S213468

IN THE SUPREME COURT OF CALIFORNIA

CITY OF PERRIS
Petitioner,
v.
RICHARD C. STAMPER, et al.,
Respondents.

After a Decision by the Court of Appeal
Fourth Appellate District, Division Two
Case No. E053395

Appeal from the Riverside County Superior Court, Case No. RIC524291
The Honorable Dallas Holmes, Judge Presiding

Application for Leave to File Brief of Amici Curiae; Brief of Amici Curiae League of California Cities and California State Association of Counties in Support of Petitioner City of Perris

Andrew W. Schwartz (SBN 87699)
Maya Kuttan (SBN 276127)
Laura D. Beaton (SBN 294466)
Shute, Mihaly & Weinberger LLP
396 Hayes Street
San Francisco, California 94102
Telephone: (415) 552-7272
Fax: (415) 552-5816
Attorneys for League of California Cities and California State Association of Counties

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

California Cases

Non-California Cases

Federal Statutes

California Statutes

Other Statutes

Other Authorities

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

Under Rule 8.520(f) of the California Rules of Court, the League of California Cities and the California State Association of Counties ("Amici") apply for leave to file the following amicus curiae brief.

I. PROPOSED AMICI AND THEIR INTERESTS

A. League of California Cities

The League of California Cities ("League") is an association of 472 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of twenty-four city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

B. California State Association of Counties

The California State Association of Counties ("CSAC") is a non-profit corporation. The membership consists of the fifty-eight California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised

of county counsels throughout the state. The Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

Members of both the League and CSAC are public entities charged with acquiring property for public projects and regulating land use. This case could affect the costs incurred by members of CSAC and the League to provide public infrastructure and could expand the reach of regulatory takings that would inhibit their regulation of land use to protect the public environment, health, safety, and welfare of the community.

II. NEED FOR FURTHER BRIEFING

The accompanying amicus brief provides different arguments than those of the City of Perris. First, applying the *Nollan/Dolan* test requires findings of law that are not a proper function of a jury. The test requires deference to the agency's judgment that dedication of property is necessary to mitigate the impacts of a development project. Juries do not sit in judgment of such economic and social policies of another branch of government. Second, the project for which the property is condemned is not relevant to the value of the condemned property. That the City condemned the property for a City project has no bearing on the admissibility of the City's appraiser's assumption that the City would require a dedication of certain land if the owners were to develop the property.

III. NO PARTICIPATION BY PARTIES OTHER THAN POTENTIAL AMICUS

Neither the parties to this case, nor their counsel, nor any third party has participated in or contributed funds for the writing of this amicus brief, in whole or in part.

Accordingly, amici respectfully request that the Court accept the accompanying brief for filing in this case.

INTRODUCTION

In this appeal, the City of Perris ("City") condemned a 1.66-acre strip of land ("Acquisition Area") across a 9.11-acre larger parcel ("Property") for a public street. Even though the highest and best use of the Property is industrial or commercial, under *City of Porterville v. Young* (1987) 195 Cal.App.3d 1260, the City's appraiser valued the Acquisition Area at an agricultural value—a lower value than for industrial or commercial use—assuming that the City would have required the owner to dedicate the Acquisition Area for a public street as a condition of developing the larger parcel.

Respondents, Owners of the Property ("Owners"), concede that, as a condition of permission to develop the Property, they would be required to dedicate a portion of the Property for a public street to accommodate the vehicular traffic generated by the development. However, they claim that this dedication, which was assumed by the City's appraiser, would not meet the regulatory takings test under *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374 ("*Nollan/Dolan*"). The *Nollan/Dolan* test requires that an agency exacting real property from a developer as a condition of development approval demonstrate that the dedication will mitigate an impact of the development and that the level of the dedication is roughly proportional to that impact.

The first question in this appeal is whether a judge or a jury decides whether the dedication that the City's appraiser assumed would be required (an "assumed dedication") satisfies *Nollan/Dolan*. Where an appraiser for a condemning agency assumes a dedication, amici League of California Cities and California State Association of Counties contend that whether that dedication would satisfy the *Nollan/Dolan* test is a question for a judge. While juries decide questions of fact—perhaps including the question of the reasonable probability that the dedication would be imposed and the nature and extent of that dedication—whether the assumed dedication would meet the *Nollan/Dolan* test is an issue primarily of law. It is not an appropriate matter for a jury.

A government agency exercises its police power when it imposes a condition on a permit that requires a developer to dedicate a portion of the property to the public to mitigate the project's impacts. The doctrine of Separation of Powers requires that when applying *Nollan/Dolan*'s intermediate scrutiny, courts must extend substantial deference to the decision of the separate government agency. A deferential test of the constitutionality of a regulation imposed by a co-equal branch of government is not properly applied by a lay jury. Further, Eminent Domain Law procedures and well established state policies of judicial economy and

fairness dictate that a court, rather than a jury, decides *before* trial whether an agency appraiser's assumed dedication requirement is a taking.

With regard to the second question on this appeal, Owners argue that a court should exclude evidence of the assumed dedication on the ground that the dedication was required by the very project for which the property has been condemned. This claim fails as a matter of logic because California Code of Civil Procedure section 1263.330(c) is rendered irrelevant by the first issue in this appeal. If the assumed dedication is found to be valid as a matter of law and fact, the court and jury have necessarily found that (a) there is a reasonable probability that the dedication would be imposed—not as a result of the project—but rather as a condition of development of the property, and (b) the dedication has the appropriate nexus and rough proportionality to the proposed development under *Nollan/Dolan*. On the other hand, if the assumed dedication is found to be invalid or not probable, then the entire Property, including the Acquisition Area, will be valued for the higher use. Under either result, the Project is irrelevant to the value of the Acquisition Area.

BACKGROUND

Although the Property is zoned for industrial use, it is currently used for agriculture and is unimproved. Respondent's Appendix ("RA") [volume:page] 2:0465. The Property cannot be developed for industrial or

commercial use in its present form, however, because the adjoining streets are not adequate to accommodate the additional vehicular traffic that would result from development of the Property. *Id.* It is undisputed that if the Property were developed, under the City's ordinances, Owners would be required to dedicate a portion of the Property for new streets or widening of existing streets to serve the increased vehicular traffic from Owners' development. Perris Municipal Code §§ 18.08.040, 18.24.020; Owners' Answer Brief on the Merits ("ABM") at 11.

In 2009, before Owners applied to develop the Property, the City filed an eminent domain action to acquire the Acquisition Area for construction of a portion of Indian Avenue ("Project"). In reliance on the City Council's findings in approving the Project, its determination in the Resolution of Necessity that the Acquisition Area was necessary for the Project, and the City's municipal code requiring dedication of the Acquisition Area if the Property were developed, the City's appraiser valued the Acquisition Area as undevelopable agricultural land because that portion of the Property could not be developed for industrial or commercial use. Appellant's Appendix ("AA") 1:1001-03. Rather, the Acquisition Area

would have to be dedicated to the City for construction of a public street.[1] Perris Municipal Code §§ 18.08.040, 18.24.020. In contrast, Owners' appraiser contended that the Acquisition Area should be valued for industrial use because either the City would not require that the Acquisition Area be dedicated for street use as a condition of development of the Property or because that condition would constitute a taking under *Nollan/Dolan*. AA 4:0705-09.

One hundred thirty-nine days before trial, the City moved under Code of Civil Procedure section 1260.040 for a ruling that it was reasonably probable that the City would impose the assumed dedication and that the assumed dedication would meet the *Nollan/Dolan* test. AA 2:0463-66; RA 1:0051-141. The trial court did not hear the motion but instead continued the motion to the first day of trial. *Id.*

At the trial, the Superior Court held that the reasonable probability that the City would have exacted the Acquisition Area from Owners as a condition of development of the Property and whether that assumed dedication would satisfy the *Nollan/Dolan* test were questions for the court, rather than the jury. The court ruled that the assumed dedication would be

---

[1] Conditions of agency approval of development permits requiring the property owner to dedicate part of their property to the public or pay an impact fee are also referred to as "exactions."

valid under the *Nollan/Dolan* test and that it was reasonably probable that the City would have imposed the assumed dedication as a condition of approval of development of the Property for an industrial/commercial use. AA 9:2155-56.

The Court of Appeal reversed, finding that a jury should decide both whether the assumed dedication was reasonably probable and whether it would have satisfied the *Nollan/Dolan* test because these issues were essential to determining the amount of compensation, which the jury decides. *City of Perris v. Stamper* (2013) 160 Cal.Rptr.3d 635, 652-54. This Court granted review of two questions:

1. In an eminent domain action, should a jury determine whether a required dedication would satisfy the *Nollan/Dolan* regulatory takings test?

2. Was the dedication requirement a "project effect" that must be ignored in determining just compensation?

ARGUMENT

I. WHETHER AN EXACTION SATISFIES THE *NOLLAN/DOLAN* TEST IS A QUESTION OF LAW FOR THE COURT, NOT A JURY.

Under the regulatory takings doctrine, established by the United States Supreme Court in *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, if the economic impact of regulation is so severe that it is functionally equivalent to a direct condemnation, the property owner may be entitled to compensation. *Id.* at 415; *see also Lingle v. Chevron U.S.A., Inc.* (2005)

544 U.S. 528, 539. Accordingly, courts may not invalidate regulations, but they may require compensation for particularly burdensome regulation. *Lingle*, 544 U.S. at 543. In takings cases, a court determines whether a taking has occurred, but a jury decides the amount of compensation for that taking. *Metro. Water Dist. of S. Cal. v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 965.

Because the *Nollan/Dolan* test requires a legal determination as to whether an exaction is constitutional—and thus whether a taking has occurred—application of this test is exclusively within the purview of judges. Under the constitutions of the United States and California, courts' power to declare unconstitutional an exercise of police power by a separate branch of government is limited. Courts do not substitute their judgment as to the wisdom and efficacy of a regulation, but review it with deference. A regulation may be found invalid only through the application of tests of constitutionality that have been established in judicial opinions. Juries, in sharp contrast, exercise their independent judgment to make findings of fact. Juries are not equipped to nor are they expected to exercise the deferential review of government regulation required by constitutional tests like the *Nollan/Dolan* test. This conclusion is supported by a substantial body of case law applying the Separation of Powers doctrine, the

deferential nature of the *Nollan/Dolan* test, the established role of the jury as a fact-finder, and numerous policy and practical concerns.

A. Separation of Powers Requires Courts to Afford Deference to Policies Adopted by the Legislative and Executive Branches of Government.

Under the separation of powers doctrine, government power is balanced between the three co-equal branches of the government, with which the United States Constitution "vest[ed] with certain 'core' or 'essential' functions that may not be usurped by another branch." *People v. Bunn* (2002) 27 Cal.4th 1, 14 (citations omitted). As the United States Supreme Court has consistently recognized in cases involving the powers of the other branches, the Constitution limits the role of the judiciary to restraining only the *arbitrary* exercise of legislative and executive authority. *See, e.g., Dolan*, 512 U.S. at 391 fn.8. Courts must apply the *Nollan/Dolan* test in a way that preserves the bedrock doctrine of Separation of Powers.

1. *Agins*, *Nollan/Dolan*, and Substantive Due Process.

Throughout most of the Twentieth Century, the United States Supreme Court rejected any substantive due process analysis that passed judgment on the wisdom or efficacy of a law. *See, e.g., United States v. Lopez* (1995) 514 U.S. 549, 605 (discussing history of Supreme Court's substantive due process jurisprudence) (Souter, J., dissenting). The Supreme Court consistently applied the deferential "rational basis" test to

economic regulation under the Substantive Due Process Clause of the Fourteenth Amendment. *See, e.g., United States v. Carolene Products Co.* (1938) 304 U.S. 144, 152. Under this test, courts presume that the government's decision is supported by the facts. *See, e.g., Berman v. Parker* (1954) 348 U.S. 26, 32-33. The burden is on the party challenging the regulation to prove that it constitutes an arbitrary regulation of property rights. *See, e.g., E. Enters. v. Apfel* (1998) 524 U.S. 498, 545 (Kennedy, J., concurring and dissenting).

In *Agins v. City of Tiburon* (1980) 447 U.S. 255, however, the Supreme Court strayed from judicial deference to economic and social regulation by introducing a means-ends test under the Fifth Amendment's Just Compensation Clause similar to the old and abandoned due process analysis, where courts determined whether a law was wise or effective. Disregarding Separation of Powers, *Agins* held that a regulation could effect a taking not only where it imposes a severe economic burden on property, but also where the regulation fails to "substantially advance legitimate state interests." 447 U.S. at 260.

In reliance on the "substantially advances" test of *Agins*, *Nollan* required that an ad hoc dedication "substantially advance legitimate state interests" by requiring that it have an "essential nexus" to the development, meaning that the condition must mitigate an adverse impact of the proposed

development project. 483 U.S. at 837. Building on *Nollan*, *Dolan* held that if an essential nexus exists, the amount of the exacted property must be "roughly proportional" to the property required to mitigate the impact of the project. 512 U.S. at 391. Relying on *Agins*, *Nollan/Dolan* created a substantive due process means-ends test for a taking that was divorced from the theory of regulatory takings in *Mahon*—that a regulation can work a taking if it imposes a severe economic impact on property that is equivalent to a direct condemnation.

2. The Demise of the Substantially Advances Test.

In *San Remo Hotel L.P. v. City and County of San Francisco* (2002) 27 Cal.4th 643, this Court held that *Nollan/Dolan* does not apply to legislative exactions. The Court explained that judicial deference to land use regulation by the other branches of government is necessary to achieve the "advantage of living and doing business in a civilized community." *Id.* at 675 (quoting *Mahon,* 260 U.S. at 422 (Brandeis, J., dissenting)). The Court explained its deference to the policy-making organs of government:

> [T]he necessary reciprocity of advantage [from police power regulation] lies not in a precise balance of burdens and benefits accruing to property from a single law, or in an exact equality of burdens among all property owners, but in the interlocking system of benefits, economic and noneconomic, that all the participants in a democratic society may expect to receive, each also being called upon from time to time to sacrifice some advantage, economic or noneconomic, for the common good.

San Remo Hotel, 27 Cal.4th at 675-76. This Court presaged the United States Supreme Court's ruling in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, where the High Court also acknowledged that Separation of Powers required that it defer to a development moratorium passed by a government agency charged with protecting Lake Tahoe. *Id.* at 341-42.

Three years later, in *Lingle*, the United States Supreme Court imposed needed clarity on regulatory takings doctrine. The Court unanimously reaffirmed the narrow scope of the regulatory takings doctrine and unanimously repudiated the *Agins* "substantially advances" standard as a basis for takings. "We hold that the 'substantially advances' formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence." *Lingle*, 544 U.S. at 548. The Court emphasized that regulatory takings should be concerned with economic impact, not means and ends: "A test that tells us nothing about the actual burden imposed on property rights, or how that burden is allocated, cannot tell us when justice might require that the burden be spread among taxpayers through the payment of compensation." *Id.* at 543.

Notably, the Court acknowledged the untenable conflict between the "substantially advances" test and the limited role of courts in matters of economic policy, observing that "the 'substantially advances' test . . .

would empower—and might often require—courts to substitute their predictive judgments for those of elected legislatures and expert agencies." *Id.* at 544. Accordingly, the Court held that any review of the substantive validity of government regulation must be conducted under the deferential rational basis test applicable to due process challenges. *Id.* at 537-38.

As a unanimous Supreme Court explained in *Lingle*, "The [Takings] Clause expressly requires compensation where government takes private property '*for public use*.' It does not bar government from interfering with property rights, but rather requires compensation 'in the event of *otherwise proper interference* amounting to a taking.'" 544 U.S. at 543 (quoting *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles* (1987) 482 U.S. 304, 315 (emphases original)). Thus, in *Lingle*, the Supreme Court unanimously and emphatically reaffirmed that a test under the Just Compensation Clause that allows courts to assess whether the means of a regulation fit the ends and whether the ends are legitimate violates Separation of Powers.

Despite *Lingle*'s firm rejection of the "substantially advances" means-ends takings test created in *Agins*—and even though the foundation of *Nollan* and *Dolan* was the "substantially advances" test that the Court had just repudiated—the *Lingle* Court curiously held that *Nollan* and *Dolan* were still good law. The Court explained away this apparent contradiction

by noting that the application of intermediate judicial review in *Nollan/Dolan* was appropriate because, as a condition of ad hoc development approval, a local agency exacted an ad hoc possessory interest in property, tantamount to a physical taking. *Lingle*, 544 U.S. at 546-48. In all other cases, however, the Court noted that judicial review must be conducted under the traditional rational basis standard out of respect for co-equal branches of government. *Id.*[2]

In preserving *Nollan/Dolan*'s means-ends test for exactions, the Supreme Court appears to have issued inconsistent rulings. On one hand, the *Lingle* Court unanimously held that a means-ends test is not a valid takings test because takings assumes that the regulation is valid but imposes a disproportionate economic burden on the property owner, warranting compensation. 544 U.S. at 543. On the other hand, the Court preserved a means-ends takings test under *Nollan/Dolan* for ad hoc exactions. *Id.* at 546-48. In light of *Lingle*, *Nollan/Dolan* should be applied in a manner that is faithful to the Separation of Powers.

---

[2] Eight years after *Lingle*, in *Koontz v. St. Johns River Water Management District* (2013) 133 S.Ct. 2586, the Supreme Court held that the denial of a land use permit on the ground that the applicant refused to pay a fee to mitigate impacts of the project on wetlands could effect a taking if the unsuccessful condition would have failed the *Nollan/Dolan* test. *Id.* at 2603.

B. The Intermediate Scrutiny Test of *Nollan/Dolan* Is a Deferential Test to Be Applied by Courts.

Though the *Nollan/Dolan* test requires somewhat heightened scrutiny of a regulation, a court's review is nonetheless deferential, and such deferential review of agency decisions are appropriately the province of the courts. *Nollan* for the first time imposed on an agency the requirement to demonstrate the validity of the regulation, but it does not suggest that the reviewing court apply the essential nexus test de novo. To the contrary, *Nollan* preserves deference to the agency's determination concerning the nexus of the regulation to the regulated activity. 483 U.S. at 841.

Dolan similarly did not eliminate traditional deference to agency decision-making. In deciding that the exacted property must be "roughly proportional" to the impact of the project, the Supreme Court reviewed the standards of judicial review of dedications from several state courts, concluding that most apply a "reasonable relationship" test. 512 U.S. at 389-91. The Court indicated that while rough proportionality is more rigorous than the highly deferential rational basis standard, it is not significantly so:

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of

> scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Id. at 391. The Court required merely that an agency show "some effort to quantify its findings in support of the dedication . . . beyond the conclusory statement that it could offset some of the traffic demand generated." *Id.* at 395-96.

This Court drew a similar conclusion in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, interpreting *Dolan* as requiring a mere finding that "the condition . . . is more or less proportional, in both nature and scope, to the public impact of the proposed development." *Id.* at 868; *see also id.* at 873 (agency must make at least "'some effort to quantify its findings' . . . beyond mere conclusory statements" (quoting *Dolan*, 512 U.S. at 396-97)). Thus, the court's role in review of an ad hoc dedication condition under *Nollan/Dolan* is simply to ascertain that the "dedication is not a mere pretext to obtain or otherwise physically invade property without just compensation." *Ehrlich,* 12 Cal.4th at 890 (Mosk, J., concurring).

The difficulty of instructing an eminent domain jury to apply this deferential review to an agency decision to impose an exaction raises

significant practical concerns. A jury would have to be instructed that it is to apply one standard in weighing the evidence of value of the subject property and a different standard in its determination of the validity of the exaction. The concept that the agency's decision regarding an exaction is subject to deference—that the exaction would be valid if there is merely some evidence of a connection between the exaction and the impacts of the project, and that the agency has made some effort to quantify the impacts of the project and the exaction—would be confusing. Application of the deferential, intermediate scrutiny *Nollan/Dolan* test is thus properly left to a judge.

C. Juries Do Not Decide Legal Questions or Questions of Appropriate Policy.

As discussed in Section I.A, *supra*, courts are authorized to pass judgment on the constitutionality of the acts of other branches of government. *See also Marbury v. Madison* (1803) 5 U.S. 137, 178. The *Nollan/Dolan* test, although permitting courts to exercise a higher level of scrutiny than rational basis, nonetheless requires some degree of deference—especially in light of *Lingle*'s emphatic preservation of the Separation of Powers. Application of the test is a question of constitutional law, and the court will extend deference to the decision of a separate branch of government as required by Separation of Powers.

A jury does not decide questions primarily of law such as this, even where the question contains a factual component. *See, e.g.*, *Vallejo & N. R.R. Co. v. Reed Orchard Co.* (1915) 169 Cal. 545, 555-56 (in eminent domain action, trial court decides questions of law, including those mixed with fact; juries decide compensation). Indeed, California and other state courts' treatment of the *Nollan/Dolan* test and application of similar tests makes clear these tests are questions of law for the courts. That some questions of fact may be mixed with legal questions is not grounds to refer the question to a jury.[3]

1. California Courts Apply *Nollan/Dolan* as a Question of Law.

This Court has limited the role of the jury in an inverse condemnation action, including challenges to exactions. In *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, this Court held that "the right to a jury trial applies in inverse condemnation actions, but that right is limited to the question of damages." *Id.* at 15. There is no right to jury trial on the issue whether there has been a taking in the first instance. Our research indicates

---

[3] In the trial court, Owners agreed that whether the assumed dedication meets the *Nollan/Dolan* test is a judge question, rather than a jury question. AA 6:1386; Reporter's Transcript ("RT") 43:1-7. The Court of Appeal decided sua sponte that the decision as to compliance of the dedication with *Nollan/Dolan* is for a jury, even though neither party requested that result or briefed the issue in the appeal. *See City of Perris v. Stamper* (2013) 160 Cal.Rptr.3d 635, 652-54.

that no California decision has allowed a jury to decide the constitutionality of a government police power regulation. Such review has uniformly been conducted under a mandamus procedure or its equivalent, where a judge sits without a jury. *See, e.g.*, *Ehrlich*, 12 Cal.4th at 896 (property owner challenged validity of exaction under *Nollan/Dolan* by petition for writ of mandate; citing cases adjudicating exactions by mandamus procedures) (Mosk, J., concurring).

For example, in *Ehrlich*, a city conditioned its approval of the property owner's development permit on the owner's payment of a $280,000 recreation fee. *Id.* at 862. The owner challenged the fee under *Nollan/Dolan* by a petition for a writ of mandate. *Id.* at 861-62. This Court found that, *as a matter of law*, the fee satisfied the nexus test of *Nollan*, but did not satisfy the rough proportionality test required by *Dolan*. *Id.* at 882-83. The Court nowhere suggested that a determination of this issue would be appropriate for a jury.

2. Other California Precedent Supports Limiting Consideration of *Nollan/Dolan* to the Courts.

Other California case law and procedural requirements in the takings context indicate that courts apply the *Nollan/Dolan* test, not juries. For example, in *Hensler*, this Court held that in challenging the validity of any quasi-adjudicatory (ad hoc) land-use regulation, the developer must first exhaust administrative remedies. 8 Cal.4th at 13, 17. Following exhaustion

of administrative remedies, *Hensler* and other unanimous authority require that a quasi-adjudicatory act of local government may be challenged only by mandamus under Code of Civil Procedure section 1094.5. *See id.* at 27-28 (purpose of requiring attacks on land-use decisions being brought by petitions for administrative mandamus is to promote sound fiscal planning); *see also City of Santee v. Super. Ct.* (1991) 228 Cal.App.3d 713, 718 ("Code of Civil Procedure section 1094.5 is the exclusive remedy for judicial review of the quasi-adjudicatory administrative action of the local-level agency.").

The standard of judicial review of the quasi-adjudicatory decision of an administrative agency is deferential: the agency's decision must be upheld if there is any substantial evidence in the administrative record to support the decision. *Donley v. Davi* (2009) 180 Cal.App.4th 447, 456. Determining whether the agency's decision is supported by substantial evidence is a question of law that is determined by a court, never a jury. *See, e.g., W. States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559, 573. The agency's findings carry a "strong presumption as to their correctness and regularity." *Id.* (citation omitted). Accordingly, a court will not reweigh the evidence but will "indulge all [of the agency's] presumptions and resolve all conflicts in favor of [its] decision." *Id.*; *see also Sunset Amusement Co. v. Bd. of Police Comm'rs* (1972) 7 Cal.3d 64, 76 (A trial

court's review of an administrative agency's decision "is confined to determining whether there was substantial evidence before the [agency] to support its findings; the court may not reweigh the evidence."). A court will not substitute its own judgment for the agency's as long as the decision is one that could have been made by a reasonable person. *Cal. Youth Auth. v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.

Accordingly, where a court is asked to review the validity of the decision of another government agency to impose a dedication requirement on a development permit, a judge applies a deferential standard of review under section 1094.5. If the judge finds that the regulation is invalid under *Nollan/Dolan*, a jury could determine the amount of damages for a taking. *Hensler*, 8 Cal.4th at 15. But juries do not decide whether a dedication is a taking under *Nollan/Dolan*.

Although an exaction imposed in a quasi-adjudicatory proceeding is subject to an "intermediate standard of judicial scrutiny" under *Nollan/Dolan*—placing the evidentiary burden of demonstrating constitutionality on the agency imposing the condition—the exaction is nonetheless an exercise of the government's police power. *Ehrlich*, 12 Cal. 4th at 868-69, 883; *Silicon Valley Taxpayers Assn. v. Santa Clara Open Space Auth.* (2008) 44 Cal.4th 431, 437; *Regency Outdoor Advert., Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 523. *Nollan*, *Dolan*, *Lingle*, and

this Court's opinions addressing the *Nollan/Dolan* test uniformly hold that application of the *Nollan/Dolan* test is a mixed question of law and fact to be answered by a court extending deference to the decision of another government agency.

This inquiry is similar to one of whether an agency is liable for pre-condemnation damages. Liability for pre-condemnation damages depends on facts such as whether (a) the agency made an official announcement of an intent to condemn, (b) the agency's pre-condemnation conduct was unreasonable, (c) the property owner suffered damage, and (d) the agency caused the damage. *Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 52; *Contra Costa Water Dist. v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 896. Despite this factual component, the determination of liability for pre-condemnation damages is a question for the court, not a jury. *City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 897. Only if the trial court determines that the agency is liable for pre-condemnation damages does the amount of such damages go to a jury. *Id.*

Further, this Court has held that tests similar to the *Nollan/Dolan* test are to be applied by judges. The *Nollan/Dolan* standard of judicial review is the same as the standard for reviewing a development impact fee under the Mitigation Fee Act, Government Code sections 66000 et seq. ("MFA"). *See Ehrlich*, 12 Cal.4th at 864-66 (*Nollan/Dolan* inquiry equivalent to MFA

test); *see also San Remo Hotel*, 27 Cal.4th at 671 (holding that review of development impact fees under MFA and *Nollan/Dolan* is under same standard). Challenges to exactions under the MFA must be by petition for writ of mandate under Code of Civil Procedure section 1094.5. *Branciforte Heights, LLC v. City of Santa Cruz* (2006) 138 Cal.App.4th 914, 927.

As discussed above, review of agency action under section 1094.5's substantial evidence standard is a question of law for a judge. *See W. States Petroleum*, 9 Cal.4th at 573. Thus, there is no question that review of a development impact fee under the MFA is likewise a question for a judge. It would be incongruous for a court to decide whether an exaction satisfies the MFA, yet allow a jury to decide whether the same type of exaction meets the *Nollan/Dolan* test, particularly where the plurality in *Ehrlich* found that the standard of review under both laws is the same.

3. That Some Questions of Fact Are at Issue Does Not Deprive The Court of its Responsibility to Decide Questions of Law.

That the validity of the dedication under *Nollan/Dolan* in the instant case requires the decision-maker to resolve some questions of fact does not support submitting the decision to a jury. Judges regularly decide questions of fact in applying the *Nollan/Dolan* test. In *Dolan* and *Ehrlich*, the Court engaged in extensive analysis of facts pertinent to the nexus and proportionality of an exaction. *Dolan*, 512 U.S. at 386-96; *Ehrlich*, 12 Cal.4th at 878-79, 881-85; *id.* at 908-12 (Kennard, J., concurring and

dissenting). Moreover, while juries weigh evidence and decide the value of property in eminent domain, judges routinely decide whether that evidence meets legal standards of admissibility. *See*, *e.g.*, *City of Corona v. Liston Brick Co. of Corona* (2012) 208 Cal.App.4th 536, 540, 545 (trial court properly excluded opinion as to value of non-subject property); *County Sanitation Dist. v. Watson Land Co.* (1993) 17 Cal.App.4th 1268, 1280-81 (judge properly excluded valuation opinion that failed to follow established methodology for valuing easements in condemnation proceedings); *Contra Costa Water Dist. v. Bar-C Props.* (1992) 5 Cal.App.4th 652, 660 (judge has "considerable judicial discretion in admitting or rejecting evidence of value" including testimony as to "developer's approach" to value) (citation omitted); *People ex rel. Dept. of Pub. Works v. Murray* (1959) 172 Cal.App.2d 219, 232-33 (court's finding on admissibility of comparable sales should be made outside hearing of jury).

Here, the court would assume the facts—i.e., that the dedication proposed by the City's appraiser would be imposed in type, location, and amount—and then determine whether those facts meet constitutional standards. Thus, even if a determination of the reasonable probability that an exaction would be imposed and the nature and extent of that exaction is a jury question, it does not follow that application of the *Nollan/Dolan* test to the particular exaction assumed by the condemning agency's appraiser is

also a jury question. Reasonable probability that an exaction will be imposed and what kind of, where, and how much property the agency would exact are factual questions; whether the dedication assumed by the agency's appraiser complies with *Nollan/Dolan* is a question of law within the exclusive purview of the court.[4]

4. No Other State Allows Juries to Apply *Nollan/Dolan*.

Our research indicates that only one opinion in any jurisdiction suggests that a jury can adjudicate the *Nollan/Dolan* test. That case, *Skoro v. City of Portland* (D. Or. 2008) 544 F.Supp.2d 1128, was cited by Owners, but it does not support referring the *Nollan/Dolan* test to a jury here. In *Skoro*, the court considered summary judgment motions on the "essential nexus" portion of the *Nollan/Dolan* test and stated that neither party had presented sufficient evidence for the court to determine that a reasonable jury would decide the case in favor of either party. *Id.* at 1131-33. The court described the summary judgment standard; it did not hold

---

[4] The Court of Appeal relied on *Campus Crusade*, 41 Cal.4th 954, to support its theory that whether an assumed exaction comports with *Nollan/Dolan* is a question for the jury. *See City of Perris v. Stamper* (2013) 160 Cal.Rptr.3d 635, 652-54. However, *Campus Crusade* supports the proposition that the constitutionality of an exaction is a question for the judge, while the jury decides the likelihood that exaction will be imposed after considering evidence allowed by the judge. 41 Cal.4th at 973-74. It does not require a court to abdicate it role as the decider of legal issues like application of the *Nollan/Dolan* test.

that a jury can judge the constitutionality of a government action. *See id.* at 1137-38.

Regardless, one federal district court's opinion on the matter is not relevant here. "The Fifth Amendment 'leaves to the state . . . the procedures by which compensation maybe sought.'" *Ehrlich*, 12 Cal.4th at 866 (quoting *Hensler*, 8 Cal.4th at 13). This Court's opinions in *Hensler*, *Ehrlich*, and *San Remo Hotel* establish that, in California, a determination as to compliance with *Nollan/Dolan* is a question for a judge. Thus, the *Skoro* court's opinion is not relevant authority.

Further, our research indicates that no state court allows juries to apply the *Nollan/Dolan* test. *See, e.g., Hallmark Inns & Resorts, Inc. v. City of Lake Oswego* (Or. Ct. App. 2004) 88 P.3d 284, 288-93 (judge deferred to city's *Nollan/Dolan* analysis of dedication of walkway as condition of development of hotel); *Matter of Grogan v. Zoning Bd. of Appeals of Town of E. Hampton* (N.Y. Sup. Ct. App. Div. 1995) 221 A.D.2d 441, 442 (court deferred to agency's findings to hold that conservation easement exaction was roughly proportional to construction impact); *J.C. Reeves Corp. v. Clackamas County* (Or. Ct. App. 1994) 887 P.2d 360, 363-66 (court relied on agency findings of rough proportionality to uphold exaction of land for streets in new subdivision); *McClure v. City of Springfield* (Or. Ct. App.

2001) 28 P.3d 1222, 1228 (court approved agency's analysis of exaction for public street).

Further, the cases cited in Owners' Brief for the proposition that juries occasionally decide whether government action is constitutional (ABM at 35-39) are not relevant here. With one exception—*Skoro*, discussed above—these cases concern conduct of individual public employees, not government police power. *See* ABM at 39-40.

Finally, *City of Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 707-22 does not support submitting the question of the validity of an exaction to a jury because the case did not address the propriety of a jury attempting to apply the *Nollan/Dolan* test. *Del Monte Dunes* was brought under 42 U.S.C. section 1983. *Id.* at 721. In its opinion, the Supreme Court expressly limited its holding to cases brought under that federal statute, which imposes unique requirements not applicable to other causes of action, including actions under state constitutions for regulatory takings. *See id.* ("We do not address the jury's role in an ordinary inverse condemnation suit. The action here was brought under section 1983, a context in which the jury's role in vindicating constitutional rights has long been recognized . . . .").

Del Monte Dunes is further inapposite because it concerned application of the "substantially advances" test—now abolished by

Lingle—to a city's rejection of development plans rather than application of the *Nollan/Dolan* test to a regulation. *See* Del Monte Dunes, 526 U.S. at 721. Also, in *Del Monte Dunes*, the city proposed a jury instruction that allowed the jury to decide whether the city's actions were "reasonable," thereby waiving any argument that the jury could not decide whether the regulation satisfied a constitutional means-ends test. *Id.* at 704. *Del Monte Dunes* thus does not contribute to resolution of this issue.

D. Important Policy and Practical Considerations Require That a Judge Applies *Nollan/Dolan* Before Trial.

The constitutionality of a dedication assumed by the agency's appraiser should be adjudicated by a judge for the further reason that the validity of the dedication should be resolved well before trial—something only a judge can do. Indeed, California's Eminent Domain Law provides a pre-trial motion procedure tailor-made for such a case. Code of Civil Procedure section 1260.040(a) states:

> If there is a dispute between plaintiff and defendant over an evidentiary or other legal issue affecting the determination of compensation, either party may move the court for a ruling on the issue. The motion shall be made not later than 60 days before commencement of trial on the issue of compensation. The motion shall be heard by the judge assigned for trial of the case.

This pre-trial motion procedure promotes the important State policy that eminent domain litigation be avoided where possible. *See* Gov't. Code §§ 7267 (public agencies shall avoid eminent domain litigation to the

greatest extent practicable), 7267.1(a) ("The public entity shall make every reasonable effort to acquire expeditiously real property by negotiation."), 7267.2(a)(1) (agency must appraise property and offer full amount of appraisal to owner prior to condemning property); Code Civ. Proc. § 1250.410(a) (agency and owner required to exchange settlement offers twenty days before trial). Section 1260.040 "improv[es] pretrial procedures for resolving legal disputes affecting valuation by . . . [adding] a general provision for early resolution of [those] disputes." *Dina v. People ex rel. Dept. of Transp.* (2007) 151 Cal.App.4th 1029, 1042. This provision allows "[r]esolution of legal issues in a timely fashion[, which] will help pave the way for a resolution of the proceedings without the need for trial." *Recommendation: Early Disclosure of Valuation Data and Resolution of Issues in Eminent Domain* (Oct. 2000) 30 Cal. Law Revision Com. Rep. (2000) p. 586. By providing a mechanism for early resolution of legal issues like the validity of an assumed dedication, section 1260.040 helps avoid expenditure of resources to establish a legally unavailable ground for valuation. Early resolution of the validity of an assumed dedication will help narrow the gap between the parties' valuations, thereby fostering settlement before trial. *See Dina*, 151 Cal.App.4th at 1042.

California's Eminent Domain Law provides that parties must exchange Final Offers and Demands regarding compensation twenty days

before trial. Code Civ. Proc. § 1250.410. This procedure allows the parties to avoid trial if one accepts the other's Offer or Demand. Public policies encouraging settlement of eminent domain actions would be frustrated, however, in cases where the agency's appraisal turns on an assumption that the owner would have to dedicate a portion of the property, if the agency does not learn until after the trial starts that its appraiser's assumption is invalid. The agency would be unable to formulate a reasonable Final Offer twenty days before trial without knowing whether the jury will find the dedication requirement to be constitutional in the verdict. This adds a significant level of risk to agencies electing to go to trial in eminent domain actions. To mitigate that risk, agencies would be inclined to make higher Final Offers than warranted, resulting in a windfall to condemnees at the taxpayers' expense.

Compounding the chaos that could ensue in eminent domain actions if juries decide whether dedications are constitutional during trial, the valuation evidence of the party on the losing end of the jury's decision risks becoming irrelevant and inadmissible in its entirety. Indeed, this occurred in the instant case, where Owners did not learn until trial that their appraisal—based on the conclusion that the assumed dedication was invalid under *Nollan/Dolan*—was inadmissible. At the trial, Owners had no evidence with which to counter the City's appraisal, forcing Owners to

stipulate to the City's value of $44,000 based on agricultural land sales. RT 2:312:4-21; AA 9:2179-80. Had Owners known before trial that the City's dedication would be valid, they could at least have presented evidence on the value of the Acquisition Area for agriculture use.

The significant body of precedent and longstanding constitutional doctrines discussed here—along with important policy and practical considerations—all point to the judge as the sole arbiter of whether an exaction may pass constitutional muster. A jury is not appropriately equipped to apply deferential review to a government agency's exercise of police power, and indeed, no relevant case law has suggested that a jury assumes that role. Further, postponing *Nollan/Dolan* decisions until trial undermines California's policy of speedy, fair, and cost-effective resolution of eminent domain cases. Accordingly, this Court should reverse the Court of Appeal on this issue.

II. THE PROJECT HAS NO RELEVANCE TO THE VALUE OF THE ACQUISITION AREA.

As to the second issue, Owners contend that the "project effect" rule under Code of Civil Procedure section 1230.330 requires exclusion of evidence that the City would require Owners to dedicate a portion of the Property for public streets if they seek to develop their property. They argue that the City cannot claim that the Acquisition Area is worth less than the remainder of the Property where the dedication is required for the

Project. The difficulty with Owners' argument is that under *Nollan/Dolan*, the dedication must be required as a result of the hypothetical development *of the subject property*, not as a result of the Project for which the Acquisition Area is condemned. In fact, the Project is irrelevant to this determination.

The assumed dedication is a mitigation measure imposed under the City's police power. To meet the *Nollan/Dolan* test, that mitigation measure must have an essential nexus and be roughly proportional to an adverse condition created *by the development of the subject property.*

On the one hand, if the hypothetical dedication passes the *Nollan/Dolan* test, and it is found to be reasonably probable that it will be imposed, the dedication area of the larger parcel must be valued for its current use instead of a higher value that may be ascribed to the portion of the larger parcel that would not have been dedicated for public use. *City of Porterville*, 195 Cal.App.3d at 1269. The project for which the subject property is being acquired, however, will have no impact on the value of that use because the appraiser is *required* to exclude any impact of the project on the fair market value of the property being condemned under Code of Civil Procedure section 1263.330:

> The fair market value of the property taken shall not include any increase or decrease in the value of the property that is attributable to any of the following:
>
> (a) The project for which the property is taken.

(b) The eminent domain proceedings in which the property is taken.

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

On the other hand, if the dedication is found to be invalid or not probable, then the entire larger parcel, including the Acquisition Area, will be valued for the higher use. Under either result, the Project is irrelevant to the value of the Acquisition Area.

While the Project in the instant case may shed light on the nature, location, and amount of the dedication that would be reasonably probable in the event that Owners developed the Property for an industrial or commercial use, the trial court's task is to assess whether the assumed dedication would pass the *Nollan/Dolan* test. The trial court here found not only that the assumed dedication was reasonably probable, but also that the dedication satisfied *Nollan/Dolan*. In doing so, the trial court needed to consider only mitigation measures that were reasonably probable of being imposed if Owners were to develop the Property in the future. The trial court presumably, and correctly, disregarded the Project in making that determination.

CONCLUSION

The validity of the dedication condition assumed by the City's appraiser under the *Nollan/Dolan* test is a question of law for the judge that should be decided in advance of trial under Code of Civil Procedure section

1260.040. The Project here had no effect on the value of the Acquisition Area.

DATED: April 11, 2014 SHUTE, MIHALY & WEINBERGER LLP

By: _____
ANDREW W. SCHWARTZ

Attorneys for League of California Cities and California State Association of Counties

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court 8.204(c), I certify that the text of this brief consists of 7,425 words, not including tables of contents and authorities, signature block, and this certificate of word count as counted by Microsoft Word, the computer program used to prepare this brief.

Dated: April 11, 2014

By: _____
Andrew W. Schwartz

577888.1

PROOF OF SERVICE

Perris v. Stamper
Supreme Court Case No. S213468
Court of Appeal Fourth Appellate District, Division Two
Case No. E053395
Riverside County Superior Court Case No. RIC524291

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On April 11, 2014, I served true copies of the following document(s) described as:

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE; BRIEF OF AMICI CURIAE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

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

Executed on April 11, 2014, at San Francisco, California.

Juanito H. Maravilla

SERVICE LIST
Perris v. Stamper
Supreme Court Case No. S213468
Court of Appeal Fourth Appellate District, Division Two
Case No. E053395
Riverside County Superior Court Case No. RIC524291

K. Erik Freiss
Allen Matkins Leck Gamble Mallory & Natsis, LLP
1900 Main Street, 5th Floor
Irvine, CA 92614
Tel: 949-553-1313
Fax: 949-553-8354
E-Mail: rfriess@allenmatkins.com
Attorneys for Respondents Richard C. Stamper, Donald D. Robinson, and Donald Dean Robinson, LLC

Eric L. Dunn
Sunny K Soltani
Pam K. Lee
Aleshire & Wynder, LLP
18881 Von Karman Avenue, Suite 1700
Irvine, CA 92612
Tel: 949-223-1170
Fax: 949-223-1180
Attorneys for Petitioner City of Perris

Hon. Dallas S. Homes
c/o Clerk of the Court
Riverside County Superior Court
4050 Main Street
Riverside, CA 92501
Tel: -951-777-3147

Court of Appeal
4th District Div 2
3389 Twelfth Street
Riverside, CA 92501
Tel: 951-782-2500
Fax: -951-248-0235