'S REPLY BRIEF ON THE MERITS

ERIC L. DUNN (Bar No. 176851)
SUNNY K. SOLTANI (Bar No. 209774)
PAM K. LEE (Bar No. 246369)
ADRIANA P. MENDOZA (Bar No. 286659)
ALESHIRE & WYNDER, LLP
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
Telephone: (949) 223-1170
Facsimile: (949) 223-1180

Attorneys for Plaintiff and Respondent
CITY OF PERRIS

TABLE OF CONTENTS

TABLE OF CONTENTS (cont.)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Cases

TABLE OF AUTHORITIES (cont.)

Page(s)

TABLE OF AUTHORITIES (cont.)

Page(s)

State Statutes

Federal Rules

I. INTRODUCTION AND SUMMARY OF RESPONSE

It is undisputed that realignment and construction of Indian Avenue will increase the value of land owned by Defendants Stamper and Robinson ("Owners") by situating the undeveloped 9.11 acre property ("Property") directly astride a major throughway when it would have otherwise been vacant land, insufficient in size for any meaningful economically sound development consistent with large industrial developments in North Perris. (Reporter's Transcript ("RT") [page:line] 101:4-12.)

It is also undisputed that, assuming the dedication requirement is constitutional, Owners would have to dedicate ***for free*** the 1.66 acres at issue ("Subject Interests") at the time they develop the Property and would have to construct their portion of Indian Avenue.

Most significantly, it is undisputed that the construction of Indian Avenue will benefit Owners, and the general public because, without it the necessary traffic circulation will not occur through this part of the City to have a successful development of any sort.[1] (RT 98:25-99:11; RA 2:0302 [Tab 11].) Indian Avenue's current configuration will allow development of the Property with both light industrial and commercial uses in an area

---

[1] Owners assert they would have had Perry Street and Barrett Avenue as access roads to the Property. However, these are small roads that would not allow for the kind of industrial traffic necessary for an economically-sound development in this area. Because additional roads, are necessary to meet projected transportation needs resulting from anticipated development of properties in the area, including the Property, the City created the North Perris Road and Bridge Benefit District ("NPRBBD"). In creating the NPRBBD the City explained that, "selected facilities [e.g., Indian Avenue] are needed to provide acceptable levels of service in conjunction with the planned development of the area. Eligible facilities are those which will provide a regional benefit ... by diverting a significant portion of the truck traffic away from some of the major thoroughfares within the City of Perris and [will] accommodate an acceptable level of service to support new development." (Respondent's Appendix ("RA") [volume:page] 2:0302, 0310 [Tab 11].) Owners' assertion is a red herring.

greatly in need of commercial uses to serve industrial developments. (RT 115:24-117:8, 117:27-118:2; RA 2:0294-0296.) Commercial use will bring substantially higher prices per square foot. (RT 143:23–144:2.) Owners not only wish to obtain this highly valuable benefit, but also demand an additional $1.3 million (over $750,000 per acre) from the taxpayers of the City.

If Owners apply for a permit to develop the Property, they would be forced to dedicate the Subject Interests for free. By contrast, if Owners keep this acreage fallow or grow crops, as Owners stipulated at trial, the Property would only be worth $44,000. Owners cannot obtain a windfall of $1.3 million merely because the City decided to take the property now as opposed to when Owners eventually seek a permit.

Absent the City's conduct, in no circumstances would Owners receive $1.3 million. Nor should they obtain such compensation now. To hold otherwise would grant Owners a demonstrable windfall. Such a purported application of the project effect doctrine would also violate the cardinal principle that eminent domain statutes not be interpreted in a manner that grants a windfall to a condemnee. (*People ex rel Dep't of Trans. v. Southern California Edison Co.* (2000) 22 Cal.4th 791, 798-99.)

A. Project Effect

Owners could only use the Property in one of two permissible ways. First, Owners could keep the Property vacant or use it for agricultural purposes. Such uses would not require a development permit from the City.

The only available alternative would be for Owners to utilize the Property for light industrial development, a use consistent with the Property's current zoning. Such use, however, would require Owners to obtain a development permit from the City. The trial court found, as a factual matter, that as an absolute precondition to granting such a permit,

the City permissibly could and would require Owners to dedicate the Subject Interests for free. Moreover, as a precondition to the permit, Owners not only would have to grant the City the land, but also would be required to build the road themselves at their own expense.

Owners alleged below that the City could not constitutionally compel them to dedicate the Subject Interests of the Property. The trial court found otherwise. However, due to evidentiary errors identified by the Court of Appeal, Owners will be entitled to reassert this claim upon remand. If Owners establish on remand that such a compelled dedication would be unconstitutional, they win and will indeed be entitled to additional compensation.

But Owners seek dramatically more in this Court.

Owners contend that even if the City ***could and would permissibly obtain the relevant acreage for free*** as a precondition to development, they are nonetheless entitled to $1.3 million for the Subject Interests. Owners argue this is so because Code of Civil Procedure Section 1263.330[2] purportedly compels a court to ignore this demonstrable reality. According to Owners, because the City only wants to take the property for the purposes of a project (i.e., building a road/Indian Avenue) that decreased the value of their property, the taking is a project effect and hence Section 1263.330 applies.

As both the trial court and the Court of Appeal recognized, however, Owners' argument is categorically tautological. ***Every single claimed dedication requirement*** is for the project for which property is being taken. Hence, on Owners' theory, the project effect doctrine applies to ***all*** exercises of condemnation and systematically excludes ***every single*** dedication. Such a categorical application of Section 1263.330 is not, and

[2] All section references are to the Code of Civil Procedure unless otherwise noted.

cannot be, a coherent legal principle, much less one consistent with the intentionally limited scope of that statute.

Owners' sole attempt to deflect this reality is that not all dedications are "project-influenced" and that, instead, "typical" dedications are permissible but not "atypical" ones. (Answer Brief, pp. 26-30.) The inquiry and issues Owners raise are inappropriate for the project effect doctrine. Owners' "typicality" argument essentially attempts to obtain a second bite at testing the constitutionality of the dedication requirement. Owners argue the following:

(a) The dedication requirement here is "atypical" and therefore a project effect because it was done as part of and for the benefit of Lowe's (Answer Brief, p. 27) or the Ridge Commerce Center (Answer Brief, p. 10), not for Owners. This assertion is not only factually inaccurate, where the relevant project is "construction of Indian Avenue," but Owners also improperly redefine the Project outside the scope of the record. Next, as the legislative history of Section 1263.330 demonstrates, "Where changes in value are caused by a project other than the one for which the property is taken, even though the two projects may be related, the property owner may enjoy the benefit or suffer the detriment caused by the other project." (The Eminent Domain Law with Conforming Changes in Codified Sections and Official Comments (Dec. 1975) 13 Cal. Law Revision Com. Rep. (1975) p. 1214.) Lastly, if Owners argue this dedication only benefits other developers, and not Owners, and thus is an "atypical" dedication, then Owners' argument is essentially a reiteration of the *Nollan* nexus standard of the constitutionality test of a claimed dedication requirement in eminent domain. The standard Owners seek has no place in a "project effect" test under Section 1263.330. If on remand the court finds based on new evidence that there is no "nexus" between the dedication and the Owner's future project, then the dedication requirement

fails and is unconstitutional as a matter of law. The City then would not be able to use agricultural values in its property appraisal. There is no need to create a new category for the applicability of the project effect doctrine beyond what the legislature intended.

(b) The size and location of the dedication requirement are "atypical" and therefore a project effect. Owners argue the dedication requirement is disproportionately large compared to the size of their Property, and the dedication is not roughly proportional to the impacts of development under the *Dolan* standard of the constitutionality test. If, on remand, the trial court finds there is no rough proportionality, then the dedication requirement is unconstitutional.

Regarding the location, Owners claim that since Indian Avenue goes through their property or curves, it is "atypical" and hence a project effect. Under their purported theory, the City could "permissibly" have required a dedication of the existing North-South roads – because that would be the "usual" taking, but once it did something "atypical" such as creating a diagonal road, Section 1263.330 purportedly applies and compels the City to pay an additional $1.6 million. This purported distinction is arbitrary. It is also unworkable, and would needlessly require courts to identify and distinguish "typical" versus "unusual" dedications.

Some dedications are constitutionally impermissible, such as those that lack a "nexus" or are not "roughly proportionate." But the present case involves no such impermissible dedication, and presents itself to this Court in a factual and procedural context in which the dedication at issue is presumed to be entirely legitimate and constitutional. Similarly, some other municipal actions (e.g., downzoning) that are undertaken solely for the purpose of minimizing the amount of compensation a City must pay may be equally illegitimate. (*See City of San Diego v. Rancho Penasquitos Partnership* (2003) 105 Cal. App. 4th 1013, 1037.) But this principle is

equally inapplicable here, as the Indian Avenue realignment was indisputably designed as a legitimate effort to develop the area.

If, on remand, the fact finder concludes that the City could and would have permissibly required Owners to dedicate the Subject Interests for free to the City, and that finding is affirmed on appeal, then Owners are more than fully compensated by the payment of $44,000, and Section 1263.330 requires no more. By contrast, if such a compelled dedication is not constitutional, then Owners may indeed be entitled to additional amounts. That is the relevant test, not whether a dedication is "typical" or for a given "project," since by definition all dedications so qualify.

B. Jury Issue

Juries do not decide whether legislative acts are constitutional. Courts do. To hold otherwise would not only conflict with centuries of precedent, but also would perniciously immunize such constitutional holdings from appellate review, as they would now become the "factual" findings of a jury. This is not, and should not be, the law.

The fact that a particular cause of action or issue herein is one to be submitted to a jury (e.g., the amount of compensation in a condemnation case) does not mean that the jury has a right to determine for itself the subsidiary legal issue of whether a particular municipal act is constitutional. For example, that Mr. and Mrs. Mottley sued the Louisville & Nashville Railroad Company for breach of contract – indisputably a legal claim – did not entitle that jury to decide whether the federal statute that outlawed the Mottley's free passes was unconstitutional. Rather, courts, not the jury, made that determination. (*Louisville & Nashville R.R. Co. v. Mottley* (1911) 219 U.S. 467, 480-86.) Similarly, when the owner of a mall sues a protester for trespass, and the protester responds by claiming that he has a constitutional right of access to the mall, the court – not the jury – decides the underlying constitutional issue notwithstanding the fact that a cause of

action for trespass is one for which there exists a right to a jury trial. (*Cf. Robins v. Pruneyard Shopping Center* (1979) 23 Cal.3d 899.)

"Questions of fact in this country, where there is a constitutional right to a jury trial, are for the jury, while questions of law are ordinarily for the judge." (*Toschi v. Christian* (1944) 24 Cal.2d 354, 363 (Traynor, J., dissenting).) Whether a particular legislative act is constitutional is not only a legal question, and hence for the court, but is also one subject to *de novo* review on appeal – the standard has no place if these issues are to be decided by a jury. Mixed questions of law and fact such as these are for resolution by a court, not a jury. (*Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Auth.* (2008) 44 Cal.4th 431, 437 ["[C]ourts use independent, *de novo* review for mixed questions of fact and law that implicate constitutional rights."].)

Even if a court might permissibly delegate the resolution of some subsidiary factual issues to the jury, the ultimate decision as to the constitutional validity of a dedication must be rendered by a court, subject to *de novo* review on appeal.

The constitutionality of a dedication requirement is accordingly an issue of law for adjudication by a judge, not a jury. A judge may permit a jury to make subsidiary factual findings if necessary and appropriate. But Owners' assertion that a jury is required to make the ultimate factual findings as to whether a contested dedication is constitutional is not and should not be the law.

II. COURTS, NOT JURIES, DECIDE THE CONSTITUTIONALITY OF DEDICATION REQUIREMENTS.

A. Owners Mischaracterize The Test Of The Constitutionality Of A Dedication Requirement As A Valuation Issue Subject To A Jury's Determination.

Owners assert that, under *Metropolitan Water Dist. of So. Calif. v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, and the California Constitution, all valuation issues in condemnation go to a jury, and because the reasonable probability and constitutionality of a dedication requirement are related to valuation, they must also go to a jury. Owners are wrong. (Answer Brief, pp. 37-38.) Owners incorrectly assume that simply because the constitutionality of a dedication requirement ***could be*** related to valuation, a jury must decide that issue.

Whether an issue is related to valuation is ***not*** the proper test to decide if the issue will be decided by a court or a jury. If Owners' assertions are true, then nearly every issue in condemnation must be decided by a jury, because all issues are somehow related to valuation. As explained below, Owners' claim, if true, would render meaningless an entire statutory scheme to have trial courts decide disputes on legal issues prior to a valuation trial.[3]

Over a century of eminent domain precedent makes clear that all issues in condemnation, except for valuation itself, are decided by a court. For example, in *Redevelopment Agency v. Contra Costa Theater, Inc.* (1982) 135 Cal.App.3d 73, a defendant owned a 14-acre leasehold interest with a 30-year lease for the operation of an outdoor movie theater. His plans to add movie screens at the property were denied by the public agency, resulting in alleged pre-condemnation damages. (*Contra Costa*

[3] Courts should not give meanings to statutes which render them meaningless. (*Pacific Gas & Electric Co. v. Count of Stanislaus* (1997) 16 Cal.4th 1143, 1152, 1163.)

Theater, supra, 135 Cal.App.3d at 78.) The trial court bifurcated the trial and decided the agency's liability for pre-condemnation damages without reference to a jury. (*Id.* at 77.) On appeal, the appellate court held that the question of liability for pre-condemnation conduct is to be determined by the court, with the issue of the ***amount*** of damages to be thereafter submitted to the jury. (*Id.* at 79.) The court reasoned, "'The right to a jury trial in condemnation proceedings goes ***only*** to the ***amount*** of compensation.' (*Id.* at 80 [emphasis in original].)

Similar to the existence of goodwill or liability for pre-condemnation conduct, the constitutionality of a claimed dedication requirement, although related to valuation, is not the actual valuation itself. Rather, determining the constitutionality of a dedication requirement is a precondition to be decided prior to compensation.

Owners' reliance on *Campus Crusade* fails because, historically, zoning cases have involved purely factual disputes for a jury to decide (*See, e.g., City of San Diego v. Neumann* (1993) 6 Cal.4th 738.) Zoning has always been a question for the jury because it is ***not legal in nature***, and courts routinely allow juries to decide the reasonable probability of a zone change. (*See, Neumann, supra*, 6 Cal.4th 738.)

As this Court noted, the reverse is true for condemnation actions. (*Campus Crusade, supra,* 41 Cal.4th at 973 ["[T]he issues we have reserved for the ***trial court*** in condemnation actions have been ***issues of law*** -- or ***mixed issues of law and fact*** where the legal issues predominate, even if there are also underlying disputes of fact -- antecedent to the valuation of the property..."] [emphasis added].) In contrast, historically, the constitutionality of a claimed dedication requirement, which is a legislative or quasi-adjudicative act, is left for the courts to review while giving deference to the legislative body.

On page 34 of the Opinion, the Court of Appeal, in trying to comport its decision with *Campus Crusade,* states that based on the evidence presented, reasonable jurors could differ regarding whether all or part of the 1.66 acres can be imposed as a dedication. Again, that determination goes to the reasonable probability prong when analyzing the validity of a dedication requirement, but it has nothing to do with the analysis of the constitutionality of a dedication requirement, which is a review of a legislative or quasi-adjudicative act.

The California Constitution has expanded a jury's purview over condemnation proceedings with respect to the issue of the ***amount of*** just compensation only.

B. Courts, Not Juries, Decide Whether A Legislative Or Quasi-Adjudicatory Act Is Valid.

Owners misconstrue the City's argument when they claim the City believes all cases involving *Nollan/Dolan* analyses should be tried before a court. The City acknowledges that in certain cases, a jury may make the factual determinations if they are properly instructed. (*See* Opening Brief, pp. 4, 32.) However, whether a jury or a court makes the analyses is dependent on the type of question (law versus fact) and the type of action (legal versus equitable).

Again, condemnation proceedings are equitable actions tried before a court. (*Koppikus v. State Capitol* Commissioners (1860) 16 Cal. 248.) Also, whether a legislative or quasi-adjudicative act is constitutional is generally an equitable action. The validity of legislative and quasi-adjudicatory acts are generally subject to review through mandamus actions, which are equitable in nature. (*See, e.g., Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 514-521. Such actions are tried before a court, which is required to give ***deference*** to the public agency's

actions. (*See California Hotel & Motel Assn. v. Industrial Welfare Com.* (1979) 25 Cal.3d 200, 212.) Such actions are never reviewed by a jury.

Whether a legislative act is constitutional is not only a legal question, and hence for the court, but is also one subject to *de novo* review on appeal, a standard that has no place if these issues are decided by a jury. What findings would the reviewing court be permitted to review if the constitutionality of a dedication requirement were to be determined by a jury?

Accordingly, this Court should hold that the constitutionality of an otherwise reasonably probable dedication requirement in a condemnation case is subject to determination by a court, not a jury.

This Court in *Consolidated Rock Products Co. v. City of Los Angeles* (1962) 57 Cal. 2d 515, emphasized that the proper exercise of police power is primarily a legislative, not a judicial function, opining:

> ... the police power [] is primarily a legislative and not a judicial function, and is to be tested in the courts not by what the judges individually or collectively may think of the wisdom or necessity of a particular regulation, but solely by the answer to the question is there any reasonable basis in fact to support the legislative determination of the regulation's wisdom and necessity?
>
> (*Id.* at 522.)

This Court, in *Ayres v. City Council of City of Los Angeles,* (1949) 34 Cal.2d 31), recognized the importance of judicial deference in reviewing legislative acts and upheld the validity of a City's action. The court stated:

> Questions of reasonableness and necessity depend on matters of fact. They are not abstract ideas or theories. In a growing metropolitan area each additional subdivision adds to the traffic burden. It is no defense to the conditions imposed in a

subdivision map proceeding that their fulfillment will incidentally also benefit the city as a whole.

(*Id.* at 41.)

It is clear that a Court, not a jury, ***upholds the conclusions of reasonableness based on the record,*** confirming that judicial deference is an important component of reviewing legislative actions, including adoptions and application of municipal code sections and/or circulations elements, which create dedication requirements.

The issue of whether a dedication requirement is constitutional, even if it contains factual disputes, can only be reviewed by the trial court or appellate court subject to a substantial evidence review of the administrative record as the legislative body. (*Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1288-1289.) Courts review quasi-adjudicatory acts and uphold the City's finding if it is supported by "substantial evidence in light of the entire record." (*BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1244.) "Under the substantial evidence test, courts do not reweigh the evidence." (*Sanchez v. State of California* (2009) 179 Cal.App.4th 467, 485.) Rather, "[t]hey determine whether there is any evidence (or any reasonable inferences which can be deduced from the evidence), whether contradicted or uncontradicted, which, when viewed in the light most favorable to an administrative order or decision or a court's judgment, will support the administrative or judicial findings of fact." (*Id.*) The court "may not substitute [its] judgment for the City's and reverse because [it] believe[s] a contrary finding would have been equally or more reasonable." (*Committee to Save The Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161 Cal. App. 4th 1168, 1182.) This deference cannot and should not be torn away from legislative bodies by sending the question of the constitutionality of a dedication requirement to the jury.

C. Owners Are Wrong That Questions Of Mixed Fact And Law Go To A Jury In Condemnation And That The Constitutionality Of A Dedication Requirement Is A Factual Determination.

"Questions of fact in this country, where there is a constitutional right to a jury trial, are for the jury, while questions of law are ordinarily for the judge." (*Toschi v. Christian* (1944) 24 Cal. 2d 354, 363 (Traynor, J., dissenting).) Under well-settled condemnation law, all issues, including mixed questions of fact and law, must be determined by a court; ***only*** the amount of compensation has ever gone to a jury. Owners, however, assert that questions of mixed fact and law, where the ***factual*** determinations predominate, go to a jury. (Answer Brief, p. 39.) Owners go even further and provide examples of factual determinations involving constitutional issues to support their argument that the constitutionality of a dedication requirement is also a factual determination that can be decided be decided by a jury.

First, Owners do not dispute that mixed issues of fact and law in condemnation, where ***legal*** determinations predominate, are properly before a court. (Owners' Answer Brief, p. 37.) Yet Owners incorrectly assert the constitutionality of a dedication requirement is largely factual, not legal. Owners are mistaken.

Owners' reliance on *City of Monterey v. Del Monte Dunes,* (1999) 526 U.S. 687 ("*Del Monte Dunes*"), and *Skoro v. City of Portland,* (D. Or. 2008) 544 F.Supp.2d 1128, is inappropriate.

The decision in *Skoro* was a determination of whether summary judgment was proper, not whether the issues of *Nollan* and *Dolan* are appropriate for the jury or court. The nexus and rough proportionality standards are questions of law, or mixed fact and law; as such, they are issues to be determined by the court. (*See Aaron v. City of Los Angeles* (1974) 40 Cal.App.3d 471, 484 [whether operation of an airport in a

manner such that aircraft noises cause a substantial interference with the use and enjoyment of property is ***a mixed question of fact and law for the trial judge*** to determine].)

The cases Owners cite for the proposition that juries throughout the country routinely decide constitutional issues are also inapposite. All those cases involve fact-based determinations. (*See, e.g., Posey v. Lack Pend Oreille Sch. Dist. No. 84* (9th Cir. 2008) 546 F.3d 1121 [whether certain speech is protected involves factual determination].)

As these cases accurately reflect, when a government employee engages in a fact-specific conduct, some lower federal courts have held that Section 1983 requires a jury trial of disputed facts. Such cases do not, however, stand for the proposition that the constitutionality of a ***legislative act*** are similarly to be decided by a jury. Under Owners' theory, even legislative facts are required to be submitted to a jury as long as they involve disputed factual issues. For example, whether the Legislature could constitutionally limit handgun sales to prevent firearm deaths would be for a jury to decide since it would involve a "factual" dispute under the Second Amendment; similarly, whether any particular law impermissibly burdened a religious practice in violation of the First Amendment (e.g., whether ingestion of peyote could be made illegal) would be decided by a jury because it involves disputed facts about the extent of the burden and the social benefits of the law. (*See District of Columbia v. Heller* (2008) 554 U.S. 570; *Employment Div. v. Smith* (1990) 494 U.S. 872.) Such a revolutionary holding would not only conflict with precedent, but would also impermissibly negate the entire category of legislative facts. (*Cf.* Fed. R. Evid. 201; Cal. Ev. Code § 450.)

The trial court found, as a factual matter, that the City would have required owners to dedicate the Subject Interests as a precondition to any development and that such a dedication would have been constitutional

since. The validity of the City's legislative finding in this regard is to be assessed by a judge, not a jury, and that determination then subject to *de novo* review in the Court of Appeal. (*See also American Bank & Trust Co. v. Community Hosp.* (1984) 36 Cal.3d 359, 372 ["It is not the judiciary's function . . . to reweigh 'legislative facts' underlying a legislative enactment."].) To hold otherwise would impermissibly permit juries to adjudicate the validity of governmental acts. This conflicts with centuries of precedent since *Marbury v. Madison* (1803) 1 Cranch 137 that it is "emphatically the province and duty" of courts to determine the constitutionality of legislative conduct. Such a ruling would allow different juries to reach conflicting factual findings on identical evidence, meaning the same governmental act would be found constitutional in one court and unconstitutional in another, with both findings required to be affirmed on appeal since substantial evidence supported the jury's finding. This is not and should not be the law either in California or in any other jurisdiction.

Upholding the Opinion with respect to a jury's ability to determine the constitutionality of a claimed dedication requirement will potentially open up floodgates related to legal issues going to the jury if they involve any factual determination. If not reversed, the Opinion may be cited for the proposition that, going forward, no legal question should ever be decided by a trial court if it involves any factual dispute. Such a holding is completely contrary to well-settled precedent holding that questions of mixed fact and law, except for questions on compensation, go to the court in eminent domain cases.

D. The Constitutionality Of A Dedication Requirement Is A Legal Prerequisite That Must Be Decided By A Court, And Hopefully As A Pretrial Motion Under Section 1260.040; Otherwise, There Would Be A Myriad Of Procedural Difficulties.

Owners argue that all questions of mixed fact and law related to compensation where factual determinations predominate are questions for a jury. (Answer Brief, pp. 35-37.) That is not the case. The California Constitution and case law are clear that juries decide the issue of actual compensation ***only*** in condemnation.

The California legislature has provided a powerful vehicle for ***courts*** to determine such prerequisites in Section 1260.040. Under Section 1260.040, disputes over evidentiary or ***legal issues*** affecting the determination of compensation, are heard before the ***court*** 60 days prior to trial on the compensation issue. Section 1260.040 gives courts broad discretion to decide compensation-related issues prior to the compensation trial.

Section 1260.040 was enacted in 2001 by the California Legislature as part of a comprehensive revision to eminent domain law to facilitate early resolution of condemnation cases by providing a process for alternative dispute resolution, encouraging early exchange of appraisals, and creating specific timelines for a speedy trial process. (Sen. Rules Com., Off. Of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 237 (2001-2002 Reg. Sess.), as amended Aug. 28, 2001, p. 1.) Section 1260.040 allows parties to move the ***court*** for a ruling on not only evidentiary but also ***other legal issues affecting the determination of compensation*** as an incentive for the parties to resolve the legal disputes prior to and possibly without the need for a protracted, expensive trial. (Assem. Com. on Judiciary, Analysis of Assem. Bill No. 237 (2001-2002 Reg. Sess.) as amended Apr. 2, 2001, p. 4.)

The constitutionality of a dedication requirement is a legal prerequisite that must be answered before the issue of compensation can be determined. It is necessary for settlement purposes and for the Owners and the City to know what appraisals to present to the jury at the time of trial.

Practically, if a jury determines the constitutionality of a dedication requirement ***at*** trial, both parties would essentially have to prepare two appraisals, one based on a constitutional and another based on an unconstitutional dedication requirement, since each would yield two different valuations for compensation purposes. Two appraisals would be required because neither party would have any idea before trial which valuation to use. Two appraisals may mean two different expert valuation witnesses, two different depositions, and essentially doubling the cost to prepare one's case for trial. This type of scenario is exactly what the Legislature intended to eliminate through Section 1260.040. A holding that the constitutionality of a dedication requirement is an issue for the jury would go against the legislative history and intent of Section 1260.040.

With the deleterious effects of having a jury decide the constitutionality of a dedication requirement cutting against the purpose of a civil procedure in condemnation law, this Court should reverse he Appellate Court and hold that the Court properly determines the constitutionality of a dedication requirement.

III. OWNERS FAIL TO SHOW THE INDIAN AVENUE DEDICATION REQUIREMENT IS A "PROJECT EFFECT".

The project effect doctrine is simple: when a project increases or decreases the value of the property for which it is being condemned, such project effect must be ignored in valuation. Here, the Project is "construction of Indian Avenue", and the City did not pass any regulations in connection with that Project to depress or decrease the value of the Subject Interests. The City's dedication requirement, enacted by ordinance in 1981, applies to ***any*** property seeking to be developed (RA 2:0270 [Tab 7]), not just the Property. Further, the 2005 Circulation Element Update was a part of the comprehensive zoning plan update of the City and involved many new and realigned roads, not just Indian Avenue. At the

time the 2005 Circulation Element Update was passed realigning Indian Avenue, the City did not even anticipate the construction of Indian Avenue.

Recognizing the flaw in the argument that if the dedication is required for "Indian Avenue construction" then the dedication must be ignored as project effect (making every dedication requirement a project effect subject to exclusion), Owners attempt to make a distinction between this case and other dedication cases by impermissibly redefining the project and arguing that not "all" dedications are project effect instead, only "typical" dedications are permissible, and "atypical" ones are not.

A. Owners Mischaracterize The Project In The Hopes Of Creating a Plausible Project Effect Argument.

The record is undisputed that the project is "construction of Indian Avenue." Yet, Owners imply the Project includes the 2005 Circulation Element Update (Answer Brief, pp. 4, 26) or the Ridge Commerce Center Development (Answer Brief, p. 10). Owners also imply the City's approval of the Lowe's distribution center in 1999 is the Project. (Answer Brief, pp. 7, 27). In essence, owners basically argue anything having to do with Indian Avenue within the last 15 years is part of the Project.

The City reiterates the facts related to the history of Indian Avenue leading up to the current Project of "Indian Avenue construction".

1. Indian Avenue Prior to 1999

Prior to 1999, the location of Indian Avenue near the Property and ***north*** of Ramona Expressway was a paper street (i.e., it existed on the Circulation Element as a street but was not physically constructed). (RA 1:0152 [Tab 5].)

2. The 1999 Circulation Element Update

In 1999 the City amended its Circulation Element and realigned Indian Avenue ***south*** of Ramona Expressway. (AA 7:1566-1569 [Tab 51].)

The amendment in the Circulation Element allowed for "the accommodation of regional transportation goals" and "developed" a system of city streets, excluding freeway, that is capable of serving existing traffic and expected future increases in traffic." (RA 1:0099 [Tab 4].) Simply because the realignment was done at the same time as the Lowe's distribution center does not mean the realignment served no other purpose. (AA 7:1566-69 [Tab 51].)

Moreover, at the time in 1999, the City did not even contemplate realigning Indian Avenue ***north*** of Ramona Expressway, yet alone construct Indian Ave. There is no evidence that, the City envisioned or had any plans to start the "Indian Avenue construction" Project in 1999.

3. The 2005 Circulation Element Update

In 2005 the City updated its Circulation Element and realigned Indian Avenue ***north*** of Ramona Expressway. (RA 1:0158, 0189 [Tab 5]; AA 7:1571-77 [Tab 51].) As part of the update, the City created new roads and realigned other roads as well, some of which contain curvilinear alignments. (See RA 1:0152 [Tab 5] [existing major rights-of-way prior to update]; RA 1:0189 [Tab 5] [future major rights-of-way after update].)

As part of the update, the City conducted extensive traffic studies to determine the best location with least private injury. (RA 1:0235-65 [Tab 6]; RT 139:7-141:16.) Specifically, the facts are undisputed that if the alignment of Indian Avenue were shifted north to avoid Owners' Property, then existing developments such as a ***residence*** or ***office structure*** would have to be demolished and taken, and existing, entitled projects would have to be relocated.[4] (AA 5:1016 [Tab 39]; RT 120:27-121:9.)

---

[4] This evidence directly conflicts with Owners' claims that Indian Avenue could have been realigned in another way to avoid their Property but the City wanted only to accommodate large developers. (Answer Brief, p. 8.)

4. The Indian Avenue Construction Project

In 2008, due to various developments and population increase, surrounding the Property, the City needed "more public rights-of-ways to increase access to surrounding properties, improve traffic flow, and ease congestion" to make economically sound developments in North Perris, including Owners' Property. (RA 2:0429 [Tab 14].) The Project was also found to "provide a means of access to properties located adjacent to [Indian Avenue]" and to "provide an identity to this revitalized area and enhance property values." (RA 2:0399 [Tab 13].) Owners' Property was the final piece. (*Id.*) Accordingly, the Indian Avenue construction Project is a logical outcome of the evolution and development of growing cities such as Perris. It is a reasonable exercise of a City's police powers.

B. Owners' Redefinition of The Project To Include Its History Or Claim That Realignment Of A Road Benefits Some Property Owners Or The City As A Whole Does Not Make The Indian Avenue Dedication Requirement A Project Effect.

That a road is realigned and cuts through a Property does not satisfy the test to determine project effect. The proper inquiry is whether a preliminary action is taken as a result of or directly related to a project that now affects the property. The answer in this case is 'no.'

Owners claim that but for the Lowe's distribution center, Indian Avenue would have never been realigned to cut across Owners' Property. Such claims are completely unsupported. Testimony is undisputed that there is a possibility that Indian Avenue would have been realigned in the same configuration, with or without a warehousing project, since traffic and development was increasing in the area. (RT 122:10-23, 123:25-124:17.)

Moreover, as Owners include more unrelated facts spanning over 15 years as part of their scheme to broadly define the Project, they get farther away from the project effect doctrine. How can the Indian Avenue

dedication requirement in 2009 for the Project of "constructing Indian Avenue" be a project effect based on the 2005 Circulation Element Update realigning Indian Avenue ***north*** of Ramona Expressway, let alone the 1999 Circulation Element Update realigning Indian Avenue ***south*** of Ramona Expressway? Owners in essence argue the ***entire history*** of Indian Avenue is part of the Project. That is not the intent of Section 1263.330.

The legislative history of Section 1263.330 clarifies that its purpose is to exclude any increase or decrease in the value of property caused by ***the*** project for which the property is being taken, not ***related*** projects. (Recommendation Relating to the Creation of Eminent Domain Law (Dec. 1974) 12 Cal. Law Revision Com. Rep. (1980) p. 1833.)

Section 1263.330 is not intended to apply to changes in value beyond the scope of the "project". "Where changes in value are caused by a project other than the one for which the property is taken, ***even though the two projects may be related, the property owner may enjoy the benefit or suffer the detriment caused by the other project.***" (The Eminent Domain Law with Conforming Changes in Codified Sections and Official Comments (Dec. 1975) 13 Cal. Law Revision Com. Rep. (1975) p. 1214. [emphasis added]; *see also, e.g., People v. Cramer* (1971) 14 Cal.App.3d 513.) Here, the "construction of Indian Avenue" for which there is a hypothetical dedication requirement on Owner's Property is an entirely different project from the realignment of Indian Avenue both ***north*** and ***south*** of Ramona Expressway.

Simply put, Section 1263.330 does not apply to exclude the Indian Avenue dedication requirement. If this Court determines otherwise, it would be going against the Legislature's intent in enacting Section 1263.330. The legislative history makes clear that a different, even if related, project for which property is being acquired is not intended to be excluded from valuation under Section 1263.330. Therefore, the Indian

Avenue dedication requirement should not be excluded from valuation as a project effect.

Assuming, ***arguendo***, that the Project can be described as including the realignment of Indian Avenue north and south of Ramona Expressway, Owners' argument that Indian Avenue benefited only Lowe's, Ridge, or other developments because their own Property is undeveloped is not a project effect argument. At best, it is an argument for lack of nexus under *Nollan*. If on remand the trier of fact finds there is no "nexus", then the dedication requirement is unconstitutional and the proper valuation of the Subject Interests cannot consider the dedication requirement. There is no need for the project effect doctrine to also include such an analysis.

C. The Alleged "Atypical" Size Or Location Of Indian Avenue Does Not Make The Dedication Requirement A Project Effect.

1. Size

Owners argue the large size of the dedication requirement makes the dedication requirement a project effect because it is unique to them. (Answer Brief, pp. 28, 31.) But undisputed evidence shows the size of the acquisition, although not typical, is ***not*** uncommon. City staff undisputedly testified the City required similar dedication sizes between 15% to 33% for this and other projects. (AA 5:1052-71, 7:1724.)

Further, that the size of the acquisition is "atypical" is not a project effect factor; it is an argument for lack of rough proportionality under *Dolan*. If on remand and based on new evidence, the fact finder finds the size is not roughly proportional to the impacts of any proposed development, then the dedication requirement is unconstitutional. There is no need to create arbitrary standards for the project effect doctrine to apply.

2. Location

Although the Project in this case is the construction of Indian Avenue, as realigned, the Project could have also easily included the construction of several other streets that were widened (but not realigned) as part of the Circulation Element Update in 2005. Would Owners also argue the widening of that second street would also be a project effect? No. As Owners themselves stated, the widening and dedication of the frontage streets would not be subject to exclusion as a project effect. (Answer Brief, p. 29.) Their distinction is that Indian Avenue was realigned and now cuts through their Property. (*Id.*)

Owners' contention not only has no basis anywhere in the text of the statute, which does not distinguish between ostensibly "typical" versus "atypical" dedications, it is also unsupported by precedent.

Further, Owner's distinction is both arbitrary and unworkable, as courts would need to identify and distinguish "typical" as opposed to "atypical" dedications by governmental entities. Such a rule would lead to absurd results. Imagine that Owners were to develop a light industrial facility that employed toxic chemicals, and the City took 1.66 acres of the Property to create safety berms around the facility. According to Owners, because the City had never before required berms, this dedication would be "atypical" and require $1.3 million in compensation because it was a project effect, whereas taking the exact same 1.66 acres and requiring landscaping pursuant to a "typical" City beautification regime would not invoke Section 1263.330 and hence would require payment of only $44,000. Such a distinction would be nonsensical.

Most critically, Owners purported interpretation of Section 1263.330 not only ignores the realities of modern urban planning, but would also frustrate rational development. No urban area limits itself solely to straight North-South/East-West streets. Nor, contrary to Owners assertion, are the

unpaved roads surrounding the Property proper for industrial developments. Industrial/commercial areas need arterial roads.

Here, the trial court found that it would be constitutional for the City to require Owners to dedicate the Subject Interests ***for free*** in light of the traffic and other burdens any development of the Property would generate. That conclusion will be retested upon remand. If it is true the acquisition of the Subject Interests is permissible, then Owners are not entitled to $1.3 million. By contrast, if the dedication is unconstitutional, then Owners may be entitled to additional compensation.

Owners' misapplication of the project effect doctrine will also impermissibly grant Owners a windfall. Absent the taking, Owners have two choices: (i) leave the Property vacant or grown crops on it, in which case the value of their 1.66 acres would indisputably be $44,000; or (ii) develop the Property, in which case Owners will be forced to dedicate the Subject Interests ***for free***. Owners would have been entitled to $44,000, or $0, instead of $1.3 million purportedly owed to them as a project effect.

D. Cases Cited By Owners Are Not Applicable Here.

Owners confuse the issues and compare apples and oranges in their project effect analysis. The only two cases they rely on, *Rancho Penasquitos, supra,* 105 Cal.App.4th 1013, and *City of San Diego v. Barratt American, Inc.* (2005) 128 Cal.App.4th 917, involve land use and zoning, not dedications. Moreover, *Rancho Penasquitos* and *Barratt American* are not "classic" project effect cases – they are unique cases where legislation was passed ***solely*** to depress property values for acquisition and were not legitimate exercises of planning powers.

Owners also cite to *People ex rel. Dept. of Public Works v. Investors Diversified Services* (1968) 262 Cal.App.2d 367, as an example of a court examining the applicability of Section 1263.330 to determine if a dedication requirement is a project effect, yet that case supports the City's

position that dedication requirements are the City's legitimate exercise of land use powers and does not stand for Owners' proposition. In *Investors,* Los Angeles sought to acquire a 10-foot wide strip of agriculturally-zoned property for street-widening, but the appraiser indicated the highest and best use was residential, which would require a zone change. (*Id.* at 368.) Under the Los Angeles Municipal Code, a zone change triggers a dedication requirement of a 20-foot wide strip of property. The City offered to show the zoning likely would have been changed to residential, thereby increasing the value of the property, but the property would be subject to dedication upon the zone change. (*Id.*) The owner argued the city imposed the dedication requirement to depress the value of the property prior to acquisition, and thus the dedication requirement should be disregarded as a project effect. (*Id.* at 666-67.) The appellate court disagreed, stating there is no law being passed "for the purpose of depressing [the land's] value in anticipation of its condemnation...no such misuse of the police power appears in the record." (*Id.* at 667.) The Court found the dedication requirement was a valid exercise of police and land use powers and was not excluded.

In the same vein, Perris Municipal Code Sections 18.08.040, 18.24.020, and 19.54.050 providing for dedication requirements were not enacted to depress any property values for Indian Avenue. (RA 2:0268, 0270, 0288-0289 [Tab 7]; RT 95:11-96:24.) Such law applies upon development of ***any*** property within the City and is a condition of approval commonly imposed on development throughout the City. *Investors* therefore supports the position that the City's dedication requirement is an ordinary, run-of-the-mill dedication requirement and a valid exercise of a land use and planning tool.

Owners contend the Court of Appeal erred in holding the dedication is not a project effect because it is "attributable to a free-standing

dedication requirement." (Answer Brief, p. 25.) Owners argue the Court of Appeal used the wrong test, because, based on the Court of Appeal's reasoning, the restrictive zoning held to be a project effect under *Rancho Penasquitos* and *Barratt American* would instead be attributable to San Diego's free-standing zoning power and thus not a project effect. Owners confuse the analogy and misunderstand the Court of Appeal's reasoning.

The free-standing dedication requirement mentioned by the Court of Appeal refers to the City's ordinance requiring dedication of ***any*** portion of property designated on the Circulation Element as a right-of-way at the time a property is developed. The ordinance does not refer to any project in particular. Applying the Court of Appeal's reasoning to *Rancho Penasquitos* and *Barratt American,* the free-standing regulation of San Diego would refer to the ordinance allowing the city to change its zoning map – the ordinance does not refer to any property/project in particular. The difference in *Rancho Penasquitos* and *Barratt American*, however, is that San Diego passed an ordinance changing the zoning of a specific group of properties only in relation to a project.

Here, there is no additional step where the City passed a regulation with respect to the Indian Avenue dedication requirement. The only thing the City did was update its Circulation Element in 2005, and such update included much more than a simple realignment of Indian Avenue. The update included adding truck routes, widening various existing streets, and creating various paper streets. (RA 2:0152, 0158, 0180, 0189, 0194, 0210 [Tab 5].)

Second, there is no misuse of power here. Unlike in *Kissinger v. City of Los Angeles,* (1958) 161 Cal.App.2d 454, where an emergency ordinance attempted to restrict property from being rezoned for the purpose of depressing its value in anticipation of its condemnation for an airport and was found to be unconstitutional, the 2005 Circulation Element update and

enactment of a generally applicable dedication requirement in the Municipal Code are valid exercises of the City's police powers for land use and planning. No such misuse of the police power appears or is implied in the record here.

Case law cited by Owners supports that the Indian Avenue dedication requirement must be considered rather than ignored in determining the value of the Subject Interests. (*See Investors,* 262 Cal.App.2d at 376.) Thus, the Indian Avenue dedication requirement, even if per Owners' contentions are oddly shaped or located, comports with other seminal condemnation cases involving dedications. In all other seminal condemnation cases, the public agencies too were trying to implement the general, specific, or transportation plan.

E. If This Court Determines The Project Effect Doctrine Is Applicable To The Indian Avenue Dedication Requirement, Then The Doctrine Should Be Limited Only To Dedication Requirements Solely Enacted As A Result Of Or Attributable To The Project For Which It Is Being Taken; That Is Not The Case Here.

Although a long-established line of condemnation cases discusses the appropriate valuation of property subject to dedication, the City understands there may be unique and rare circumstances for which Section 1263.330 may be applicable to exclude them from valuation. Such an application of Section 1263.330 should be limited only to those dedication requirements that are ***solely*** attributable to or ***solely*** enacted as a result of a specific project for which property is being taken, and for no other purpose.

For example, a city has a biking path circulation plan but desires to build a bike path on several commercially-zoned properties near downtown where no current bike paths exist on the circulation plan. For the purpose of acquiring those bike paths at depressed values, and for no other purpose, the City enacts a regulation requiring all commercially-zoned properties

near downtown to dedicate property for bike paths, even though no other commercially zoned properties in town are subject to the dedication requirement and no bike path is shown on the circulation plan as being located on those properties, . Upon enacting the regulation or simultaneously with the project, the City condemns the commercially-zoned properties for the bike path. In this example, the regulation requiring dedication of the bike path was enacted ***solely*** for the purpose of and is ***solely*** attributable to acquiring the properties at non-commercial values in order to build the bike path. Unlike the bike path dedication requirement, the Indian Avenue dedication requirement is applicable to every property upon development. Accordingly, the Indian Avenue dedication requirement does not constitute a project effect subject to exclusion from valuation.

IV. CONCLUSION

For the foregoing reasons, this Court should ***reverse*** the Court of Appeal's holding on the issue of a jury deciding the constitutionality of a dedication requirement and ***affirm*** the Court of Appeal's ruling that Section 1263.330 regarding project effect is not applicable in this case.

Dated: March 11, 2014

ALESHIRE & WYNDER, LLP
ERIC L. DUNN
SUNNY K. SOLTANI
PAM K. LEE
ADRIANA P. MENDOZA

By _____
SUNNY K. SOLTANI
Attorneys for Plaintiff and
Respondent, CITY OF PERRIS

CERTIFICATE OF WORD COUNT

I certify that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the attached Plaintiff/Respondent's Reply Brief on the Merits was produced on a computer and contains 8,382 words, as counted by the Microsoft Word 2010 word-processing program used to generate Plaintiff/Respondent's Reply Brief on the Merits.

Dated: March 11, 2014

ALESHIRE & WYNDER, LLP

By: _____

ERIC L. DUNN
SUNNY K. SOLTANI
PAM K. LEE
ADRIANA MENDOZA
Attorneys for Plaintiff and
Respondent, CITY OF PERRIS

PROOF OF SERVICE

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

On **March 11, 2014**, I served the within document(s) described as: **PLAINTIFF/RESPONDENT'S REPLY BRIEF ON THE MERITS** on the interested parties in this action as stated on the attached mailing list.

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

☒ **(BY OVERNIGHT DELIVERY)** I deposited in a box or other facility regularly maintained by NORCO Overnight Delivery, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in a sealed envelope or package designated by the express service carrier, addressed as set forth on the attached mailing list, with fees for overnight delivery paid or provided for.

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

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

Executed on **March 11, 2014**, at Irvine, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Helen B. Yurek
(Type or print name)

Helen B Yurek
(Signature)

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

SERVICE LIST

K. Erik Friess, Esq. ALLEN MATKINS LECK GAMBLE MALLORY & NATSIS, LLP 1900 Main Street, 5th Floor Irvine, CA 92614 T 949.553.1313 F 949.553.8354 E-MAIL: rfriess@allenmatkins.com	ATTORNEYS FOR DEFENDANTS AND APPELLANTS, Richard C. Stamper, Donald D. Robinson and Donald Dean Robinson, LLC (1 COPY)
Supreme Court of California Office of the Clerk, First Floor 350 McAllister Street San Francisco, CA 94102 Tel: (415) 865-7000	(1 ORIGINAL & 8 COPIES)
Hon. Dallas S. Homes c/o Clerk of the Court Riverside County Superior Court 4050 Main Street Riverside, CA 92501 Tel: (951) 777-3147	(1 COPY)
Court of Appeal 4th District Div 2 3389 Twelfth Street Riverside, CA 92501 Phone: (951) 782-2500 Fax: (951) 248-0235	(1 COPY)