

# **Case Law Update: Recent Challenges to Zoning**

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## **New York Case Law Digests Regarding Common Functions of Land Use Boards and How to Insulate them from Legal Attack**

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## Case Digests

### Zoning Board of Appeals

#### **Interpretation of Zoning Code**

In the Matter of Ogden Land Dev., LLC v. Zoning Bd. Of Appeals of Vil. Of Scarsdale, 121 A.D.3d 695 (N.Y. App. Div., 2nd Dept., 2014), the plaintiff brought an Article 78 proceeding to annul a zoning board of appeal's determination. The plaintiff requested approval from the Planning Board of the Village of Scarsdale, NY to subdivide a triangular-shaped building into two lots. The property had frontages along two roads, and the eastern edge of the property, adjacent to where these roads met, had a flattened curve shape. The Building Inspector determined that the proposed subdivision would create two lots which did not conform to the Village Code because each lot would have only one side lot line, and thus, the two proposed lots would lack two "side lots that [could] be used as a guide to check the compliance of the general direction of the proposed Depth of Lot." The plaintiff appealed the Building Inspector's determination to the Zoning Board of Appeals (ZBA), which found that the plaintiff failed to provide a basis for them to overturn the Building Inspector's finding that the plaintiff's application would create two nonconforming lots. The Supreme Court concluded that the ZBA's determination was "irrational and unreasonable" since the ZBA affirmed the Building Inspector's determination that the two proposed lots each lacked a second "side" lot line. This, in spite of the fact that the Village Code defined "Depth of Lot" as "[t]he mean horizontal distance from its front lot line to its rear lot line, measured in the general direction of its side lines," while "Width of Lot" was defined as "[t]he mean width of a lot measured at right angles to its depth. The Building Inspector determined both lengths by using the easterly side lot line in the shape of a flattened curve found at the intersection of [the two roads], and the westerly side lot line, based on the Village Code's definition of a "Side Lot Line as [a]ny lot boundary line which is not a front lot line or a rear lot line." Thus, the Supreme Court found that the "re-subdivision" map that the plaintiff submitted illustrated "a bisected pie-shaped lot, with front, rear, and easterly and westerly side lot lines." The Supreme Court annulled the ZBA's determination and remitted the matter to the Planning Board. The Appellate Division noted that judicial review of a determination of the ZBA is "limited to ascertaining whether the action was illegal, arbitrary, and capricious, or an abuse of direction." A determination of the ZBA can be affirmed if it has a rational basis and is supported by evidence. A zoning board's interpretation of a zoning code is entitled to great deference, but "its interpretation is not entitled to unquestioning judicial deference, since the ultimate responsibility of interpreting the law is with the court." The Court of Appeals affirmed the Supreme Court's finding, but felt the matter should have been remitted to the ZBA to issue a determination that the petitioner's proposed subdivision conformed to the Village Code.

In the Matter of Boni Enters., LLC v. Zoning Bd. of Appeals of the Town of Clifton Park, 124 A.D.3d 1052 (N.Y. App. Div., 3rd Dept., 2015), the plaintiffs brought an Article 78 proceeding to annul a determination of a zoning board of appeals. Plaintiffs Boni Enterprises, LLC and Country Club Acres owned contiguous parcels of real property in Clifton Park, NY. The plaintiffs submitted a revised site plan to the Town, outlining a plan to construct 74 one-family dwellings on the parcel owned by Boni Enterprises and 15

commercial buildings (to be utilized as office buildings, warehouses, and flex space), on the parcel owned by Country Club Acres. The Planning Board found that it was unable to review the application because the Town's Zoning Enforcement Officer believed there were zoning issues with petitioner's site plan. The plaintiffs appealed to the Zoning Board of Appeals (ZBA) for a definitive interpretation. The ZBA upheld the Enforcement Officer's interpretation, which determined that multiple single-family homes could not be built on Boni's parcel. The plaintiffs commenced a proceeding pursuant to Article 78 seeking review of the ZBA's determination. The ZBA counterclaimed for declarations that the Enforcement Officer's interpretation of the Town Code was correct. The Supreme Court dismissed the plaintiffs' action and made no definitive declarations. The plaintiffs appealed to the Appellate Division. The Appellate Division found that courts generally grant deference to ZBAs regarding their determination, but no deference is required if the issue is one of pure legal interpretation of zoning law. Zoning ordinances must be strictly construed against the municipality that drafted them, and any ambiguity must be resolved in favor of property owners. The Boni parcel was in a B-1 Zoning District, which permitted one- and two-family dwellings. In a B-1 district, "[n]o preexisting building(s) shall be rehabilitated or remodeled or new building(s) constructed on a vacant lot to a size greater than 12% of the lot size, with no single building to have a maximum square footage exceeding 4,800 square feet. Multiple buildings on a lot are allowed if the overall density limitations of this article are not exceeded." The plaintiffs felt that "buildings" included one-family dwellings, and that one-family dwellings were allowed on the lot if they conformed to density restrictions. The ZBA argued that the Town Code differentiates between dwellings and other buildings. The ZBA argued that "part of the purpose of a B-1 district, as noted in the Town Code, is "to allow the conversion of existing residential dwellings and vacant lots into general office uses while maintaining the area's residential character...It is intended that buildings in this district be compatible in size and appearance with residential dwellings." The court found that "the word dwelling is defined to include a "building designed or used primarily for human habitation," and that "not every building is a dwelling, but every dwelling is a building." The Appellate Court found that the Town probably never pictured 74 one-family dwellings being built on a single, undivided parcel in a B-1 Zoning District. However, the plain language of the Town Code must be interpreted as allowing one-family dwellings, and the judgment of the Supreme Court was reversed.

### **Use Variances (Unique Characteristics)**

In the Matter of Vomero v. City of New York, 13 N.Y.3d 840 (N.Y. Crt. Of Appeals, 2009), G.A.C. Catering, Inc. bought a corner lot zoned for residential use. G.A.C. demolished the residence on the lot and applied for a use variance to build a two-story photography studio. To qualify for a use variance premised upon unnecessary hardship there must be a showing that "(1) the property cannot yield a reasonable return if used only for permitted purposes as currently zoned, (2) the hardship resulted from unique characteristics of the property, (3) the proposed use would not alter the character of the neighborhood, and (4) the alleged hardship was not self-created." Here, that application was denied. G.A.C. appealed to the respondent Board of Standards and Appeals of the City of New York (BSA). After a hearing, the BSA granted the variance, noting that the hardship that caused the need for the variance was unique. The plaintiff, an owner of a neighboring home,

commenced an Article 78 action, seeking to annul the determination of the BSA. The Supreme Court granted the petition because the BSA's determination lacked a "substantial basis" in the record. The Appellate Division reversed the Supreme Court, and found that the BSA determined that other properties in the area, which have similar characteristics and are in locations similar to the subject property, had "unique physical conditions" such that "practical difficulties or unnecessary hardship" would arise with conforming uses. There was, per the Appellate Division, nothing in the record to support the finding that there was any significant difference between the subject property and those other properties. Thus, the Appellate Court found that the BSA's determination was not illegal. The plaintiff appealed. The Court of Appeals found that the order of the Appellate Division should be reversed. The Court of Appeals noted that a local zoning board has broad discretion when reviewing applications for a zoning variance, but its determination may be set aside if the record reveals that "the board acted "illegally, or arbitrarily, or abused its discretion." In this case, the BSA's decision to grant a use variance for the construction of the photo studio in a residential-zoned area was an abuse of discretion. The physical conditions of the parcel relied on by the board did not establish that the property's characteristics were "unique" as defined by local law. "Proof of uniqueness must be peculiar to and inherent in the particular zoning lot, rather than common to the whole neighborhood." The fact that this residentially-zoned corner property was situated in a commercial area did not support a finding of uniqueness because other nearby residential lots shared similar characteristics. The Court of Appeals felt that the BSA should not have granted the application in question and the judgment of the Supreme Court annulling the BSA's determination had to be affirmed.

### **Use Variances (Self-Created Burden)**

In the Matter of Jones v. Zoning Bd. of Appeals of The Town of Oneonta, 90 A.D.3d 1280 (N.Y. App. Div., 3rd Dept., 2011), the plaintiff initiated an Article 78 Action to annul the decision of a zoning board of appeals. Larry Place and his wife owned a 19-acre parcel of property located in a RA-40 Zoning District, which included permitted uses such as residential and agricultural. The property had a sand and gravel mine that had been inactive. Place applied for a use variance to permit mining on the property. The Zoning Board of Appeals (ZBA) granted the variance. An individual whose property was next to the subject property commenced an Article 78 challenge to the ZBA's determination. The Supreme Court dismissed the plaintiff's action. The plaintiff appealed to the Appellate Division, which annulled the determination of the ZBA after concluding that proper notice of the hearing was not provided to the public. During this process, the subject property was purchased by Clark Stone Products, which also applied for a use variance. The petitioners commenced the current action to annul the ZBA's determination, arguing that Clark Stone Products failed to establish an unnecessary hardship warranting a use variance. The Supreme Court dismissed the petition and the plaintiffs appealed. The Appellate Division noted that zoning boards are allowed significant discretion in considering applications for variances and their determinations will not be invalidated if they have a rational basis and are supported by significant evidence. An applicant for a use variance bears the burden of demonstrating that restrictions on the property have caused an unnecessary hardship, which "requires a showing that (1) the property cannot yield a reasonable return if used for permitted purposes as it is currently zoned, (2) the

hardship results from the unique characteristics of the property, (3) the proposed use will not alter the essential character of the neighborhood, and (4) the hardship has not been self-imposed." The plaintiff argued that the hardship was self-created when the "variance applicant purchased the property subject to the restrictions and was aware of the zoning restrictions at the time that it purchased the property." The Appellate Court here found that at the time Clark Stone Products purchased the property, Place had a valid use variance to operate the mine which, "absent a specific time limitation, runs with the land until revoked." Although the transaction occurred while an appeal of the ZBA's issuance of that variance was pending, the ZBA could rationally find that this fact alone did not make the hardship self-created. Plaintiffs were not entitled to relief.

In Friends of Lake Mahopac v. Zoning Bd. of Appeals, 15 A.D.3d 401 (N.Y. App. Div., 2nd Dept., 2005), plaintiff brought an action under Article 78 to review a determination of a zoning Board of Appeals. The area in which the subject lot is located is residential in nature. At the time of the purchase property, the owner knew that "no public marina, dock or other place where boats are lawfully hired, rented, or sold, or where docking space is lawfully rented or leased, shall" be constructed on the property, per the local Zoning Ordinance. The landowners planned to construct boat-related infrastructure on the property. They applied for certain use and area variances, which were granted by the Town of Carmel's Zoning Board of Appeals (ZBA). Plaintiffs were the Friends of Lake Mahopac. They filed this action in the Supreme Court to have the ZBA's decision annulled on the basis that the hardship was self-created. The Supreme Court annulled the ZBA's decision, and the landowners appealed. The Appellate Division noted that an applicant for a use variance bears the burden of demonstrating that restrictions on the property have caused an unnecessary hardship, which "requires a showing that (1) the property cannot yield a reasonable return if used for permitted purposes as it is currently zoned, (2) the hardship results from the unique characteristics of the property, (3) the proposed use will not alter the essential character of the neighborhood, and (4) the hardship has not been self-imposed." The Appellate Division found that "an owner who knowingly acquires land for a use prohibited by zoning may not obtain a use variance on the ground of hardship," as it is self-created. Consequently, the Court of Appeals affirmed the decision of the Supreme Court.

### **Use Variances (Financial Burden)**

In the Matter of DeFeo v. Zoning Bd. of Appeals of Town of Bedford, 137 A.D.3d 1123 (N.Y. App. Crt., 2nd Dept., 2016), developers filed a preliminary site plan with the Planning Board to build a car wash and detail facility. Much of the subject property was zoned RB, or Roadside Business, while the rear portion was zoned residential. The developers planned to use this residential portion as a driveway and parking lot. The Planning Board approved the site plan. Developers then applied to the Zoning Board of Appeals (ZBA) for use and area variances and a special permit, which the ZBA granted. Regarding the use variance, the ZBA found the applicants could not realize a reasonable return without the variance, and, furthermore, that the hardship had not been self-created. The plaintiff, who owned a nearby property, began an Article 78 action seeking to annul the ZBA's decisions. At trial, the Supreme Court found that the ZBA's determination to grant the use variance was not based on a rational basis, and annulled the board's determination. On appeal, the Appellate Division affirmed, noting that to qualify for a use variance premised

upon unnecessary hardship there must be a showing that "(1) the property cannot yield a reasonable return if used only for permitted purposes as currently zoned, (2) the hardship resulted from unique characteristics of the property, (3) the proposed use would not alter the character of the neighborhood, and (4) the alleged hardship was not self-created." The court found that the developers submitted proof that the residential portion could not be used for any permitted use, "due to the topography, lack of a septic system, and narrowness" of the lot. The developers also provided an appraisal stating if the use variance was not approved, "the development potential of the RB-zoned portion of the property would be reduced for the subject carwash project by 27%, for retail purposes by 35%, and for office space purposes by 53%.' However, the developers did not submit any actual financial information: including, but not limited to, the property's: "(1) original purchase price, (2) present price, (3) expenses and carrying costs, (4) taxes, and (5) the amount of any mortgages or other encumbrances on the property." The developers also failed to address the income currently being realized, "or any estimate of what a reasonable return on the property, in whole or part, would be." Finally, the Appellate Court noted that entitlement to a use variance is not simply established by evidence that the proposed use would be more profitable than a use that did not require the variance. Judgment of the Supreme Court was affirmed.

### **Area Variances**

In the Matter of Quintana v. Board of Zoning Appeals of Inc. Vil. of Muttontown, 120 A.D.3d 1248 (N.Y. App. Div., 2nd Dept., 2014) plaintiff filed an Article 78 action to have a determination of a zoning board of appeals denied. Plaintiff applied for a lot-depth variance, which the Village of Muttontown Zoning Board of Appeals (ZBA) denied. The plaintiff filed this action in the Supreme Court, which found the decision of the ZBA was capricious, and that "the proposed lot complied with the minimum lot-depth requirement." The ZBA appealed. The Appellate Court found that "local zoning boards have broad discretion in considering applications for variances, and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion. Accordingly, on judicial review, the determination of a zoning board should be sustained if it is not illegal, has a rational basis, and is not arbitrary and capricious." Furthermore, in determining whether to grant an area variance, a zoning board of appeals must balance the benefit to the applicant against the detriment to the health, safety, and welfare of the neighborhood. A ZBA needs to also consider "(1) whether an undesirable change will be produced in the character of the neighborhood or a detriment to nearby properties will be created by the granting of the area variance; (2) whether the benefit sought by the applicant can be achieved by some method, feasible for the applicant to pursue, other than an area variance; (3) whether the requested area variance is substantial; (4) whether the proposed variance will have an adverse effect or impact on the physical or environmental conditions in the neighborhood or district; and (5) whether the alleged difficulty was self-created, which consideration shall be relevant to the decision of the board of appeals, but shall not necessarily preclude the granting of the area variance." In the instant case, there was no evidence that the variance would create an unwanted impact in the character of the neighborhood, adversely impact the physical and environmental conditions, or otherwise harm the health, safety, and welfare of the community. Additionally, "the determination was irrational, as it rested largely on

subjective considerations of general community opposition.” The ZBA’s conclusion that the benefit sought could also be realized through an alternative plan had no rational support in the record. Therefore, the Appellate Division found that the Supreme Court correctly annulled the determination of the ZBA because it was arbitrary and capricious. The Appellate Division directed the Board to allow the application for a lot-depth variance.

In the Matter of Cacsire v. City of White Plains Zoning Bd. Of Appeals, 2011 N.Y. LEXIS 3648 (N.Y. Crt. of Appeals, 2011), a plaintiff attempted to annul a decision of the City of White Plains Zoning Board of Appeals (ZBA). Plaintiffs brought real property in the City of White Plains that included a house being used as a two-family residence. The home was listed as a two-family home on tax documentation and by the mortgagee. No Certificate of Occupancy was available. The plaintiffs planned to rent the apartments out in the home. For nine years, the plaintiffs rented out the home to two householders. Upon seeking building permits for a renovation, the Department of Buildings refused to issue the permits, advising that per their records, the home was not classified as a two-family home, and that if they wished to maintain a two-family occupancy, they would have to obtain six area variances. The ZBA denied the plaintiff’s application, finding that requested variances were substantial, would produce an undesirable change on the neighborhood, would harm the community’s health, safety, and general welfare, and the petitioner’s hardship was self-created. The plaintiffs commenced an Article 78 Action arguing that the ZBA’s determination did not have a rational basis. The Supreme Court denied the petition. The plaintiffs appealed. The Appellate Division found that a ZBA, in reviewing an application for an area variance, must determine if “granting the area variance will produce an undesirable change in the character of the neighborhood or a detriment to nearby properties; (2) the benefit sought by the applicant can be achieved by some method, feasible to the applicant, other than an area variance; (3) the requested area variance is substantial; (4) granting the proposed variance will have an adverse effect or impact on the physical environmental conditions in the neighborhood or district; and (5) the alleged difficulty was self-created.” Moreover, the determination of a zoning board should be sustained upon judicial review if it is not illegal, has a rational basis, and is not arbitrary and capricious. “Conclusory findings of facts are insufficient to support a determination by a zoning board of appeals, which is required to clearly set forth how and in what manner the granting of the variance would be improper.” The court noted that a determination by the ZBA will not be deemed rational if it rests entirely on subjective considerations, such as general community opposition. The Court found that in the instant case that there was no evidence that the variances would have a negative impact on the neighborhood, adversely impact its physical and environmental conditions, or result in a detriment to the health, safety, and welfare of the community. “The record indicated that the property owned by the petitioners had been used...and taxed by the City as a two-family dwelling for 50 years.” The variance would not result in an increase in traffic, and many of the properties nearby were similarly used. Furthermore, “the record showed that the petitioners reasonably believed that the property was legally being used as a two-family residence at the time of purchase and, moreover, that they would suffer great financial hardship if the area variances were not granted. The property was in an area zoned for one- and two-family houses, was being taxed by the City as a two-family house, and did not have a Certificate of Occupancy because the house was built before such certificates were issued.” Reviewing the above information, the Appellate Division found

that the ZBA's determination that the applicant's hardship was self-created lacked a rational basis and was arbitrary. The Appellate Division found that the Supreme Court should have granted the petition, annulled the ZBA's determination, and remitted the matter to the ZBA. The ZBA appealed to the Court of Appeals, which denied the motion to leave for appeal.

### **Facts on the Record**

In the Matter of Caspian Realty, Inc. v. Zoning Bd. of Appeals of Town of Greenburgh, 68 A.D.3d (N.Y. App. Div., 2nd Dept., 2009), the applicant had received site plan approval from the Planning Board for a furniture store, which was made up of a main floor and a cellar. After opening their store, the applicant was charged with zoning ordinance violations for having a display area in the cellar, which violated the Certificate of Occupancy. In response, the applicant filed a request for two area variances to keep using the cellar as a retail space. This request was made to the Town of Greenburgh's Zoning Board of Appeals (ZBA). The board rejected the application, noting that the applicant had consistently deceived the town as to the intended use of the cellar. The plaintiff filed an Article 78 Action to annul the decision of the ZBA. The Supreme Court found that the applicant had lied to the town regarding the intended use of the cellar, but the deceit was not an enumerated statutory factor to consider when deciding to grant a variance. The Supreme Court annulled the ZBA's determination and remitted the matter to the ZBA for reconsideration of the application. The ZBA appealed to the Appellate Division. The Appellate Division found that the applicant's "deceitful conduct could form the basis for the denial of the requested variances, but only "if that conduct and other balanced considerations fit within the factors enumerated by" town law, based on the record presented. The court found that "local zoning boards have broad discretion in considering applications for area variances." A zoning board's determination shall be upheld if it is rational and not arbitrary and capricious. A determination is rational if it has an objective basis, and does not rely on a subjective basis, such as general community opposition. The Appellate Division reversed the decision of the Supreme Court. The Appellate Division found there was significant evidence in the record to show the applicant attempted to deceive the town, and that the "applicant self-created its difficulty by its deceit." Furthermore, the record showed that in no way that, even if the variance was allowed, the owner's business would become more profitable. Consequently, the decision of the ZBA was affirmed. However, the Appellate Division did note that the record did not support the ZBA's finding that "the particular size and placement of the buildings on the lot required delivery trucks to maneuver into the lot's parking lot backwards, tying up traffic." The ZBA's determination was unsupported in the record for two reasons: a report prepared by the plaintiff's expert found that "the showroom use of the cellar did not have an adverse impact on" traffic and parking. Furthermore, the complaints on the record voiced by neighbor "that trucks of a certain size disrupted traffic by backing into the parking lot," would remain unchanged if the cellar was used as a showroom or storage. The record also did not provide any evidence that the variance would impact the neighborhood's character negatively. However, the fact that the variance was self-created overwhelmed these findings.

### **Planning Boards**

## **Special Use Permits**

In the Matter of Jamil v. Village of Scarsdale Planning Bd., 24 A.D.3d 552 (N.Y. App. Div., 2nd Dept., 2005), the owner's property was in a residential zone that allowed hospitals or nursing homes by a Special Use Permit, but there was no guidance on an Assisted Living Facility. The property owner proposed to the village the construction of such a structure, and the Building Inspector determined that an assisted living facility was a type of nursing home, and was therefore a permitted use subject to the issuance of a Special Use Permit. The petitioners, who lived nearby, challenged the building inspector's determination. The Village's Zoning Board of Appeals rejected this determination. The petitioners filed a claim in the Supreme Court, which upheld the Building Inspector's determination and dismissed the petitioner's claim. "The petitioners' appeal from that order was dismissed for neglect to prosecute." The Planning Board then issued the Special Use Permit, incorporating the Village's Building Inspector's finding. The petitioners challenged this finding in the Supreme Court. The Supreme Court denied the petition. The plaintiffs appealed. The Court found that the Planning Board did not act arbitrarily as "it relied upon the determination of the building inspector that a proposed facility was permitted as a special use within the relevant residential zone." The Court noted that the Planning Board does not have the power "to interpret the provisions of the local zoning law, a power which is vested exclusively in the building inspector and the Zoning Board of Appeals." The Planning Board was without the authority "to deny the approvals sought by the [landowner] based upon a contrary interpretation of the zoning ordinance." The Court of Appeals upheld the determination of the Supreme Court.

## **Special Use Permits (from Board of Trustees)**

In the Matter of 7-Eleven, Inc. v. Incorporated Vil. of Mineola, 127 A.D.3d 1209 (N.Y. App. Div., 2nd Dept., 2015), the plaintiffs requested a Special Use Permit from the Board of Trustees of the Village of Mineola to construct a 7-Eleven. At a public hearing, various experts offered by the plaintiff stated that the store would not detrimentally impact its surrounding neighborhood. Board members, and owners of nearby properties, were opposed, however, arguing that the convenience store's clientele would be "unsavory" and that the store would lead to increased traffic. No expert evidence was provided from these opponents. The board denied the petitioner's application, citing concerns regarding the store's potential contribution to traffic. The plaintiffs commenced an Article 78 action to annul the decision of the Board of Trustees. The Supreme Court denied the petition. The plaintiffs appealed to the Appellate Division. The court found that "a special exception, commonly known as a special use permit, gives a property owner permission to use property in a way that is consistent with the zoning ordinance, although not necessarily allowed as of right." This is opposed to a use variance, which provides a property owner permission to use property in a manner that contrasts with the local zoning ordinance. Therefore, "the burden of proof on an owner seeking a special exception is lighter than on one seeking a variance," with the owner applying for a special exception only needing "to show compliance with any legislatively imposed conditions on an otherwise permitted use." The Court found that the Board's finding that the convenience store would not be able to maintain legislatively imposed conditions was "arbitrary and capricious." Furthermore, "the claims of Board members and nearby property owners that the granting of the special use permit application would, among other things, exacerbate

existing traffic congestion were unsupported by empirical data, and were contradicted by the expert opinions offered by the petitioners.” Moreover, there was no evidence that the convenience store would have a greater impact on traffic in the neighborhood than any permitted use. The Court also noted that the Board did not acknowledge that the plaintiff expressed its intention to abide by any restrictions placed on its use. Thus, the Court found that the board’s determination was not supported by the record, and the Board’s denial was arbitrary and capricious. The Appellate Division remitted the issue to the Board for approval.

### **Site Plan Applications**

In the Matter of Valentine v. McLaughlin, 87 A.D.3d 1155 (N.Y. App. Div., 2nd Dept., 2011), a landowner purchased property and sought approval of a site plan from the Planning Board of the Town of Mount Pleasant. The Planning Board denied approval “on the basis that it was unsafe and contrary to the public welfare.” Valentine initiated an Article 78 action challenging the Planning Board’s determination, and the Supreme Court granted the petition “on the ground that the Planning Board’s determination to deny the petitioner’s application was arbitrary and capricious.” The Supreme Court annulled the Planning Board’s determination and ordered the Planning Board to approve the site plan. The Appellate Division found that “in conducting...site plan review, the Planning Board is required to set appropriate conditions and safeguards which are in harmony with the general purpose and intent of the Town’s zoning code, and which give particular regard to...achieving conformance of the final site development with any town development plan.” To this goal, a Planning Board can properly consider whether the project is consistent with surrounding properties, if it would impact the character of the area, and if that change was irreversible. “In applying these criteria to proposed site plans, “[a] local planning board has broad discretion...and judicial review is limited to determining whether the action taken by the board was illegal, arbitrary, or an abuse of discretion. Where a planning board’s decision has a rational basis in the record, a court may not substitute its own judgment, even where the evidence could support a different conclusion.” The appellate court found that the Planning Board had broad authority to grant site plans, and it was common-sense to deny the site plan since it was not suitable to the topography of the area or the character of the neighborhood. Therefore, the Supreme Court erred in substituting its judgment for the Planning Board’s and annulling the Planning Board’s decision.

### **Subdivision Applications**

In the Matter of Ashley Homes of L.I., Inc. v. O’Dea, 51 A.D.3d 911 (N.Y. App. Div., 2nd Dept., 2008), the plaintiff bought a parcel of land measuring 32,000 feet in square area, and sought to divide the property into two lots. The applicable zoning ordinance required a minimum lot size of 20,000 feet. The plaintiff applied for an area variance from the Town of Riverhead’s Zoning Board of Appeals for two lots measuring 16,000 square feet in area each. The ZBA approved this variance. The applicable zoning ordinance was then amended, requiring a minimum lot area of 40,000 feet. Following this, the ZBA granted the petitioner’s application to extend the previously issued area variance. The plaintiff then submitted an application for subdivision approval to the Planning Board, which denied the application based on the argument that the required lot area was now 40,000

square feet and the two proposed lots did not conform to this requirement. The Planning Board had noted that the ZBA had granted an area variance, but concluded that “the variance is not applicable to the amended zoning” ordinance. The plaintiff commenced an Article 78 action against the Planning Board challenging their determination. The Supreme Court annulled the Planning Board’s determination and directed the Planning Board to approve the subdivision application. The Planning Board appealed. The Appellate Court found that “the issue of conformity with zoning regulations is within the primary jurisdiction of the Town Zoning Board.” In the instant case, the Planning Board argued that the petitioner “had not been granted a variance from the new 40,000-square-foot requirement, and the Planning Board was merely applying the zoning ordinance as it existed at the time of the petitioner’s application for subdivision approval.” But the ZBA, which assumedly knew of the amendment to the zoning ordinance, allowed the petitioner an extension to their variance, and therefore the variance “was still in effect at the time the Planning Board denied the petitioner’s subdivision application.” Therefore, the Planning Board’s determination “usurped the power of the ZBA, and therefore was affected by an error of law.” Because the determination was based upon findings concerning the alleged nonconformity of the petitioner’s proposed subdivision with the zoning ordinance, “which findings were not within the Planning Board’s proper jurisdiction to make, the Supreme Court properly...granted the petition [and] annulled the determination.”

In the Matter of Nickhart Realty Corp. v. Southold Town Planning Bd., 109 A.D.3d 930 (N.Y. App. Div., 2nd Dept., 2013), a property owner sought approval of their plan to subdivide a parcel into two lots and to build a single-family home on each lot. Because each lot would be less than 20,000 square feet in area, a zoning area variance had to be obtained. The property owner obtained that approval from the Southold Town Zoning Board of Appeals. The Suffolk County Department of Health Services (SCDHS) also granted a variance for the installation of a private on-site sewage system, which was based on the transfer of sanitary flow credits. The Planning Board then granted the owner’s request for a negative declaration for its proposed subdivision under SEQRA, having concluded “that the proposed subdivision [would] not likely have a significant impact on the environment and, thus, was not likely to require the preparation and circulation of an environmental impact statement.” The Planning Board then provided approval of the preliminary plat, and in doing so referenced the variance from the SCDHS. The Planning Board later provided a “conditional final plat approval, requiring, for the first time, that the [owner] submit proof of either its compliance” with the Town Code, which limited the use of a transfer of sanitary flow credits, or an approval from the SCDHS that was “not dependent on a transfer of sanitary flow credits.” The property owner then began an Article 78 action seeking a declaratory judgment “challenging the resolution insofar as it imposed the new condition.” The Supreme Court found that the Planning Board’s determination was arbitrary and capricious. The Planning Board Appealed. The Appellate Division found that “although the Planning Board’s approval of the preliminary plat...did not guarantee approval of the final version, a planning board may not, in the absence of significant new information, deny final approval if a property owner implements the modifications or conditions required by a preliminary approval.” The court noted that the Planning Board had known that the SCDHS’s approval of their variance was based on the transfer of sanitary flow credits. Since no significant new information was discovered

after the Planning Board gave its approval to the preliminary plat, the imposition of new requirements in the conditional final approval was, the Supreme Court properly held, arbitrary and capricious.

### **Administrative Work by Planning Boards**

In the Matter of Laurel Realty, LLC v. Planning Bd. of Town of Kent, 40 A.D.3d 857 (N.Y. App. Div., 2nd Dept., 2007), the plaintiff owed a 137.44-acre parcel of unimproved land in the Town of Kent. The parcel was zoned residential. The plaintiff applied to the Planning Board to subdivide the property. The Planning Board refused to consider the application due to its erroneous belief that the property had been subdivided illegally earlier. After a legal proceeding in the Supreme Court, the Planning Board agreed to hear the application. While reviewing the application, the Planning Board designated itself the lead agency for the SEQRA review. The Town Board then enacted a local law imposing an eight-month moratorium on the Planning Board's review of "certain subdivision applications, including the petitioner's application." The plaintiff filed an Article 78 action seeking a declaratory judgment that the moratorium was invalid. The Supreme Court found the law invalid. This decision was appealed to the Appellate Division. The Appellate Division found that the "moratorium, which was extended twice for short periods of time, is a valid stopgap or interim measure, reasonably designed to temporarily halt development while the Town considered updates to its master plan and comprehensive changes to its zoning ordinance." Furthermore, the court found that the moratorium, including its eight-month extension and shorter extension, was enacted for a reasonable amount of time. However, an unreasonable delay by the Town in finalizing zoning changes may render future extensions of the moratorium invalid. Furthermore, "the applicability of the moratorium to the petitioner's subdivision application did not violate the so-ordered stipulation of settlement in [a] previous proceeding commenced by the petitioner against the Planning Board, in which the Planning Board merely agreed to hear the petitioner's application in accordance with its own rules, including compliance with the moratorium after it was enacted." The Appellate Division found that the petitioner did not have a "clear legal right" to relief, and that the Supreme Court should have declared the moratorium valid.

In the Matter of Bagga v. Stanco, 90 A.D.3d 929 (N.Y. App. Div., 2nd Dept., 2011), the Planning Board of the Town of Oyster Bay approved the plaintiff's site plan application for the construction of a retail structure. The first floor of the building was to be divided into retail units, and the second floor was to be made up of 11 residential apartments. This was different from an earlier proposal by the plaintiff in which the second floor of the structure was to be used only for storage. The property was in a Neighborhood Business Zoning District, which allowed residential units above retail space. A consulting engineer found that the 11 apartments would add 60 vehicular trips during peak traffic hours on top of the trips generated by the original plan for the property. The engineers also found that the site plan would provide 73 off-street parking spaces, which exceeded the requirement of 67 off-street parking spaces under the Town Code. The Nassau County Planning Commission approved the site plan, finding that it "conformed with its objective of promoting mixed use commercial/residential development along arterial roadways, and that approval of the project might encourage redevelopment of other marginal properties" in the area. However, at two public hearings of the Town Planning Board, many residents

opposed the site plan approval “on the ground that apartments located over retail stores would attract undesirable tenants.” Therefore, the Planning Board denied the application. In their denial, the Planning Board noted “concern over access to the premises, the propensity for excessive traffic congestion, and lack of parking.” The plaintiff began an Article 78 action to annul the Planning Board’s determination. The Supreme Court denied the petition, finding that the Planning Board acted rationally since some of the residents who spoke at the Planning Board meetings were concerned about the increased traffic the proposal would create. The matter was appealed to the Appellate Division. The Appellate Division found that a “planning board has broad discretion in deciding applications for site plans...and judicial review is limited to determining whether the board’s action was illegal, arbitrary, or an abuse of discretion.” The Planning Board’s finding must be upheld if it is rational, and is not arbitrary and capricious. When reviewing decisions of planning boards, courts only consider substantial evidence on the record and see if it backs the board’s decision. The Appellate Division found that the record had no evidence to support the rationality of the Planning Board’s decision. Instead, the record contradicted the Planning Board’s concerns over traffic congestion, access, and parking. Furthermore, the Appellate Division noted that the site plan complied with the requirements of the Town Code, including the Zoning Ordinance and the Comprehensive Plan, and the proposed use was allowed in the zoning district. The Planning Board’s decision was determined to be based solely on generalized community anger, and nothing related to the Town Code. The Appellate Division found that “the Supreme Court should have granted the petition and annulled the Planning Board’s determination.”

### **Architectural Review Boards**

In Sagaponack Homeowners Ass'n v. Chief Bldg. Inspector, 279 A.D.2d 579 (N.Y. App. Div., 2nd Dept., 2001), landowners proposed to develop a single-family home with accessory structures, including a playhouse, beach, and garden pavilions. The Chief Building Inspector referred the owners seven building permit applications to the Architectural Review Board (ARB). The ARB approved five of the applications (and adjourned indefinitely a determination on the remaining two) and the Building Inspector issued five building permits. The plaintiffs were an unincorporated homeowner’s association consisting of local homeowners and individuals who owned property near the subject property. They challenged the ARB’s approval of the five applications, advising that the ARB’s decision was “preliminary and non-final.” The Supreme Court found that the ARB’s decision was final and binding, and that the plaintiff’s claim was time-barred. The plaintiffs appealed. The Appellate Division found that “administrative actions are not final and ripe for judicial review unless and until they impose an obligation, deny a right or fix some legal relationship as a consummation of the administrative process.” The Appellate Division found that determining finality necessitates an examination of the completeness of the administrative action and a consideration of whether the “decision-maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury.” Because that the ARB postponed any consideration of the other two applications does “not indicate that [the ARB] was derelict in its duty to ensure that the plans for the...parcel were of harmonious character; as required by [Town Law].” The claim was properly dismissed.

In the Matter of Birch Tree Partners, LLC v. Town of E. Hampton, 78 A.D.3d 693 (N.Y. App. Div., 2nd Dept., 2010), the plaintiff commenced an Article 78 action to review a determination of the Architectural Review Board of the Town of East Hampton (ARB) which granted the application of a landowner for the construction of a fence between the owner's property and the plaintiff's property. The Supreme Court denied the petition. The plaintiff appealed. The Appellate Division found that judicial review of the ARB's determination is limited to ascertaining whether the action "was illegal, arbitrary and capricious, or an abuse of discretion." In determining if a board's decision was arbitrary and capricious, a court must determine if it was based on a rational basis. An ARB's decision "should not be disturbed unless the record shows that the agency's action was arbitrary, unreasonable, irrational or indicative of bad faith." The Appellate Division found that the ARB fulfilled its duty to ensure that the fence was designed in a manner that was harmonious with its surroundings, based on the Zoning Code. The ARB's decision was upheld.

### **Miscellaneous Items**

#### **Comprehensive Plans/Spot Zoning by Town Boards/Planning Boards**

In the Matter of Hart v. Town Bd. of Town of Huntington, 114 A.D.3d 680 (N.Y. App. Div., 2nd Dept., 2014), the owners of an underused property applied for the rezoning of the lot from R-40, which allowed one single-family home per acre, to an R-RM Retirement Community District. This was required to build 66 townhouses on the property that would include affordable housing for seniors. While the application was being considered, the Town Board "adopted a master plan denominated as the Horizons 2020 Comprehensive Plan Update (hereinafter the Master Plan), which urged the preservation of open spaces while promoting a more diverse housing stock affordable to all income groups." The Board then approved the application for the rezoning. Opponents to the project then filed an Article 78 action seeking a declaration that the rezoning was spot-zoning and "was not accomplished in accordance with a comprehensive municipal land-use plan." The Town and the property owner moved for summary judgment on this matter. The Supreme Court granted the motion, and the plaintiffs appeal. The Appellate Division found that "a party challenging the determination of a local governmental board bears the heavy burden of showing that the target regulation is not justified under the police power of the state by any reasonable interpretation of the facts. If the validity of the legislative classification for zoning purposes is even fairly debatable, it must be sustained upon judicial review." When a plaintiff fails to illustrate a conflict with the comprehensive plan, the zoning classification must be affirmed. In this case, the Appellate Division found that the plaintiffs "failed to raise a triable issue of fact as to whether there was a clear conflict between the rezoning and the Master Plan." The Master Plan listed goals including maintaining open spaces and the low-density character of the neighborhood. However, the Master Plan also called for specialized housing, including senior housing and affordable housing. "Although the proposed development will likely increase the density of the neighborhood, it also will preserve a sizable portion of the property as open land, provide senior housing, and provide a number of affordable units." Therefore, the Court found that the rezoning of the property followed the Master Plan and did not constitute spot zoning.

#### **Re-zonings by Redevelopment Agencies/Town Boards**

In BLF Assoc., LLC v. Town of Hempstead, 59 A.D.3d 51 (N.Y. App. Div., 2nd Dept., 2008), the Town of Hempstead formed a local redevelopment agency to develop a "Usage Plan" (or redevelopment plan) for a piece of property formerly owned by the military that the town expected to acquire. However, the town did not acquire this land, and the land was sold to a developer. The town proceeded to adapt a Usage Plan for the land into a statute. The owner initiated an action in the Supreme Court seeking a determination that the Town's statute was unconstitutional. The owners moved for summary judgment, and the defendant Town cross-moved for summary judgment. The Supreme Court granted the owner's motion because the Town's statute was "ultra vires," and, therefore, void. The Town appealed. The Appellate Division found that "towns and other municipal authorities have no inherent power to enact or enforce zoning or land use regulations. They exercise such authority solely by legislative grant and in the absence of legislative delegation of power[,] their actions are ultra vires and void." The enabling statutes applicable here confers upon the Town the authority to enact ordinances which "[f]or the purpose of promoting the health, safety, morals or the general welfare of the community ... regulate and restrict the height, number of stories and size of buildings and other structures, the percentage of the lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, and the location and use of buildings, structures and land." Town law states that the Town may form "districts of such number, shape and area as may be deemed best suited to carry out the purposes of [the enabling] act; and within such districts it may regulate and restrict the erection, construction, reconstruction, alteration or use of buildings, structures or land." The Town Law also mandated that such zoning regulations be "made in accordance with a comprehensive plan." The Usage Plan called for specific numbers of, and types of, dwellings, which are not required under the local zoning ordinance. Furthermore, a plan to construct a 9,000-square foot community center does not fall under the requirements of the zoning ordinance. The Court found that the Usage Plan for the lot was "unnecessarily and excessively restrictive" and not serving a legitimate zoning purpose. Moreover, the requirement of the Usage Plan that the recreational facility be owned by a homeowners' association, and that the senior citizen homes be cooperative unit, are ultra vires, and therefore void. It is a "fundamental rule that zoning deals basically with land use and not with the person who owns or occupies it." Thus, the town's plan for the property does not fall under the zoning ordinance. Furthermore, the Appellate Division noted that the Usage Plan did not fall in line with the Town's Comprehensive Plan. The Appellate Division found that the Supreme Court "properly denied the defendants' cross motion and granted the owner's motion for summary judgment because the town's plan for the property was ultra vires.

### **SEQRA Review by Planning Boards**

In the Matter of Riverkeeper, Inc. v. Planning Bd. Of Town of Southeast, 9 N.Y.3d 219 (N.Y. Crt. Of Appeals, 2007), a developer submitted an application to the Planning Board of the Town of Southeast requesting approval of a proposed subdivision. Three years after declaring itself the lead agency under SEQRA, and mandating the preparation of a draft environmental impact statement (DEIS), the Planning Board found that the project "would likely have a significant impact on the environment." The property owner then prepared a DEIS, EIS, FEIS (final environmental impact statement), DSEIS (draft

supplemental environmental impact statement), and FSEIS, which were examined by the Planning Board and subjected to public review. The Planning Board then issued a SEQRA determination that the requirements of SEQRA had been met and that the project “minimized or avoid[ed] adverse environmental effects to the maximum extent practicable.” After a series of new discoveries of environmental concerns regarding the project and related litigation, the Planning Board found that a second SEIS was not required. The plaintiffs “challenged the Board’s determination that a second SEIS was not required.” In a comprehensive opinion dismissing the petitions, [the Supreme Court] concluded that the Board had taken the requisite hard look at the areas of concern and made a reasoned elaboration of its decision not to require a second SEIS. The Appellate Division reversed. A divided Appellate Division determined that the Board “could not have met its obligation under SEQRA without requiring a SEIS to analyze the current subdivision plat in light of the change in circumstances.” The matter was appealed to the Court of Appeals. The Court of Appeals found that “a lead agency’s determination whether to require a SEIS...is discretionary.” The decision to prepare a second SEIS as a result of newly discovered information “must be based upon...(a) the importance and relevance of the information; and (b) the present state of the information in the EIS.” Furthermore, the Court of Appeals found that the judicial review of the Planning Board’s determination, under SEQRA, is limited to “whether the agency identified the relevant areas of environmental concern, took a hard look at them, and made a reasoned elaboration of the basis for its determination.” The court did not want to second-guess the Planning Board, and found that the Planning Board’s decision should only be annulled if it is arbitrary, capricious, or unsupported by the evidence. “The courts may not substitute their judgment for that of the agency for it is not their role to weigh the desirability of any action or [to] choose among alternatives.” Based on the evidence provided, the Court of Appeals found that the Planning Board “took a hard look at the areas of environmental concern and made a reasoned elaboration of the basis for its conclusion that a second SEIS was not necessary.” Material the Planning Board relied on included the DEIS, the FEIS, the initial SEIS, supplemental reports by the Town’s wetlands consultant, a developer’s engineering consultant, and the Board’s own consultants. “The Board’s determination that the changes did not present significant adverse environmental impacts and did not require the preparation of a second SEIS was not arbitrary or capricious and [was] supported by the evidence.” The petition was dismissed.

**14th Annual Land Use & Sustainable Development Conference**  
**Land Use Law Center**  
**Elisabeth Haub School of Law**  
**Pace University**  
**December 8, 2016**

*Case Law Update Panel*

*Michael Allan Wolf*  
*Richard E. Nelson Chair in Local Government Law*  
*University of Florida Levin College of Law*

*Murr v. State of Wisconsin*, 859 N.W.2d 628 (Wisc. Ct. App. 2014), *cert. granted*, 136 S. Ct. 890 (2016)

*Litz v. Maryland Department of the Environment*, 131 A.3d 923 (Md. 2016)

*Harris County Flood Control District v. Kerr*, 2016 Tex. LEXIS 501 (2016)

*California Building Industry Association v. City of San Jose*, 351 P.3d 974 (Cal. 2015), *cert. denied*, 136 S. Ct. 928 (2016)

**COURT OF APPEALS  
DECISION  
DATED AND FILED  
December 23, 2014**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See WIS. STAT. § 808.10 and RULE 809.62.*

**Appeal No. 2013AP2828**

**Cir. Ct. No. 2012CV258**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**JOSEPH P. MURR, MICHAEL W. MURR, DONNA J. MURR AND  
PEGGY M. HEAVER,**

**PLAINTIFFS-APPELLANTS,**

**v.**

**STATE OF WISCONSIN AND ST. CROIX COUNTY,**

**DEFENDANTS-RESPONDENTS.**

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APPEAL from a judgment of the circuit court for St. Croix County:  
SCOTT R. NEEDHAM, Judge. *Affirmed.*

Before Hoover, P.J., Stark and Hruz, JJ.

¶1 PER CURIAM. Joseph Murr, Michael Murr, Donna Murr and Peggy Heaver (collectively, the Murrs) appeal a judgment dismissing their regulatory takings claim upon motions for summary judgment by the State of Wisconsin and St. Croix County. We agree with the circuit court that the

challenged regulatory action, an ordinance that effectively merged the Murrs' two adjacent, riparian lots for sale or development purposes, did not deprive the Murrs of all or substantially all practical use of their property. Accordingly, we affirm.

## BACKGROUND

¶2 This appeal represents the second time the Murrs' dispute with the County over the use of their property has come before this court. In *Murr v. St. Croix County Board of Adjustment*, 2011 WI App 29, ¶¶1-2, 332 Wis. 2d 172, 796 N.W.2d 837, we concluded the circuit court properly affirmed the County's denial of Donna Murr's request for a variance to separately sell or develop what are known as Lots E and F, two contiguous parcels on the St. Croix River.<sup>1</sup>

¶3 Our earlier opinion sets forth the history of the property, which we briefly restate here. Furthermore, as this is an appeal from a decision granting summary judgment against the Murrs, we view all pertinent facts and reasonable inferences from those facts in the light most favorable to the Murrs. See *Thomas ex rel. Gramling v. Mallett*, 2005 WI 129, ¶4, 285 Wis. 2d 236, 701 N.W.2d 523.

¶4 The Murrs' parents purchased Lot F in 1960. *Murr*, 332 Wis. 2d 172, ¶4. They built a cabin near the river and transferred title to their plumbing company. *Id.* In 1963, the Murrs' parents purchased an adjacent lot, Lot E, which

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<sup>1</sup> Donna Murr was the only named party in the previous suit. See *Murr v. St. Croix Cnty. Bd. of Adjustment*, 2011 WI App 29, ¶4 n.4, 332 Wis. 2d 172, 796 N.W.2d 837. Her interests are aligned with those of her siblings in the present matter, so for ease of reading we will refer to the Murrs collectively in our recitation of the facts pertaining to the earlier suit.

In addition, our previous decision did not specifically identify the lots using the "E" and "F" nomenclature. The Murrs represent this nomenclature comes from an unrecorded subdivision map. For ease of reading, we will supplement the statement of facts in our earlier opinion with the appropriate designation.

has remained vacant ever since. *Id.* The Murrs allege Lot E was purchased as an investment property, with the intention of developing it separate from Lot F or selling it to a third party.

¶5 The lots have a common topography. Each is bisected by a 130-foot bluff, but they are moderately level at the top and near the river. *Id.* Together, the lots contain approximately .98 acres of net project area.<sup>2</sup> *Id.* The Murrs' parents transferred Lot F to the Murrs in 1994, followed by Lot E in 1995.<sup>3</sup> *Id.*

¶6 The 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots under ST. CROIX COUNTY, WIS., CODE OF ORDINANCES, LAND USE & DEV., Subch. III.V, LOWER ST. CROIX RIVERWAY OVERLAY DIST. § 17.36I.4.a. (July 1, 2007) (the Ordinance), which has been in place since the mid-1970s. *See State v. St. Croix Cnty.*, 2003 WI App 173, ¶4, 266 Wis. 2d 498, 668 N.W.2d 743. The Ordinance prohibits the individual development or sale of adjacent, substandard lots under common ownership, unless an individual lot has at least one acre of net project area.<sup>4</sup>

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<sup>2</sup> “Net project area” means “developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands.” WIS. ADMIN. CODE § NR 118.03(27) (Feb. 2012).

<sup>3</sup> Although not material to our decision because ownership was at all times common, we note that the Murrs’ parents conveyed the contiguous properties to two other siblings in addition to the Murrs. The record indicates those siblings subsequently quitclaimed their ownership interests to the Murrs.

<sup>4</sup> As set forth in our earlier decision, the Ordinance reads:

(4) **SUBSTANDARD LOTS** Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:

(a) 1. The lot is in separate ownership from abutting lands, or

(continued)

However, if abutting, commonly owned lots do not each contain the minimum net project area, they together suffice as a single, buildable lot. *Murr*, 332 Wis. 2d 172, ¶11 n.9.

¶7 Years later, after repeated flooding, the Murrs decided to flood proof the cabin on Lot F and sell Lot E as a buildable lot. Among other things, the Murrs sought a variance to separately use or sell their two contiguous lots. *Id.*, ¶5. The DNR and county zoning staff opposed the Murrs' application and, following a public hearing, the St. Croix County Board of Adjustment denied the application. *Id.*, ¶6. The Murrs sought certiorari review and the circuit court affirmed the portion of the Board's decision relevant to this appeal. *Id.* On appeal, we agreed with the circuit court that the Board acted appropriately. *Id.*, ¶2. The Wisconsin Supreme Court denied the Murrs' subsequent petition for review.

2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.

(b) All structures that are proposed to be constructed or placed on the lot and the proposed use of the lot comply with the requirements of this subchapter and any underlying zoning or sanitary code requirements.

*Murr*, 332 Wis. 2d 172, ¶10 & n.8 (noting that the Ordinance's internal paragraph lettering and numbering is illogical and potentially confusing, such that use of lettering and numbering of the administrative code provision on which the Ordinance is based, WIS. ADMIN. CODE § NR 118.08(4) (Feb. 2012), is more appropriate). As we previously noted, the administrative code provision is "not a model of clear draftsmanship," and we renew our call, implicit in our previous decision, for the DNR to review its language. *See id.*, ¶11.

¶8 The Murrs then filed a complaint against the State and County pursuant to WIS. STAT. § 32.10,<sup>5</sup> alleging that the Ordinance resulted in an uncompensated taking of their property under WIS. CONST. art. I, § 13.<sup>6</sup> The Murrs alleged that the Ordinance and the administrative code provision on which it was patterned, WIS. ADMIN. CODE § NR 118.08(4) (Feb. 2012), deprived them of “all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot.” They asserted Lot E could not be put to alternative uses like agriculture or commerce due to its size, location and steep terrain. Finally, they alleged the lot was usable only for a single-family residence, “and without the ability to sell or develop it the lot is rendered useless.”

¶9 The State and County separately sought summary judgment. Their motions essentially advanced the same arguments: the Murrs’ claim was time barred; the Murrs failed to exhaust their administrative remedies; they had no protectable property right to sell a portion of their property; and they were not deprived of all or substantially all the beneficial use of their property.

¶10 The circuit court granted summary judgment to the County and State. The court first concluded the Murrs’ claim was time barred, reasoning that the Ordinance “had immediate economic consequence[s]” when it was enacted. Despite this conclusion, the court also reached the merits of the Murrs’ claim. It determined that the applicable law required it to analyze the effect of the

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<sup>5</sup> All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

<sup>6</sup> The Murrs represented they had served the State and County with a Notice of Claim that demanded compensation for the taking of their land. The County denied the claim by letter dated October 3, 2011. The State did not issue a denial, but the claim was deemed denied due to the passage of time.

Ordinance on the Murrs' property as a whole, not each lot individually. Accordingly, the court held there was no taking because the Murrs' property, taken as a whole, could be used for residential purposes, among other things. Specifically, the court noted the undisputed fact that, even under the Ordinance, “[a] year-round residence could be built on top of the bluff and the residence could be located entirely on Lot E, entirely on Lot F, or could straddle both lots.” Further, the court determined the Murrs' property—again, defined as Lots E and F combined—retained significant value, citing an appraisal opining that the merger decreased the property value by less than ten percent. The court denied a subsequent motion for reconsideration, and the Murrs now appeal.

## DISCUSSION

¶11 We review a grant of summary judgment de novo, applying the same methodology as the circuit court. *Hardy v. Hoefferle*, 2007 WI App 264, ¶6, 306 Wis. 2d 513, 743 N.W.2d 843. Summary judgment is appropriate if the “pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” WIS. STAT. § 802.08(2). As the moving parties, the County and the State must show a defense that would defeat the Murrs’ claim. See *Voss v. City of Middleton*, 162 Wis. 2d 737, 748, 470 N.W.2d 625 (1991).

¶12 The Murrs argue the circuit court erred for two reasons. First, they assert their claim is not time barred. They reason their claim was not ripe until their request for a variance was denied and they exhausted their appellate rights from that decision. Second, the Murrs argue the Ordinance deprived them of all, or substantially all, beneficial use of their property. We conclude the Murrs’

takings claim fails on its merits as a matter of law. Accordingly, we do not reach the issue of whether their claim was timely filed and assume, without deciding, that it was. *See Raasch v. City of Milwaukee*, 2008 WI App 54, ¶2, 310 Wis. 2d 230, 750 N.W.2d 492 (citing *Gross v. Hoffman*, 227 Wis. 296, 299-300, 277 N.W. 663 (1938)) (where one issue is dispositive, we need not address other issues).

¶13 The federal and state constitutions do not prohibit the taking of private property for public use, but they do require that the government provide just compensation for any taking. *260 N. 12th St., LLC v. DOT*, 2011 WI 103, ¶43, 338 Wis. 2d 34, 808 N.W.2d 372.<sup>7</sup> “A ‘taking’ need not arise from an actual physical occupation of land by the government.” *Eberle v. Dane Cnty. Bd. of Adjustment*, 227 Wis. 2d 609, 621, 595 N.W.2d 730 (1999). A “taking” can also occur if the government enacts a regulation “that is ‘so onerous that its effect is tantamount to a direct appropriation.’” *E-L Enters., Inc. v. Milwaukee Metro. Sewerage Dist.*, 2010 WI 58, ¶22, 326 Wis. 2d 82, 785 N.W.2d 409 (quoting *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 537 (2005)). The Murrs allege the latter type of taking—a regulatory or constructive taking—occurred here. Whether the Ordinance constituted a taking of the Murrs’ property without compensation is a question of law. *See Zealy v. City of Waukesha*, 201 Wis. 2d 365, 372, 548 N.W.2d 528 (1996).

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<sup>7</sup> The Fifth Amendment of the United States Constitution, made applicable to the States through the Fourteenth Amendment, “mandates that private property shall not ‘be taken for public use, without just compensation.’” *260 N. 12th St., LLC v. DOT*, 2011 WI 103, ¶43, 338 Wis. 2d 34, 808 N.W.2d 372 (quoting U.S. CONST. amend. V). Similarly, the Wisconsin Constitution prohibits the taking of private property “for public use without just compensation therefor.” *Id.* (quoting WIS. CONST. art. I, § 13).

¶14 A landowner who believes the government has taken his or her property without instituting formal condemnation proceedings may bring an inverse condemnation claim under WIS. STAT. § 32.10 to recover just compensation. *See E-L Enters.*, 326 Wis. 2d 82, ¶36. That statute, which is the legislative fulfillment of WIS. CONST. art. I, § 13, is, by its terms, designed solely to deal with the traditional exercise of the government's eminent domain power vis-à-vis physical occupation. *E-L Enters.*, 326 Wis. 2d 82, ¶36. However, our supreme court has concluded regulatory takings are also cognizable under § 32.10. *See E-L Enters.*, 326 Wis. 2d 82, ¶37.

¶15 The landmark case in this respect was *Howell Plaza, Inc. v. State Highway Commission*, 66 Wis. 2d 720, 226 N.W.2d 185 (1975). There, the court concluded "that there need not be an actual taking in the sense that there be a physical occupation or possession by the condemning authority ...." *Id.* at 730. To state a claim under WIS. STAT. § 32.10 in the absence of physical occupation, the facts alleged must demonstrate that a government restriction "deprives the owner of all, or substantially all, of the beneficial use of his property." *Id.* at 726; *see also E-L Enters.*, 326 Wis. 2d 82, ¶37.

¶16 Here, the Murrs seek compensation solely for the alleged taking of Lot E. They contend that, given the application of the Ordinance, Lot E "serves no purpose or use" and has no value because it "cannot be sold." The Murrs argue the circuit court erred by examining the beneficial uses of Lots E and F in combination. Instead, citing *Jonas v. State*, 19 Wis. 2d 638, 121 N.W.2d 235 (1963), and *Lippert v. Chicago & Northwestern Railway Co.*, 170 Wis. 429, 175 N.W. 781 (1920), the Murrs contend there is a genuine issue of material fact as to whether Lots E and F were used together such that they may be considered as one for purposes of the regulatory takings analysis.

¶17 Contrary to the Murrs' assertions, the issue of whether contiguous property is analytically divisible for purposes of a regulatory takings claim was settled in *Zealy*. There, our supreme court concluded that before considering whether a regulatory taking has occurred, "a court must first determine what, precisely, *is* the property at issue ...." *Zealy*, 201 Wis. 2d at 375. The landowner in *Zealy* argued the City of Waukesha accomplished a regulatory taking by creating a conservancy district over 8.2 acres of his 10.4-acre parcel, thereby precluding residential development on the majority of the property. *Id.* at 370-71. The court, however, rejected the owner's attempt to so segment the property, concluding a "landowner's property in such a case should be considered as a whole." *Id.* at 376. Because the landowner retained over two acres zoned for business and/or residential use, and farming was permitted within the conservancy district, no compensable taking occurred. *Id.* at 378-80.

¶18 In so holding, the court credited both the Supreme Court's historical formulation of the takings inquiry and practical considerations. "[T]he United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel ...." *Id.* at 375-76. Instead, to determine whether a particular government action has accomplished a taking, courts are to focus "'both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole ....'" *Id.* at 376 (quoting *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978)). This analysis preserves a municipality's authority to place reasonable limits on the use of property without requiring the payment of compensation for every incidental infringement of property rights. See *id.* (quoting *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987)).

¶19 The Murrs contend *Zealy* is distinguishable because that case turned on the owner's ability to use one large parcel, whereas the Murrs assert they have been wholly deprived of the use of at least one of their two separate parcels. We disagree. There is no dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, contiguity is the key fact under *Zealy*. See *Zealy*, 201 Wis. 2d at 375-76 (observing the Supreme Court "has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel ...."). This is evident from our supreme court's subsequent decision in *R.W. Docks & Slips v. State*, 2001 WI 73, 244 Wis. 2d 497, 628 N.W.2d 781. There, a developer partially completed a marina and condominiums but the DNR, noting an emergent weedbed along the shoreline, refused to grant a permit for the dredging necessary to complete the remaining 71 boat slips. *Id.*, ¶¶8-9. Applying *Zealy*, the court held that the developer's subsequent takings claim must be analyzed "in light of the marina as a whole rather than the parcel that was to have contained the 71 boat slips." *Id.*, ¶27.

¶20 Neither *Jonas* nor *Lippert*, the authorities on which the Murrs rely, cast any doubt upon what has become a well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein. See *R.W. Docks & Slips*, 244 Wis. 2d 497, ¶¶25-27 & n.5 (reaffirming *Zealy* and declining to revisit the issue). *Jonas* and *Lippert* both involved formal condemnation proceedings; they were not regulatory takings cases. See *Jonas*, 19 Wis. 2d at 639; *Lippert*, 170 Wis. at 429-30. As such, the issue was not whether there had been a taking but rather the amount of compensation due.

¶21 When properly viewed as valuation cases, it becomes clear *Jonas* and *Lippert* are inapplicable. The property owners in those cases argued they

were entitled to “severance” damages—an amount representing diminutions in the value or use of other property attributable to the loss of the condemned property. *See Jonas*, 19 Wis. 2d at 642; *Lippert*, 170 Wis. at 430-32. The availability of such damages turns on “[u]nity of use,” a concept which assesses whether the properties “are used as a unit so that each is dependent and related to the use of the other, or [whether they are] … devoted to separate and distinct uses, so as to constitute independent properties.” *See Jonas*, 19 Wis. 2d at 642; *Lippert*, 170 Wis. at 431-32; *see also Spiegelberg v. State*, 2006 WI 75, ¶14, 291 Wis. 2d 601, 717 N.W.2d 641 (“The unity of use rule permits a condemnee to receive compensation when a taking from one property must be considered in terms of its effect on another property, in order for those affected … to be fully compensated.”); *Bigelow v. West Wis. Ry. Co.*, 27 Wis. 478, 487 (1871). Nothing to which the Murrs have directed our attention persuades us the unity of use concept should be applied to determine whether a regulatory taking has occurred in the first instance.

¶22 With the analysis properly focused on the Murrs’ property as a whole, it is evident they have failed to establish a compensable taking, as a matter of law. There is no dispute that their property suffices as a single, buildable lot under the Ordinance. *See Murr*, 332 Wis. 2d 172, ¶11 n.9. Thus, the circuit court properly observed the Murrs can continue to use their property for residential purposes. Specifically, the Ordinance allows the Murrs to build a year-round residence on top of the bluff, if they choose to raze their cabin located near the river. Notably, this use may include Lot E, as the new residence could be located entirely on Lot E, entirely on Lot F, or it could straddle both lots. The Murrs’ ability to use Lot E for residential purposes, standing alone, is a significant and valuable use of the property. *See Palazzolo v. Rhode Island*, 533 U.S. 606, 631

(2001) (regulation permitting a landowner to build a substantial residence does not leave property economically idle under the Takings Clause). Accordingly, the Murrs have not been denied “all or substantially all practical use[]” of their parcel. *Zealy*, 201 Wis. 2d at 374.

¶23 The Murrs, at least implicitly, acknowledge that they *could* locate a residence on Lot E if they so choose. However, they then focus on what Lot E *cannot* be used for. The Murrs point to deposition testimony indicating Lot E is unsuitable for use in wildlife conservation, agriculture or forestry. In framing the issue in this way, the Murrs ignore the applicable test. We are not concerned with what uses are prohibited or what are the “highest and best uses,” but rather only what use or uses remain. *See Zinn v. State*, 112 Wis. 2d 417, 424, 334 N.W.2d 67 (1983) (taking occurs when a restriction placed on the property practically or substantially renders the property useless for all reasonable purposes).

¶24 “Many zoning ordinances place limits on the property owner’s right to make profitable use of some segments of his property.” *Keystone Bituminous Coal Ass’n*, 480 U.S. at 498. The critical question is whether the property owner has been denied “all or substantially all practical uses of [the] property ....” *Zealy*, 201 Wis. 2d at 374. Here, as in *Zealy*, the “extent of the parcel at issue ... is clearly identified, and just as clearly the parcel retains substantial uses.” *Id.* at 380.

¶25 The Murrs obliquely suggest that even if their property has not suffered a loss of all or substantially all its practical use, they are nonetheless entitled to compensation because a partial taking has occurred. In addition to the “categorical” takings analysis, set forth above, courts also use an “ad hoc factual, traditional takings inquiry” that analyzes the “nature and character of the

governmental action, the severity of the economic impact of the regulation on the property owner, and the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property." *R.W. Docks & Slips*, 244 Wis. 2d 497, ¶17.

¶26 With respect to the nature and character of the government action, when a property owner does "not suffer the loss of substantially all of the beneficial uses of his land," we need not consider whether the regulation advances a legitimate state interest. *Zealy*, 201 Wis. 2d at 380-81. In any event, the Murrs do not contend the County lacked a valid public purpose for enacting the Ordinance. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (court of appeals need not address undeveloped arguments). Indeed, in our earlier decision regarding the Murrs' property, we observed that the Ordinance is part of a federal and state effort to protect the "national wild and scenic rivers system," including the Lower St. Croix River. *Murr*, 332 Wis. 2d 172, ¶10. The Ordinance and similar laws were designed to "preserve property values while limiting environmental impacts." *Id.*, ¶14.

¶27 To that end, our supreme court's decision in *Just v. Marinette County*, 56 Wis. 2d 7, 201 N.W.2d 761 (1972), is instructive. There, a shoreland zoning ordinance established a conservancy district over wetlands within 1,000 feet of a lake and prohibited any filling without a permit. *Id.* at 12-14. This, in effect, prevented "the changing of the natural character of the land ...." *Id.* at 17. The landowner asserted the ordinance was unconstitutional because it amounted to constructive taking without compensation. *Id.* at 14. The court disagreed, finding the ordinance a valid exercise of the police power to "protect navigable waters and the public rights therein from the degradation and deterioration which results from uncontrolled use and development of shorelands." *Id.* at 10, 14-16. The court

emphasized that the owner could still use the land “for natural and indigenous uses,” and remarked that “[a]n owner of land has no absolute and unlimited right to change the essential natural character of his land so as to use it for a purpose for which it was unsuited in its natural state and which injures the rights of others.” *Id.* at 17. **Just** establishes that because of the strong public interest in preventing degradation of the natural environment, property owners advancing takings claims based on environmental legislation have a much more difficult time showing they were deprived of all or substantially all practical use of their property. *See Howell Plaza, Inc. v. State Highway Comm'n*, 92 Wis. 2d 74, 85-86, 284 N.W.2d 887 (1979).

¶28 The Murrs also argue a genuine issue of material fact exists regarding the severity of the Ordinance’s economic impact on their property. They contend the degree to which the Ordinance compromised the value of their property is disputed. The Murrs disagree with the circuit court’s conclusion that the property decreased in value by less than ten percent when considered as a whole versus as two separate lots. Rather, the Murrs argue the record includes expert opinions that Lot E is “up to 90% less valuable than land that can be independently developed.”

¶29 Any disagreement between experts as to the value of the property does not create a genuine issue of material fact in this case. The Murrs’ valuation argument assumes they had an unfettered right to use their land as they pleased at the inception of their ownership. This is not so. The Ordinance was on the books for nearly two decades before the Murrs became the common owners of Lots E and F. This is precisely why we concluded in the Murrs’ earlier appeal that any diminution in their property’s value occurred at the time they took title to both contiguous lots:

Because the provisions are already effective prior to subsequent owners' acquisition of their lots, there is no concern that the provisions would deprive those persons of their property. Any effect on property values has already been realized.

Further, because Murr is charged with knowledge of the existing zoning laws, *see State ex rel. Markdale Corp. v. Board of Appeals of Milwaukee*, 27 Wis. 2d 154, 162, 133 N.W.2d 795 (1965), as a subsequent owner she was already in a better position than any person who owned at the [Ordinance's] effective date. Unless she or a subsequent owner brought her vacant lot under common ownership with an adjacent lot, that parcel would forever remain a distinct, saleable, developable site. Unlike those who owned on the effective date, she had the option to acquire, or not acquire, an adjacent lot and merge it into a single more desirable lot.

**Murr**, 332 Wis. 2d 172, ¶¶16-17. In sum, the Murrs knew or should have known that their lots were "heavily regulated from the get-go." *See R.W. Docks & Slips*, 244 Wis. 2d 497, ¶29.

¶30 This reasoning also disposes of the Murrs' assertion that they have always intended Lot E to be developed or sold individually. We regard this as an argument under the factor assessing the degree to which the regulation has interfered with the property owner's distinct investment-backed expectations in the property.<sup>8</sup> The Murrs presumably knew that bringing their substandard, adjacent parcels under common ownership resulted in a merger under the Ordinance. Accordingly, even if the Murrs did intend to separately develop or sell

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<sup>8</sup> While the precise contours of their argument are unclear, to the extent the Murrs are attempting to argue their expectation of separate use should inform the contiguous property rule of *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 375-76, 548 N.W.2d 528 (1996), we disagree. A property owner's subjective, desired use is irrelevant to determining the extent of the property at issue for purposes of a regulatory taking. *See id.* at 377-78 ("Looking to a landowner's anticipated use of various parcels and sub-parcels of land in order to determine the extent of the parcel at issue would require ascertaining a landowner's subjective intent before being able to evaluate a possible takings claim.").

Lot E, that expectation of separate treatment became unreasonable when they chose to acquire Lot E in 1995, after their having acquired Lot F in 1994.<sup>9</sup> In short, the Murrs “never possessed an unfettered ‘right’” to treat the lots separately. *See Murr*, 332 Wis. 2d 172, ¶30.

¶31 Based on the foregoing, we conclude the circuit court properly granted summary judgment in favor of the County and State. The undisputed facts establish that the Murrs’ property, viewed as a whole, retains beneficial and practical use as a residential lot. Accordingly, we conclude they have not alleged a compensable taking as a matter of law.

*By the Court.*—Judgment affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

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<sup>9</sup> In their reply brief, the Murrs argue that *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), stands for the proposition that “acquiring land after enactment of a regulation is not fatal to a regulatory takings claim.” While that is an arguably accurate recitation of *Palazzolo*’s holding, it does not benefit the Murrs here. We reject any notion that the Murrs’ investment-backed expectations can be used to limit *Zealy*’s holding regarding how the relevant property is defined. *See Zealy*, 201 Wis. 2d at 375-77. Future generations continue to have the right to challenge unreasonable limitations on the use and value of land, regardless of when the property was purchased. *See Palazzolo*, 533 U.S. at 627-28. This does not mean, however, that they can expect their opinions about the future use of property to affect how the relevant property is defined for purposes of determining whether a regulatory taking has occurred.



*Gail B. Litz v. Maryland Department of the Environment, et al.*, No. 23, September Term, 2015. Opinion by Harrell, J.

## **EMINENT DOMAIN – INVERSE CONDEMNATION**

“Inverse condemnation” is a shorthand description of an action by which a landowner seeks just compensation for a taking of his or her property in the absence of formal condemnation proceedings. *See Coll. Bowl, Inc. v. Mayor & City Council Of Baltimore*, 394 Md. 482, 489, 907 A.2d 153, 157 (2006). It is possible for a plaintiff to state a claim for inverse condemnation by pleading governmental inaction in the face of an affirmative duty to act.

## **EMINENT DOMAIN – INVERSE CONDEMNATION – MARYLAND AND LOCAL GOVERNMENT TORT CLAIMS ACTS**

Inverse condemnation is a constitutional claim requiring just compensation as a remedy. It is not covered under the Local Government Tort Claims or Maryland Tort Claims Acts. Similar to the eminent domain provisions under the Fifth and Fourteenth Amendments to the United States Constitution, Article III, section 40 of the Maryland Constitution does not provide sovereign immunity to state or local governments for an unconstitutional taking.

## **TORTS – TRESPASS – LOCAL GOVERNMENT TORT CLAIMS ACT**

Trespass is a tort covered by the Local Government Tort Claims Act and subject to the LGTCA’s notice requirements.

Circuit Court for Caroline County  
Case No. 05-C-10-013616

Argued: November 9, 2015

IN THE COURT OF APPEALS  
OF MARYLAND

No. 23

SEPTEMBER TERM, 2015

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GAIL B. LITZ

v.

MARYLAND DEPARTMENT OF THE  
ENVIRONMENT, et al.,

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Barbera, C.J.,  
Battaglia,  
Greene,  
Adkins,  
McDonald,  
Watts,  
Harrell, Glenn T., Jr. (Retired, Specially  
Assigned),  
JJ.

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Opinion by Harrell, J.  
Battaglia, McDonald and Watts, JJ.,  
concur and dissent.

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Filed: January 22, 2016

“The nine most terrifying words in the English language are,  
‘I’m from the government and I’m here to help.’”

-Ronald Reagan, 40th President of the United States,  
News Conference (12 August 1986).

Petitioner, Gail B. Litz, might have welcomed hearing those nine words spoken to her, but, according to her Third Amended Complaint, they were not forthcoming. In this litigation, Ms. Litz makes a second appearance before this Court regarding a parcel of real property (containing a lake) in Caroline County, Maryland, that was contaminated allegedly by run-off from failed septic systems serving homes and businesses in the Town of Goldsboro. The human sewage seeped out of the septic fields into ground and surface water flowing into drainage swales, which drained into streams flowing into Ms. Litz’s lake. Ms. Litz operated a popular lake-front recreational campground on her property in Goldsboro. Unable to operate the campground because of the pollution to her lake, Ms. Litz lost the property through foreclosure by the bank holding the mortgage.

She filed a complaint in the Circuit Court for Caroline County. After two prior trips to the Court of Special Appeals and one to this Court, Ms. Litz’s remaining claims against Respondents, the State of Maryland, the Maryland Department of the Environment (“MDE”), the Department of Health and Mental Hygiene (in the guise of the Caroline County Health Department) (collectively referred to in this opinion sometimes as the “State” or the “State Respondents”), and the Town of Goldsboro, the case reaches us for the second time regarding her claims of inverse condemnation against all Respondents and trespass against the Town. We issued a writ of certiorari to consider questions regarding Ms. Litz’s relative success in stating these claims and the

applicability of the Local Government Tort Claims Act and the Maryland Tort Claims Act. After determining in our first encounter with this litigation that Ms. Litz filed suit within applicable statutes of limitations, we hold now that, at the preliminary motion stage of the litigation, Ms. Litz provided sufficient factual averments to state claims for inverse condemnation against Respondents.<sup>1</sup>

## **ALLEGATIONS IN THE THIRD AMENDED COMPLAINT<sup>2</sup>**

The 140 acre Litz property is located in the Town of Goldsboro in Caroline County, Maryland. When Ms. Litz's parents purchased the property in 1948, it contained a pond and grist mill. The Litz family constructed a dam in the mid-1950s to create originally a 28-acre lake, known as "Lake Bonnie," to assist with irrigation of the fields. The Litz family opened also a recreational campground business on the property, which had campsites, swimming, fishing, and boating – centered around Lake Bonnie. Ms. Litz inherited the property in 2001 and became the owner of the campground business. It was her "intention and expectation that she would continue to own and operate the Campground as her primary occupation and source of income."

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<sup>1</sup> The issue of whether Ms. Litz stated adequately a claim for trespass against the Town is not at issue before this Court. The issue was raised only in the Town of Goldsboro's Petition for a Writ of Certiorari, which this Court denied.

<sup>2</sup> Our recitation of the "facts" (and reasonable inferences drawn therefrom favorable to Ms. Litz) come purely from Ms. Litz's Third Amended Complaint. We will focus exclusively on those allegations that relate to the questions for which we granted certiorari.

Lake Bonnie “receives its water from two local streams, the Oldtown Branch and the Broadway Branch, and [the lake] discharges a constant overflow of water [through a spillway] directly into the Choptank River,” a tributary of the Chesapeake Bay. Because Goldsboro was a small town<sup>3</sup>, there was no public water or sewer service available. The residents and businesses in the Town relied on individual wells and septic systems. Both of the local streams receive groundwater and surface water from roads maintained by the Maryland State Highway Administration and flow into Lake Bonnie. Two local drainage associations<sup>4</sup> were created along these streams. The municipal surface water open drainage collection system flows also into the streams and ultimately into Lake Bonnie.

As time passed, the septic systems within the Town began to fail, the septic fields overflowed into the open drainage system, and contaminated the two streams, which led to the contamination of Lake Bonnie. Following failed attempts to fix the problem in the 1970s, the Caroline County Health Department conducted studies in the 1980s.<sup>5</sup> A study conducted in 1985 by Lester A. Coble, Jr., then Director of the Caroline County

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<sup>3</sup> According to the Third Amended Complaint, the population of Goldsboro in 2000, was 216 people.

<sup>4</sup> Drainage associations “are networks of drainage ditches that drain the local fields, and are funded by a mixture of federal, state, and local money. The PDAs have also been informally used as storm water drainage systems for the Town, and have been used to remove waste water from the Town.”

<sup>5</sup> According to Ms. Litz’s allegations, the Caroline County Health Department, a State agency for present purposes, “had the legal responsibility to review applications for septic systems, where appropriate issue permits for septic systems, and conduct inspections of the septic systems.”

Department of Health, “found that between 70% and 80% of the Town had at least one of the three following problems: (1) confirmed sewage pits; (2) raw sewage or waste water; or (3) shallow wells less than one hundred feet or deep wells less than fifty feet from a source of contamination.”

By 1988, the Caroline County Health Department reported to the Maryland Department of the Environment that the shallow wells tested in Goldsboro contained “elevated levels of fecal coliform,” i.e., pathogens found in human bodily waste. On 18 September 1995, the Caroline County Health Department concluded that the “use of the stormwater management system in the Town as a sewage system has gotten to crisis proportions.” A 1 December 1995 letter from the Maryland Department of the Environment stated that “[t]here are actual water quality impacts on Lake Bonnie. . . It now appears that the situation has deteriorated and created environmental concerns that will need to be addressed.”

On 8 August 1996, MDE and Goldsboro’s then-Mayor William H. Bartin signed an administrative consent order which “explain[ed] the problems, order[ed] Goldsboro to take certain actions, impose[d] mandatory reporting obligations and specifie[d] penalties for non-compliance.” Some of the specific requirements of the agreement between MDE and Goldsboro included:

1. Within 60 days . . . (Goldsboro will) identify the private sewage disposal systems located in and around Goldsboro which are discharging pollutants to surface or ground water . . .
2. By October 30, 1996, complete a study to identify and characterize the construction of a public sewer system. . .

3. By January 1, 1997, submit (to MDE) for review and approval a plan and schedule . . . for construction of a public sewer system (the “Compliance Plan”)

4. Within 30 days of approval of the Compliance Plan, begin implementation of the Compliance Plan.

Meeting the timetable and remedies contemplated by this Consent Order did not come to pass.

In 2004, the Caroline County Health Department issued warnings to multiple towns, including Goldsboro, about issuing additional building permits for areas with water and sewage concerns. Even with these warnings, “the Town has failed to comply with any of the material terms of the Consent Order and MDE has enforced no part of it.”

Because Lake Bonnie was being polluted continually by the pollutants in the water flowing through the drainage system into the Oldtown Branch and the Broadway Branch and then into Lake Bonnie, Ms. Litz alleges that “the campground has been destroyed, and Litz’s property has been substantially devalued,” which left her “unable to pay the mortgage on the Litz property because the campground was generating no income.” A foreclosure action resulted and the property was sold to Provident State Bank on 14 May 2010 for \$364,000.

## **PROCEDURAL HISTORY**

Ms. Litz’s original complaint, filed on 8 March 2010, sought a permanent injunction and alleged negligence, trespass, private and public nuisance, and inverse condemnation against the Town of Goldsboro and Caroline County (the Health

Department<sup>6</sup>) and negligence and inverse condemnation against MDE. An amendment later added a count for mandamus or equitable relief under the Environmental Standing Act. Ms. Litz's second amended complaint added the Department of Health and Mental Hygiene ("DVMH") and the State of Maryland as defendants, seeking a permanent injunction and alleging negligence, trespass, private and public nuisance, and inverse condemnation against the newly added defendants.

On 13 September 2010, a hearing was conducted in the Circuit Court on motions to dismiss (based on a host of defenses, including applicable statutes of limitation) filed by MDE, DVMH, the State, the County, and Goldsboro. The Circuit Court granted the motions to dismiss as to all defendants<sup>7</sup>, save the Town, reserving ruling as to the Town to allow for a response to be filed. On 22 September 2010, Ms. Litz filed a Motion for Reconsideration in the Circuit Court and, a few days later, filed her opposition to Goldsboro's Motion to Dismiss. On the same day, Ms. Litz filed her Third Amended Complaint, which added some factual allegations, but stated no additional claims.

The trial judge denied Ms. Litz's Motion for Reconsideration and dismissed her claims against all of the defendants, with prejudice and without leave to amend. Ms. Litz

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<sup>6</sup> “[A]ny claim against the County would be against the County Health Department, which was for the purposes of the present case a State agency.” *Litz v. Maryland Dep’t of Env’t*, 434 Md. 623, 634, 76 A.3d 1076, 1082 (2013) (hereinafter “*Litz I*”).

<sup>7</sup> On the record, the Circuit Court “dismissed all counts against the State defendants on the ground that the State was protected by sovereign immunity and [Ms.] Litz failed to comply with the requirements of the Maryland Tort Claims Act.” *Litz I*, 434 Md. at 634, 76 A.3d at 1082.

appealed to the Court of Special Appeals<sup>8</sup>, which affirmed, in an unreported opinion, the Circuit Court’s dismissal based on its narrow conclusion that Ms. Litz’s claims were barred by the relevant statutes of limitation.

We granted Ms. Litz’s first Petition for Certiorari, *Litz v. Maryland Dep’t of Env’t*, 429 Md. 81, 54 A.3d 759 (2012). We concluded ultimately that “it was error to affirm the grant of the motions to dismiss Litz’s causes of action for negligence, trespass, and inverse condemnation on the grounds of limitations, but we affirm the judgments of the Circuit Court and the intermediate appellate court in dismissing Litz’s nuisance counts.” *Litz v. Maryland Dep’t of Env’t*, 434 Md. 623, 642, 76 A.3d 1076, 1087 (2013) (hereinafter “*Litz I*”). We remanded the case to the Court of Special Appeals to conduct a review of the other arguments advanced by the governmental defendants for why Ms. Litz’s suit should be dismissed totally.

On remand, the Court of Special Appeals reviewed the legal sufficiency of Ms. Litz’s remaining tort and inverse condemnation claims, the applicability and satisfaction of the notice requirements under the Maryland Tort Claims Act (“MTCA”) and Local Government Tort Claims Act (“LGTCA”), and the defense of governmental immunity. In an unreported opinion, the intermediate appellate court concluded that Ms. Litz failed

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<sup>8</sup> In her brief filed with the Court of Special Appeals, Ms. Litz did not appeal the dismissal of her tort claims (trespass and negligence) against the State or the Environmental Standing Act claim against the MDE, leaving only the inverse condemnation claims against these defendants. She appealed the dismissal of her claims for negligence, nuisance, trespass, and inverse condemnation against the Town.

to state an inverse condemnation claim against the State<sup>9</sup>, reasoning that “[a]t most, MDE [and the other State entities] can be charged with discretionary inaction, which would not support a taking claim.” Ultimately, the Court of Special Appeals held “that the circuit court properly dismissed the State and its agencies from the case,” but that it was “error to dismiss the negligence, trespass and inverse condemnation claims against the Town.”

At the conclusion of the intermediate appellate court’s second review, Ms. Litz’s remaining causes of actions included only those three claims against the Town.

Ms. Litz filed her second Petition for Writ of Certiorari with this Court, which we granted, *Litz v. Maryland Dep’t of the Env’t, et al.*, 442 Md. 515 (2015), to consider four questions, which we have reordered for organizational convenience:

- 1) Whether the Court of Special Appeals erred when it held that Petitioner failed to state a cause of action for inverse condemnation against the State government Respondents?
- 2) Whether an inverse condemnation claim comes within the notice requirements of the Maryland Tort Claims Act and the Local Government Tort Claims Act?
- 3) Whether the Court of Special Appeals exceeded the scope of this Court’s remand order when it considered an issue disavowed expressly by Respondents, to wit, whether Petitioner’s claim for inverse condemnation against the State government Respondents was subject to the Maryland Tort Claims Act?<sup>10</sup>

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<sup>9</sup> As described previously, the State includes: the State of Maryland, DHMH, MDE, and the Caroline County Health Department, the latter acting as a State agency for purposes of this case.

<sup>10</sup> In our opinion, *Litz I*, 434 Md. at 657, 76 A.3d at 1095, we remanded the case to the Court of Special Appeals for further proceedings: “On remand, the intermediate appellate court shall have the opportunity to entertain any other arguments properly before the court.” The question of whether the Court of Special Appeals exceeded the scope of our remand order was not briefed fully by all sides and we note that, under

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(Continued...)

- 4) Whether a trespass claim is covered by the notice requirement of the Local Government Tort Claims Act?

We conclude that Ms. Litz stated adequately in her Third Amended Complaint a facial claim for inverse condemnation against Respondents. Moreover, a claim for inverse condemnation is not covered by the notice provisions of either tort claims act. We agree, however, with the intermediate appellate court's holding that the tort of trespass is covered by the notice requirement of the LGTCA. Thus, we reverse in part and affirm in part the judgment of the Court of Special Appeals, and remand with instructions to remand the case to the Circuit Court for Caroline County for further proceedings.

#### **STANDARD OF REVIEW**

Because this case was disposed of by the Circuit Court through the grant of motions to dismiss, pursuant to Maryland Rule 2-322, our review of the sufficiency of the facts alleged is limited to the four corners of the relevant complaint, the Third Amended Complaint. We “accept all well-pled facts in the complaint, and reasonable inferences drawn from them, in a light most favorable to the non-moving party.” *Converge Servs. Grp., LLC v. Curran*, 383 Md. 462, 475, 860 A.2d 871, 878-79 (2004). Thus, dismissal of a complaint “is proper only if the alleged facts and permissible inferences, so viewed,

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(...continued)

Maryland Rule 8-131(a), it is within our discretion to decide an issue not raised below “if necessary or desirable to guide the trial court or to avoid the expense and delay of another appeal.” Thus, we will exercise our discretion to decide the issues, which we have determined are before us properly.

would, if proven, nonetheless fail to afford relief to the plaintiff.” *Ricketts v. Ricketts*, 393 Md. 479, 492, 903 A.2d 857, 864 (2006) (citations omitted). We determine “whether the trial court was legally correct, examining solely the sufficiency of the pleading.” *Ricketts*, 393 Md. at 492, 903 A.2d at 865 (citation omitted).

## **DISCUSSION**

### **I. Inverse Condemnation**

#### **a. Contentions**

Ms. Litz contends that she alleged sufficiently a cause of action for inverse condemnation by alleging that the failure of Respondents to address the pollution and sewage problems led directly to the substantial devaluing of her property and its ultimate loss. She highlights this Court’s prior opinion in which we stated that “a reasonable trier of fact could infer that Litz alleges two distinct takings: 1) the loss of the use and enjoyment of Lake Bonnie and the Campground; and (2) the foreclosure of her property in May 2010.” *Litz I*, 434 Md. at 656, 76 A.3d at 1095. Ms. Litz argues further that these claims are not covered by the MTCA or the LGTCA because the claims are not torts, but rather unconstitutional takings. Because unconstitutional takings are pleaded, Ms. Litz maintains that the State (and its agencies) and the Town should not be able to avail themselves of the defense of governmental immunity.

The State Respondents posit that the lower courts dismissed properly Ms. Litz’s inverse condemnation claim against them because her allegations did not reveal any affirmative act (regulatory or otherwise) by the State which led to a taking. Additionally, the State Respondents argue that any injury Ms. Litz suffered was the result of acts

caused by private third parties, i.e., the property owners in Goldsboro whose septic fields failed. Because Ms. Litz did not state sufficiently a claim for inverse condemnation, the State sees the issue of the applicability of the MTCA and the LGTCA as effectively moot. The Town takes a similar position on this issue, responding that Ms. Litz complained only that the Town had not enacted any regulation or taken effective action to stop the contamination caused by private citizens and, therefore, there was no governmental taking.

### **b. Sufficiency of the Third Amended Complaint**

Article III, Section 40 of the Maryland Constitution provides: “The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.” Section 40 has been determined to “have the same meaning and effect in reference to an exaction of property, and that the decisions of the Supreme Court on the Fourteenth Amendment<sup>[11]</sup> are practically direct authorities.” *Bureau of Mines of Maryland v. George’s Creek Coal & Land Co.*, 272 Md. 143, 156, 321 A.2d 748, 755 (1974). Although this constitutional provision covers specifically eminent domain actions, it also grounds a cause of action that has come to be known as an inverse condemnation.

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<sup>11</sup> “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

An inverse condemnation claim is characterized as “a shorthand description of the manner in which a landowner recovers just compensation for a taking of his property when condemnation proceedings have not been instituted.” *Coll. Bowl, Inc. v. Mayor & City Council Of Baltimore*, 394 Md. 482, 489, 907 A.2d 153, 157 (2006) (citing *United States v. Clarke*, 445 U.S. 253, 257, 100 S.Ct. 1127, 1130, 63 L.Ed.2d 373, 377 (1980)). Essentially, a plaintiff may “recover the value of property which has been taken in fact by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency.” *Coll. Bowl, Inc.*, 394 Md. at 489, 907 A.2d at 157 (quoting D. Hagman, Urban Planning and Land Development Control Law 328 (1971)). The Supreme Court explains that a government is liable for inverse condemnation if it “forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Coll. Bowl, Inc.*, 394 Md. at 489, 907 A.2d at 157 (citing *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83, 100 S.Ct. 2035, 2041, 64 L.Ed.2d 741, 753 (1980)).

To state a claim for inverse condemnation, a plaintiff must allege facts showing ordinarily that the government action constituted a taking. Defining a “taking” for purposes of an inverse condemnation claim is a “fact-intensive” inquiry. The Supreme Court has explained that a plaintiff seeking to state a claim for inverse condemnation “bears a substantial burden” and must be able to show that “justice and fairness” entitle him or her to compensation. *Eastern Enters. v. Apfel*, 524 U.S. 498, 523, 118 S. Ct. 2131, 2146 (1998). Significant factors in the analysis include: “the economic impact of the regulation, its interference with reasonable investment backed expectations, and the

character of the governmental action.” *Eastern Enter.,* 524 U.S. at 523-24, 118 S. Ct. at 2146 (citations omitted). Accordingly, an inverse condemnation claim may arise ordinarily in multiple ways:

[T]he denial by a governmental agency of access to one’s property, regulatory actions that effectively deny an owner the physical or economically viable use of the property, conduct that causes a physical invasion of the property, hanging a credible and prolonged threat of condemnation over the property in a way that significantly diminishes its value, or, closer in point here, conduct that effectively forces an owner to sell.

*Coll. Bowl, Inc.*, 394 Md. at 489, 907 A.2d at 157.

A difficulty with Ms. Litz’s claim of a “taking” fitting neatly within conventional thinking about inverse condemnation is that her allegations focus predominantly on the inaction of Respondents, rather than any affirmative action by those parties. There is no controlling Maryland law that we could find that sheds light on this wrinkle. Thus, we look outside our borders for guidance. Upon this review, it seems appropriate (and, in this case, fair and equitable, at least at the pleading stage of litigation) to recognize an inverse condemnation claim based on alleged “inaction” when one or more of the defendants has an affirmative duty to act under the circumstances. Therefore, we hold, as a matter of Maryland law, that an inverse condemnation claim is pleaded adequately where a plaintiff alleges a taking caused by a governmental entity’s or entities’ failure to act, in the face of an affirmative duty to act.

Our survey revealed that, in some states, unalloyed allegations of government inaction alone may suffice to plead adequately an inverse condemnation claim. For example, the language of the Minnesota Constitution provides that “[p]rivate property

shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.” Minn. Const. Art. I, § 13. In application of this provision, the Minnesota courts follow a standard that “[a]n unconstitutional taking is a governmental action or *inaction* that deprives a landowner of all reasonable uses of its land.” *Evenson v. City of St. Paul Bd. of Appeals*, 467 N.W.2d 363, 365 (Minn. Ct. App. 1991) (emphasis added).

In contrast, in South Carolina, a plaintiff brought a cause of action against the City of Greenville alleging that the city “improperly and negligently designed and maintained its municipal drainage system in the area where his business was located,” which led to substantial damage to his business and property after heavy rains resulted in flooding. *Hawkins v. City of Greenville*, 594 S.E.2d 557, 560 (S.C. Ct. App. 2004). The South Carolina Court of Appeals concluded that the plaintiff could not state a claim for inverse condemnation by alleging only “failures to act.” *Hawkins*, 594 S.E.2d at 562. The failure to act would not sustain a claim for inverse condemnation because the case law in South Carolina held: “To establish an inverse condemnation, a plaintiff must show: ‘(1) an *affirmative, positive, aggressive act* on the part of the governmental agency; (2) a taking; (3) the taking is for a public use; and (4) the taking has some degree of permanence.’” *Id.* (emphasis added). Of course, the major distinction between the Minnesota and South Carolina approaches is the specific requirement of the South Carolina case law requiring an “affirmative” act on the part of the government. This

requirement is more specific than found in Maryland case law and, thus, is not persuasive in our analysis of the present case.<sup>12</sup>

We find more persuasive cases which sanction a plaintiff advancing an inverse condemnation claim in the face of government inaction where the governmental agency had an affirmative duty to act under the particular circumstances. A case from a Florida District Court found that when a county failed to “reasonably maintain and repair Old A1A [a county-owned road] that it has effectively abandoned it, thereby depriving [the appellants] of access to their property without compensation[, it was] a cognizable claim.” *Jordan v. St. Johns Cnty.*, 63 So. 3d 835, 839 (Fla. Dist. Ct. App. 2011). Old A1A had been subject over the years to considerable damage from storms and erosion. *Jordan*, 63 So. 3d at 837. The appellants owned property located in a subdivision accessible only by Old A1A because the subdivision was located on a barrier island. *Jordan*, 63 So. 3d at 836. The court concluded that “governmental inaction—in the face of an affirmative duty to act—can support a claim for inverse condemnation.” *Jordan*, 63 So. 3d at 839. Because it was the county’s responsibility to maintain this road and it failed to do so, the pleaded inaction supported maintenance of an inverse condemnation cause of action against the county.

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<sup>12</sup> Similar to the Minnesota Constitution, the language of Maryland’s eminent domain provision of the Maryland Constitution is general and broad: “The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.” Md. Const. Art. III, § 40.

The California appellate courts have held also that “in order to prove the type of governmental conduct that will support liability in inverse condemnation it is enough to show that the entity was aware of the risk posed by its public improvement and deliberately chose a course of action—or inaction—in the face of that known risk.” *Arreola v. Cnty. of Monterey*, 122 Cal. Rptr. 2d 38, 55 (Cal. Ct. App. 2002), *as modified on denial of reh’g* (July 23, 2002). In *Arreola*, the county had been alerted by concerned property owners starting in 1977 about the potential failure of a river levee due to the weakening effects of a build-up of vegetation and the increased risk of resultant flooding. *Arreola*, 122 Cal. Rptr. 2d at 56. Monterey’s actual knowledge of the maintenance problems and its ability to control the project, made it immaterial whether the county had “responsibility for operation of the project.” *Arreola*, 122 Cal. Rptr. 2d at 69-72. In spite of its knowledge of the problem, the County “did not take any action to correct the situation until 1991 or later [and the] knowing failure to clear the Project channel, in the face of repeated warnings and complaints was” enough for an inverse condemnation claim after floods damaged the plaintiff’s property. *Id.*

We find persuasive these cases. Within the Third Amended Complaint, Ms. Litz alleges that the Town had “undertaken [since at least 1973] the task of correcting its failing community sewage system.” Her complaint includes allegations that, by 1985, the Town was informed of the results of a study conducted by the Caroline County Department of Health, which concluded that immediate action was necessary. These warnings continued between 1985 and 1996 before any purported affirmative “action” was taken, to wit, the Consent Order was executed. Additionally, Ms. Litz was notified

by a 12 June 1996 letter from the Caroline County Health Department that, because the sewage discharges had not been eliminated, Lake Bonnie continued to be a health threat. Even after the 1996 Consent Order was signed between MDE and the Town, Respondents failed to effect any changes to the sewage treatment or drainage systems in the Town. In 2004, the Caroline County Health Department distributed a warning to the Town regarding additional septic or building permits being approved.

The Court of Special Appeals referred to this situation as an overall “failure to regulate.” The cases cited by the intermediate appellate court to support this characterization focused on interference with various types of property rights by third parties, which government failed to avert, mitigate, or cure.<sup>13</sup> Those cases are not persuasive here. Two of those cases involved assertions that the Federal Government had committed a taking because it failed to regulate conduct by third parties; however, the property interest at issue for each plaintiff was not a traditional in-fee property interest.

*See Georgia Power Co. v. United States*, 633 F.2d 554, 555 (Ct. Cl. 1980) (company claimed a taking of its electrical powerline easement); *Alves v. United States*, 133 F.3d 1454, 1455-56 (Fed. Cir. 1998) (plaintiff “argued that the [Bureau of Land Management’s] failure to contain the trespass [by others] constituted a Fifth Amendment taking and a breach of contract based on his interpretation of his grazing permits and/or an exchange-of-use agreement as contracts”). Neither of these cases resulted in a

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<sup>13</sup> This endorsed the theory put forth by the State that any damage to Lake Bonnie and Ms. Litz’s property was attributable to third-party, private property owners, not Respondents.

“taking” because the regulations imposed by the Federal Government were not meant to act as an “insurer that private citizens will act lawfully with respect to property subject to governmental regulation.” *Alves*, 133 F.3d at 1458. Additionally, the courts determined that both of these situations were more like private tort actions, as opposed to an unconstitutional taking, because of the nature of the implicated property rights and the allegations advanced by the plaintiff.

The Town of Goldsboro relies on *Casey v. Mayor & City Council of Rockville*, 400 Md. 259, 929 A.2d 74 (2007), for the proposition that “[e]ssential to the successful assertion of any regulatory takings claim is a final and authoritative determination of the permitted and prohibited uses of a particular piece of property.” *Casey*, 400 Md. at 308, 929 A.2d at 103-04; *but see Falls Rd. Cnty. Ass’n, Inc. v. Baltimore Cnty.*, 437 Md. 115, 142-44, 85 A.3d 185, 201-02 (2014) (even after there was a final administrative order and the county has the general duty and responsibility “to enforce land use and zoning requirements, it clearly does not pursue enforcement on every arguable violation”). Certainly we do not disagree with this statement from *Casey* in the context of the zoning action involved there, but we disagree with the Town’s characterization of Ms. Litz’s claim as being analogous. Our intermediate appellate court colleagues viewed Ms. Litz’s claim as a “failure to regulate.” Her claim was not expressed as a regulatory taking, such as a “down-zoning,” which might require analysis under the *Casey* precedent.

Although the sewage was flowing from the failed septic systems of private citizens and/or businesses (which governmental entity approved the installation of the systems and whether the approvals were proper has yet to be explored in this case because

discovery has yet to occur), Ms. Litz alleges that the Town and the State were aware of the failure of the community sewage systems, the contamination of the surface and groundwater, and the conveyance of the sewage to Lake Bonnie via the community drainage system. It is not merely a case of a property right being affected adversely by private third parties solely and exclusively. Ms. Litz's property was alleged to have been "condemned" by the failure of the State and Town in the face of an affirmative duty to abate a known and longstanding public health hazard. Although questions of which Respondents had statutory or legal duties with regard to abatement of the contamination are open in the proceeding as far as it has advanced, it is not frivolous to hypothesize that state, county, and municipal agencies may have duties to step in to protect the public health, as illustrated by the execution of the 1996 Consent Order.

In *State Dep't of Env't v. Showell*, 316 Md. 259, 264, 558 A.2d 391, 393 (1989), this Court held that it was within the broad powers of the State Department of Health and Mental Hygiene to execute a consent order to protect the public health when it was clearly a "'reasonable remedial measure' executed within the authority of the Department to promote a legitimate governmental objective." These powers afforded to the Department to protect public health included:

In respect to the scope of the Department's powers, § 9-204(a) of the Health-Environmental Article provides that "[t]he Secretary has general supervision and control over the waters of the State, insofar as their sanitary and physical condition affect the public health or comfort and may make and enforce rules and regulations and order works to be executed to correct and prevent their pollution." As to existing sewerage systems, the Secretary may "[c]ompel their operation in a manner that will protect the public health and comfort." § 9-204(b)(1).

*Showell*, 316 Md. at 270, 558 A.2d at 396 (alterations in original). Under the current version of the Environment Article of the Maryland Code, the State is empowered to step-in to ensure the enforcement of the Federal Water Pollution Control Act. *See* Maryland Code (1984, 2013 Repl. Vol.), Environment Article, § 9-253 (“Env’t”).

Even if, however, it is determined on remand that the State Respondents and the Town did not have a general or specific statutory duty to act to abate this public health hazard, Ms. Litz’s allegations may be read to assert that execution of the Consent Order created an affirmative duty to act. Without discovery regarding the origins of and seeming failure to enforce the Consent Order and its terms, it was premature to resolve Ms. Litz’s claim for inverse condemnation by the grant of the motions to dismiss. Moreover, at the current stage of these proceedings and given our holding here regarding governmental inaction as a basis for an inverse condemnation claim, the parties have not briefed or argued the applicable law under these circumstances.

Although we agree that Ms. Litz stated adequately a claim for inverse condemnation, we caution that our decision should not be seen by any party as either an unqualified victory or calamity. Ms. Litz may not succeed ultimately on her inverse condemnation claim against any or all of the Respondents. We conclude only that it was improper to decide as a matter of law, at the present stage of the litigation, that Ms. Litz failed to state a claim for inverse condemnation. Her entitlement to relief may become clearer or blurred after the respective sides have the opportunity to conduct discovery and argue the law of liability.

### **c. Application of the LGTCA and the MTCA to an Inverse Condemnation Claim**

The LGTCA was created “to limit the designated local governments’ financial liability as well as to provide the employees of local governments certain protections from damages.” *Rounds v. Maryland-Nat. Capital Park & Planning Comm’n*, 441 Md. 621, 638, 109 A.3d 639, 648-49 (2015), *reconsideration denied* (Mar. 27, 2015). We conclude that the General Assembly did not intend to include a claim for inverse condemnation to come within the ambit of the provisions of either tort claims act.<sup>14</sup>

A claim for inverse condemnation is not a tort in a traditional sense and has been treated routinely and differently than torts. In *Reichs Ford Rd. Joint Venture v. State Roads Comm’n of the State Highway Admin.*, 388 Md. 500, 506 n.2, 880 A.2d 307, 310 n.2 (2005), the circuit court dismissed all of the plaintiff’s tort claims for failure to follow the notice requirements of the MTCA. The plaintiff’s inverse condemnation claim, however, was allowed to move forward, without the necessity of proof of compliance with the notice provision of the MTCA. *Id.*

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<sup>14</sup> In *Rounds v. Maryland-Nat. Capital Park & Planning Comm’n*, 441 Md. 621, 643, 109 A.3d 639, 651-52 (2015), we explained:

Nothing in the statute’s language or its legislative history indicates that the General Assembly intended to exclude any category of tortious conduct committed by a local government or its employees, from the scope of the LGTCA notice requirement. As we have previously indicated, “[t]his Court has been most reluctant to recognize exceptions in a statute when there is no basis for the exceptions in the statutory language.”

*See also Lee v. Cline*, 384 Md. 245, 256, 863 A.2d 297, 304 (2004) (holding that “[t]here are no exceptions in the statute for intentional torts or torts based upon violations of the Maryland Constitution. This Court has been most reluctant to recognize exceptions in a statute when there is no basis for the exceptions in the statutory language”).

Additionally, it is well-established that “that agents of the State do not enjoy immunity with respect to a wrongful taking of property without just compensation.” *Dep’t of Nat. Res. v. Welsh*, 308 Md. 54, 60, 521 A.2d 313, 316 (1986). We have explained:

. . . it would be strange indeed, in the face of the solemn constitutional guarantees, which place private property among the fundamental and indestructible rights of the citizen, if this principle could be extended and applied so as to preclude him from prosecuting an action. . . against a State Official unjustly and wrongfully withholding property.

*Lee v. Cline*, 384 Md. 245, 263, 863 A.2d 297, 308 (2004) (citation and quotations omitted). These constitutional guarantees require that state officials not be immune from suit because, as “expressed in Article 19 of the Maryland Declaration of Rights, that a plaintiff injured by unconstitutional state action should have a remedy to redress the wrong.” *Lee*, 384 Md. at 264, 863 A.2d at 308. It is only logical that courts would treat eminent domain and inverse condemnation claims differently from common law or statutory torts because the remedy afforded to the respective plaintiff is different.

We have explained that “constitutionally speaking, fair market value is usually the only measure of damages in an eminent domain condemnation.” *Reichs Ford Rd. Joint Venture*, 388 Md. at 513, 880 A.2d at 314 (citing *Kimball Laundry Co. v. United States*, 338 U.S. 1, 5–6, 69 S.Ct. 1434, 1438, 93 L.Ed. 1765(1949)).<sup>15</sup> We have recognized “that

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<sup>15</sup> Within the context of eminent domain and inverse condemnation proceedings, fair market value is defined as:

applying the LGTCA damages cap to a constitutionally based taking, or inverse condemnation could conflict with a vested right to just compensation.” *Espina v. Jackson*, 442 Md. 311, 332-33, 112 A.3d 442, 455 (2015) (citations and quotations omitted). This conflict arises because the eminent domain provision of the Maryland Constitution<sup>16</sup> creates “an implied contract between the government and a private landowner.” *Widgeon v. E. Shore Hosp. Ctr.*, 300 Md. 520, 531, 479 A.2d 921, 926 (1984). This implied contract differs from the duty element of Maryland tort law. Because the remedy afforded to a plaintiff in the case of a taking is fair market value, the damages “cap” associated with the LGTCA and the MTCA should not apply. By parity of reasoning, the notice requirements of each tort claims act would not apply either.

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(...continued)

(b) The fair market value of property in a condemnation proceeding is the price as of the valuation date for the highest and best use of the property which a vendor, willing but not obligated to sell, would accept for the property, and which a purchaser, willing but not obligated to buy, would pay, excluding any increment in value proximately caused by the public project for which the property condemned is needed. In addition, fair market value includes any amount by which the price reflects a diminution in value occurring between the effective date of legislative authority for the acquisition of the property and the date of actual taking if the trier of facts finds that the diminution in value was proximately caused by the public project for which the property condemned is needed, or by announcements or acts of the plaintiff or its officials concerning the public project, and was beyond the reasonable control of the property owner.

Maryland Code (1974, 2003 Repl. Vol.), Real Property Article, § 12-105(b) (“RP”).

<sup>16</sup> “The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation.” Md. Constitution, Art III, § 40.

Therefore, we conclude that Ms. Litz’s claim for inverse condemnation is not covered by the LGTCA or the MTCA, and especially their respective notice requirements.

## **II. Trespass Claim against the Town of Goldsboro**

Ms. Litz contends that the Court of Special Appeals erred by deciding that her trespass claim against Goldsboro was a tort subject to the LGTCA and its notice requirement. She relies on Maryland common law to argue that local governments should not be afforded immunity from a trespass claim. She contends further that the adoption of the LGTCA did not change the common law standard and, therefore, her trespass claim should not be subject to the LGTCA.

The Town responds that Ms. Litz did not assert an actual trespass claim against it, alleging only that the Town failed to stop a trespass by others. Because Ms. Litz did not allege that the Town committed a trespass, according to the Town, the issue of whether this claim is covered by the LGTCA is moot.

Under common law, a trespass claim is generally “an intentional or negligent intrusion upon or to the possessory interest in property of another.” *Schuman v. Greenbelt Homes, Inc.*, 212 Md. App. 451, 475, 69 A.3d 512, 526 *cert. denied sub nom. Schuman v. Greenbelt Homes*, 435 Md. 269, 77 A.3d 1086 (2013) (citation and quotation marks omitted). In Ms. Litz’s Third Amended Complaint, she alleged that the “Town, County, DHMH and the State are invading and have invaded Litz’s property by approving residential septic systems in the Town that channel polluted ground water and discharge those waters in unnatural and harmful quantities, qualities, and rates of flow onto Litz’s property.” In our earlier opinion in this litigation, we found that the

complaint alleged a continuing cause of action on this score because, in the light most favorable to Ms. Litz, “a trier of fact could conclude that the Town’s duties were ongoing and continuous.” *Litz I*, 434 Md. at 648-49, 76 A.3d at 1091. In specific reference to the trespass claim, we concluded that

Although her cause of action for trespass appears to be in reference to the ongoing effects from the approval of the septic systems, drawing reasonable inferences in the light most favorable to [Ms.] Litz, we do not construe this allegation to assert that the Town on a single occasion approved a septic system in Goldsboro that has channeled polluted water onto her property. Additionally, there is nothing in the Complaint that indicates that the Town did not approve any septic systems within three years of [Ms.] Litz filing a claim in 2010. From the earlier allegations that the private septic systems all penetrated the groundwater, that they were contributing to contamination of the ground and surface water, that such water was channeled eventually into Lake Bonnie, and that the contamination problems continued over a long period of time, one could infer reasonably that approval of septic systems by the Town contributed to the continual flow of effluent from the Town to Lake Bonnie.

*Litz I*, 434 Md. at 650, 76 A.3d at 1091. Thus, Ms. Litz’s trespass claim was not barred by the relevant statute of limitations. We are tasked here, however, with determining whether the LGTCA’s notice requirement applies to the trespass claim. The Court of Special Appeals determined that a trespass claim is considered a tort subject to the LGTCA. We agree.

The Court of Special Appeals relied on our decision in *Lee v. Cline* to conclude that the LGTCA embraced trespass claims. In *Lee*, our focus was on the language of the MTCA, which “plainly appear[ed] to cover intentional torts and constitutional torts as long as they were committed within the scope of state employment and without malice or gross negligence.” *Lee*, 384 Md. at 256, 863 A.2d at 304. Because the “term ‘tort’ as

defined by Blacks encompasses all ‘civil wrong,’ not just wrongs that were recognized as a civil wrong at common law,” it would follow necessarily that a trespass claim is included within this definition. *Espina*, 442 Md. at 325, 112 A.3d at 450.

Ms. Litz takes issue with the intermediate appellate court’s reliance on *Lee* because *Lee* involved an interpretation of the MTCA, not the LGTCA. The MTCA was amended in 1985<sup>17</sup> to broaden the coverage “to include tort actions generally, with certain specified exceptions and limitations. Section 12-104(a)(1) of the State Government Article now provides that . . . [n]either intentional torts (in the absence of malice), nor torts based upon constitutional violations, are excluded.” *Lee*, 384 Md. at 255, 863 A.2d at 303. Therefore, under this statute, as long as the intentional tort or constitutional violation was “committed within the scope of state employment and without malice or gross negligence,” it is subject to the MTCA. *Lee*, 384 Md. at 256, 863 A.2d at 304. Because “the purpose of the [Maryland] Tort Claims Act’s immunity is to insulate state employees generally from tort liability if their actions are within the scope of

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<sup>17</sup> When the General Assembly enacted the Maryland Tort Claims Act in 1981, the waiver of the State’s governmental immunity was limited to six distinct categories of claims:

These six categories were limited to specific types of negligence actions such as the negligent operation or maintenance of a motor vehicle, negligence by a state health care employee, defective conditions in state structures or property, and negligent actions by state employees in state parks or recreation facilities. These six categories would not have encompassed intentional torts or tort actions based upon constitutional violations.

*Lee*, 384 Md. at 255, 863 A.2d at 303.

employment and without malice or gross negligence,” it would be reasonable for this “broader purpose” to apply fully to non-malicious intentional torts and covered constitutional violations. *Lee*, 384 Md. at 261, 863 A.2d at 307.

There is not a vast chasm between the language of the two statutory tort claim schemes as to the tortious conduct covered. The LGTCA was enacted for a purpose similar to the MTCA, to “provide a remedy for those injured by local government officers and employees, acting without malice in the scope of their employment, while ensuring that the financial burden of compensation is carried by the local government ultimately responsible for the public officials’ acts.” *Ashton v. Brown*, 339 Md. 70, 108, 660 A.2d 447, 465-66 (1995). Consequentially, the analysis for which tortious conduct is covered would be largely identical.<sup>18</sup> The LGTCA “covers municipalities and counties and applies to ‘employees,’ as distinguished from the common law concept of public officials, and it applies to all torts without distinction, including intentional and constitutional torts.” *Thomas v. City of Annapolis*, 113 Md. App. 440, 457, 688 A.2d 448, 456 (1997). Because the language of the LGTCA makes no distinction between intentional and non-intentional torts, Ms. Litz’s trespass claim against the Town of Goldsboro would be subject to the LGTCA and its notice requirement.

The notice requirement of the LGTCA is “intended to apprise a local government

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<sup>18</sup> The only major difference between the two statutes for present analytical purposes is the protection that each affords the state employees – the MTCA provides state employees with direct immunity from suit, whereas the LGTCA grants to local government employees only immunity from damages, not from suit.

of its possible liability at a time when it could conduct its own investigation, i.e., while the evidence was still fresh and the recollection of the witnesses was undiminished by time, sufficient to ascertain the character and extent of the injury and its responsibility in connection with it.” *Prince George’s Cnty. v. Longtin*, 419 Md. 450, 466-67, 19 A.3d 859, 869 (2011) (citing *Rios v. Montgomery County*, 386 Md. 104, 126–27, 872 A.2d 1, 14 (2005)). Under the LGTCA, “an action for unliquidated damages may not be brought against a local government or its employees unless the notice of the claim required by this section is given within 1 year after the injury.” Maryland Code (1974, 2013 Repl. Vol.), Courts & Judicial Proceedings Article § 5-304(b)(1) (“CJP”). It further requires a plaintiff to provide notice in writing and “shall state the time, place, and cause of the injury.” CJP § 5-304(b)(2).

We concluded previously that Ms. Litz’s trespass claim was a continuing tort based on the “ongoing effects from the approval of the septic systems.” *See Litz I*, 434 Md. at 650, 76 A.3d at 1091-92. Because we were not asked in the earlier case to determine whether Ms. Litz’s notice under the LGTCA was timely, we affirm now the judgment of the Court of Special Appeals, which concluded that Ms. Litz may be able to show that her notice to the Town under the LGTCA was timely, and hold that it was improper for the Circuit Court to grant the Town’s motion to dismiss Ms. Litz’s trespass claim at this preliminary stage of litigation. Discovery will reveal likely the answer to this asserted defense.

Thus, Ms. Litz is entitled to continue to litigate her tort claims (negligence and trespass) against the Town, but must show compliance with the notice requirements of

the LGTCA. We conclude further that her inverse condemnation claims against the State Respondents and the Town may proceed, without regard to the notice provisions of the MTCA or the LGTCA.

**JUDGMENT OF THE COURT OF SPECIAL APPEALS  
AFFIRMED IN PART AND REVERSED IN PART.  
CASE REMANDED TO THE COURT OF SPECIAL  
APPEALS WITH INSTRUCTIONS TO REMAND THE  
CASE TO THE CIRCUIT COURT FOR CAROLINE  
COUNTY FOR FURTHER PROCEEDINGS. COSTS IN  
THIS COURT AND THE COURT OF SPECIAL  
APPEALS TO BE PAID BY RESPONDENTS.**

Circuit Court for Caroline County  
Case No. 05-C-10-013616

Argued: November 9, 2015

IN THE COURT OF APPEALS  
OF MARYLAND

No. 23

September Term, 2015

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GAIL B. LITZ

v.

MARYLAND DEPARTMENT OF THE  
ENVIRONMENT, ET AL.

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Barbera, C.J.  
Battaglia  
Greene  
Adkins  
McDonald  
Watts  
Harrell, Jr., Glenn T. (Retired,  
Specially Assigned),

JJ.

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Concurring and Dissenting Opinion by Watts,  
J., which Battaglia and McDonald, JJ., join

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Filed: January 22, 2016

Respectfully, I concur in part and dissent in part. I agree with the Majority that “the tort of trespass is covered by the notice requirement of the” Local Government Tort Claims Act (“the LGTCA”). Maj. Slip Op. at 9.<sup>1</sup> Assuming that we reach the issue, I also agree with the Majority that “a claim for inverse condemnation is not covered by the notice provisions of” the LGTCA and the Maryland Tort Claims Act (“the MTCA”). Maj. Slip Op. at 9. I, however, would not reach that issue because I agree with the Court of Special Appeals that Gail B. Litz (“Litz”), Petitioner, failed to state a claim for inverse condemnation against the State and its agencies (together, “the State”). Accordingly, I would affirm the judgment of the Court of Special Appeals.<sup>2</sup>

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<sup>1</sup>As the Majority notes, in its petition for a writ of *certiorari*, the Town contended that Litz failed to state a claim for trespass. This Court denied the Town’s petition for a writ of *certiorari*, and granted only Litz’s petition for a writ of *certiorari*, which did not present a question as to whether Litz stated a claim for trespass. Thus, like the Majority, I express no opinion on whether Litz adequately stated a claim for trespass, as that issue is not before this Court.

On a related note, the Majority lists, as one of the questions presented in Litz’s petition for a writ of *certiorari*, the issue of “[w]hether the Court of Special Appeals exceeded the scope of this Court’s remand order[.]” Maj. Slip Op. at 8. In a footnote, the Majority notes that this issue “was not briefed fully by all sides[,]” Maj. Slip Op. at 8 n.9, but the Majority states: “[W]e will exercise our discretion to decide the issues, which we have determined are before us properly[.]” Maj. Slip Op. at 9 n.9. The Majority, however, does not address the issue of whether the Court of Special Appeals exceeded the scope of this Court’s remand order. Given that the Majority expresses no opinion on this issue, neither do I.

<sup>2</sup>The Circuit Court for Caroline County (“the circuit court”) dismissed all of Litz’s claims against all of the defendants. Litz appealed, and the Court of Special Appeals affirmed. Litz filed a petition for a writ of *certiorari*, which this Court granted. See Litz v. Md. Dep’t of the Env’t, 429 Md. 81, 54 A.3d 759 (2012). This Court affirmed in part, reversed in part, and remanded to the Court of Special Appeals. See Litz v. Md. Dep’t of Env’t, 434 Md. 623, 657, 76 A.3d 1076, 1096 (2013). On remand, the Court of Special Appeals, among other things: (1) affirmed the circuit court’s dismissal of Litz’s claim for inverse condemnation against the State; (2) reversed the circuit court’s dismissal of Litz’s

The Majority candidly acknowledges that it is writing on a blank slate. Specifically, the Majority states:

A difficulty with [] Litz’s claim of a “taking” fitting neatly within conventional thinking about inverse condemnation is that her allegations focus predominantly on the inaction of Respondents, rather than any affirmative action by those parties. **There is no controlling Maryland law that we could find that sheds light on this wrinkle.**

Maj. Slip Op. at 13 (emphasis added). The Majority proceeds to discuss out-of-State cases, and ultimately holds that Litz stated a claim for inverse condemnation based on Respondents’ inaction. See Maj. Slip Op. at 13-17.

I would write on the blank slate differently. Specifically, I would hold that, to state a claim for inverse condemnation, a plaintiff must allege that some kind of affirmative action by a governmental entity constituted a taking; I would not hold that an omission by

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claims for inverse condemnation and trespass against the Town; and (3) remanded to the circuit court.

The Majority: (1) reverses the Court of Special Appeals’s affirmance of the circuit court’s dismissal of Litz’s claims for inverse condemnation against the State; (2) affirms the Court of Special Appeals’s reversal of the circuit court’s dismissal of Litz’s claims for inverse condemnation and trespass against the Town; and (3) remands to the Court of Special Appeals with instructions to remand to the circuit court. See Maj. Slip Op. at 28-29. In other words, on remand in the circuit court, Litz’s claim for inverse condemnation against the State, and her claims for inverse condemnation and trespass against the Town, will remain.

As the Majority does, I would affirm the Court of Special Appeals’s reversal of the circuit court’s dismissal of Litz’s claims for inverse condemnation and trespass against the Town; however, unlike the Majority, I would also affirm the Court of Special Appeals’s affirmance of the circuit court’s dismissal of Litz’s claims for inverse condemnation against the State. In other words, under my position, on remand in the circuit court, Litz’s claims for inverse condemnation and trespass against the Town would remain, but Litz’s claim for inverse condemnation against the State would not. As noted above in Footnote 1, this Court denied the Town’s petition for a writ of *certiorari*; thus, the issue of whether Litz stated claims for trespass or inverse condemnation against the Town is not before this Court.

a governmental entity can constitute a taking. The definition of “inverse condemnation,” examples of claims for inverse condemnation, and judicial restraint lead me to this result.

Earlier in this litigation, in Litz v. Md. Dep’t of Env’t, 434 Md. 623, 652, 76 A.3d 1076, 1093 (2013), we noted that an “[i]nverse condemnation is a taking without just compensation.” (Citation omitted). In other words, a claim for inverse condemnation is “a cause of action against a governmental defendant to recover the value of property which has been **taken in fact** by the governmental defendant, even though no formal exercise of the power of eminent domain has been attempted by the taking agency[.]” Id. at 653, 76 A.3d at 1093 (some emphasis added) (citation and internal quotation marks omitted). Implicit in the definition of “inverse condemnation” is the principle that, to engage in an inverse condemnation, a governmental entity must, in fact, “take” property through some kind of affirmative action, as opposed to an omission.

This Court’s precedent offers examples of claims for inverse condemnation, and it appears that every single one of them was based a governmental entity’s alleged active taking of property through some kind of affirmative action, as opposed to an omission. For example, in MacLeod v. City of Takoma Park, 257 Md. 477, 481, 478, 263 A.2d 581, 584, 582 (1970), a plaintiff raised a claim for inverse condemnation where a city demolished the plaintiff’s fire-damaged building. In Reichs Ford Rd. Joint Venture v. State Roads Comm’n of the State Highway Admin., 388 Md. 500, 506, 505, 504, 880 A.2d 307, 310, 309 (2005), a plaintiff raised a claim for inverse condemnation where, without “formally exercis[ing] its eminent domain powers[,]” the State Roads Commission of the State Highway Administration of the Maryland Department of Transportation took steps to

condemn the plaintiff's property, thus allegedly scaring off the plaintiff's existing tenant and future tenants.<sup>3</sup> Similarly, in Coll. Bowl, Inc. v. Mayor & City Council of Balt., 394 Md. 482, 489, 907 A.2d 153, 157 (2006), a plaintiff raised a claim for inverse condemnation where a city allegedly "us[ed] the threat of condemnation to force the [plaintiff's landlord] to undertake its own redevelopment of the [plaintiff's] building."<sup>4</sup>

In Coll. Bowl, 394 Md. at 489, 907 A.2d at 157, this Court offered even more examples of inverse condemnation, stating:

[A]n inverse condemnation can take many different forms[: ]the denial by a governmental agency of access to one's property, regulatory actions that effectively deny an owner [of] the physical or economically viable use of the property, conduct that causes a physical invasion of the property, hanging a credible and prolonged threat of condemnation over the property in a way that significantly diminishes its value, or . . . conduct that effectively forces an owner to sell.

One of these types of inverse condemnation, a "regulatory taking," occurs where a governmental entity adopts a "regulation [that] deprives the property owner of all viable economic use of the entire property at issue[.]" City of Annapolis v. Waterman, 357 Md. 484, 507, 745 A.2d 1000, 1012 (2000) (citation and footnote omitted); see also Muskin v. State Dep't of Assessments & Taxation, 422 Md. 544, 566, 30 A.3d 962, 974 (2011) ("To

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<sup>3</sup>Specifically, in Reichs Ford Rd. Joint Venture, 388 Md. at 504, 880 A.2d at 309, a lessee operated a gas station on the plaintiff's property. The State Roads Commission "met with . . . the lessee . . . to inform it of the intended condemnation[.]" Id. at 505, 880 A.2d at 309. The lessee "elected not to exercise its option to extend the lease term with [the plaintiff], apparently due to the looming specter of condemnation." Id. at 505, 880 A.2d at 309. The plaintiff "claim[ed] that it was unable to lease the property as a gas station or for any other economically viable use due to the [State Roads Commission]'s plans." Id. at 505, 880 A.2d at 310.

<sup>4</sup>In Coll. Bowl, 394 Md. at 491, 907 A.2d at 158, this Court concluded that "[t]here was no taking."

determine whether a regulatory taking occurred, the Court must look to the facts of the individual case and consider the following factors: (1) the economic impact of the regulation on the claimant, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action.” (Citation and internal quotation marks omitted)).

In each of these scenarios, a plaintiff attempts to hold a governmental entity responsible for something that the governmental entity **did**, not something that the governmental entity did **not** do. By contrast, here, Litz advances the novel legal theory that governmental entities “took” her property by omission or inaction. The Majority endorses Litz’s theory by “recogniz[ing] an inverse condemnation claim based on alleged ‘inaction’ when one or more of the defendants has an affirmative duty to act under the circumstances.” Maj. Slip Op. at 13.

To me, this is essentially the equivalent of creating a private right of action<sup>5</sup> anytime that a plaintiff’s property decreases in value as a result of a governmental entity’s noncompliance with a statute—even if nothing in the statute’s language or legislative history indicates that the General Assembly intended to create a private right of action. As the Majority notes, “[u]nder the current version of the Environment Article of the Maryland Code, the State is empowered to step-in to ensure the enforcement of the Federal Water

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<sup>5</sup>“A private right of action is a basis upon which a claimant may bring a claim.” State Ctr., LLC v. Lexington Charles Ltd. P’ship, 438 Md. 451, 517, 92 A.3d 400, 439 (2014); see also Private Right of Action, Black’s Law Dictionary (10th ed. 2014) (“**private right of action** An individual’s right to sue in a personal capacity to enforce a legal claim.” (Bolding in original)).

Pollution Control Act.” Maj. Slip Op. at 19-20 (citing Md. Code Ann., Envir. (1984, 2013 Repl. Vol.) (“EN”) § 9-253). In turn, EN § 9-253 states in its entirety:

(a) *In general.* — For purposes of the Federal Water Pollution Control Act, the Secretary [of the Environment] is the State water pollution control agency in this State. (b) *Granting of powers to Secretary.* — The Secretary [of the Environment] has all powers that are necessary to comply with and represent this State under the Federal Water Pollution Control Act. (c) *Other units of State government prohibited from exercising powers.* — Another unit of the State government may not exercise any power given to the Secretary [of the Environment] under this section.

(Paragraph breaks omitted). Nothing in EN § 9-253’s language indicates that the General Assembly intended to create a private right of action anytime that a plaintiff’s property decreases in value as a result of the Secretary of the Environment’s noncompliance with the Federal Water Pollution Control Act.

Respectfully, the Majority neither mentions EN § 9-253’s legislative history nor addresses whether EN § 9-253’s legislative history indicates that the General Assembly intended to create a private right of action. Accordingly, there is no basis for affording the equivalent of a private right of action based on a governmental entity’s noncompliance with EN § 9-253. See Walton v. Mariner Health of Md., Inc., 391 Md. 643, 669, 894 A.2d 584, 599 (2006) (“Where the legislative history does not indicate any discussion whatsoever as to whether a statute gives rise to [] a[n implied private] right [of action], the fact that the [statute] is silent would weigh heavily against an intent by the [General Assembly] to create a private cause of action.”).

Simply stated, I would hold that an affirmative action by a governmental entity—*i.e.*, a “taking”—is essential to a claim for inverse condemnation. Alleging an omission or

inaction by the governmental entity is insufficient to state a claim for inverse condemnation. By holding otherwise, the Majority greatly expands the definition of inverse condemnation, the consequences of which are yet to be seen.

For the above reasons, respectfully, I concur in part and dissent in part.

Judge Battaglia and Judge McDonald have authorized me to state that they join in this opinion.

# **IN THE SUPREME COURT OF TEXAS**

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No. 13-0303

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**HARRIS COUNTY FLOOD CONTROL DISTRICT AND  
HARRIS COUNTY, TEXAS, PETITIONERS,**

v.

**EDWARD A. AND NORMA KERR, ET AL., RESPONDENTS**

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**ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS**

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**Argued December 4, 2014**

JUSTICE WILLETT delivered the opinion of the Court, in which JUSTICE JOHNSON, JUSTICE GUZMAN, JUSTICE LEHRMANN, and JUSTICE BROWN joined.

JUSTICE LEHRMANN filed a concurring opinion.

JUSTICE DEVINE filed a dissenting opinion, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, and JUSTICE BOYD joined.

We granted rehearing in this cause February 19, 2016, and now withdraw the opinion and judgment previously issued and substitute the following opinion.

This long-running dispute poses a question of constitutional law: whether governmental entities that engage in flood-control efforts are liable to homeowners who suffer flood damage, on the theory that the governments effected a taking of the homeowners' property by approving private

development without fully implementing a previously approved flood-control plan. Under the circumstances presented, we answer no.

## **I. Background**

### **A. Factual and Procedural Background**

Plaintiffs (the homeowners) consist of about 400 homeowners whose homes were located in the upper White Oak Bayou watershed of Harris County. The homes suffered flood damage one or more times when flooding occurred during Tropical Storm Francis in 1998, Tropical Storm Allison in 2001, and another unnamed storm in 2002. The homeowners sued Harris County and the Harris County Flood Control District (collectively the County), asserting a takings cause of action.<sup>1</sup> The homeowners sued other defendants as well, including the Texas Department of Transportation, municipal utility districts, engineering firms, and private developers; those claims were settled or dismissed and are not presented for review.

The District was created under Article XVI, section 59 of the Constitution, which authorizes the creation of conservation and reclamation districts. The District is charged with “the control . . . of the storm and flood waters, and the waters of the rivers and streams in Harris County and their tributaries for . . . flood control . . . and other useful purposes.”<sup>2</sup> The Defendants contend their

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<sup>1</sup> In addition to their inverse condemnation takings claim, the homeowners asserted a nuisance claim. The court of appeals held that because the homeowners had not invoked a separate waiver of governmental immunity in support of the nuisance claim, the claim was dependent on the takings claim in that the homeowners could only sue “for a nuisance that rises to the level of a constitutional taking.” 445 S.W.3d 242, 254 (quoting *City of Dallas v. Jennings*, 142 S.W.3d 310, 312 (Tex. 2004)). We agree with the court of appeals that “resolution of the [homeowners’] takings claim is equally dispositive with respect to their nuisance claim.” *Id.* See also *Jennings*, 142 S.W.3d at 312 (“Because we conclude . . . plaintiffs did not establish a constitutional taking . . . the City has retained immunity from the plaintiffs’ nuisance claim.”).

<sup>2</sup> Act of May 10, 1937, 45th Leg., R.S., ch. 360, § 1, 1937 Tex. Gen. Laws 714 (as amended).

conduct in this case with respect to flood control was coextensive, and the homeowners do not argue otherwise.<sup>3</sup> The Harris County Commissioners Court is the governing body of the District.<sup>4</sup>

Most of the homeowners' homes were built in the 1970s and early 1980s. Prior to the three flood events in issue, the homeowners' properties had suffered little or no flood damage, although the area has a long history of flooding. In 1976 the U.S. Army Corps of Engineers prepared an "Interim Report on Upper White Oak Bayou." The report was prepared for consideration by numerous federal and state entities including the District, the Cities of Houston and Jersey Village, and the Harris County Commissioners Court. The report noted recurring flooding in the upper White Oak Bayou drainage basin, an area covering 61 square miles, and described damaging flooding "occurring almost annually for the past several years." It stated that the flooding was "caused primarily by inadequate channel capacities of the streams," and that the problem was "compounded by continuing urbanization" of the fast-growing area. It predicted: "Additional residential development is expected to occur with or without an adequate plan for controlling the floods. Although current local regulations require that new structures be built above the level of the 100-year flood, damages will increase substantially in the future with increased rainfall runoff rates." It proposed "enlargement, rectification, and partial paving" of the bayou and tributaries, together with other flood-control measures. The plan was to be funded primarily by the federal government.

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<sup>3</sup> Defendants present identical argument to us in combined briefing. Their briefing states that "[t]he District was the arm of the County that dealt with flood control," and at oral argument, counsel for Defendants stated that "the District really can't act without the County's approval. The County only acts in flood control through the District. . . . There may be different duties but in terms of their acts in this case they're absolutely coextensive."

<sup>4</sup> Act of May 10, 1937, 45th Leg., R.S., ch. 360, § 1, 1937 Tex. Gen. Laws 714 (as amended).

The County concurred with Corps' findings and agreed to act as a sponsor for the project, but federal funding was slow to materialize. The County approved new residential developments in the 1976–1984 period. The District began requiring new developments in the upper Bayou watershed to provide on-site detention ponds. The parties disagree on the extent to which the District deviated from this policy. The District eventually hired Pate Engineers to develop a flood-control plan, which was presented in a written report in 1984. The Pate Plan noted a “current policy requiring on-site stormwater detention on all new development projects in the Upper White Oak Bayou watershed,” and proposed channel improvements combined with detention basins, with the goal of eliminating “the [100-year] flood plain in the upper portion of the watershed.” The Plan stated that its implementation “should eliminate the existing flood plains through the existing developed portion of upper White Oak Bayou and provide for phased implementation of the ultimate plan to maintain 100-year flood protection on White Oak Bayou as future development occurs.” In 1984, the County approved the Pate Plan and authorized the District to implement it. The Plan was to be funded through local taxes and impact fees, because federal funding was no longer available, and was to be implemented in phases. Developers who did not construct on-site detention facilities could pay an impact fee that would fund the construction of regional detention facilities.

The Pate Plan was never fully implemented, and flooding continued. In 1990 the District commissioned a new study by Klotz Associates to address flood concerns. The Klotz Plan called for measures that were different from the Pate Plan measures. The parties offer different characterizations of the shift from the Pate Plan to the Klotz Plan. The County contends that the Klotz Plan was necessary because assumptions in the Pate Plan proved wrong, and that the Klotz

Plan was more ambitious than the Pate Plan. The homeowners contend that the Klotz Plan was less extensive than the Pate Plan for various reasons.

The homeowners claim that the flooding of their homes was caused by the County's approval of "unmitigated" upstream development, combined with a failure to fully implement the Pate Plan.<sup>5</sup> Their expert, Larry Mays, relied on alleged unmitigated development occurring in the 1976–1990 time frame.<sup>6</sup>

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<sup>5</sup> The homeowners had also alleged in the trial court that the County had worsened flooding by construction of a "control structure" or "dam" in White Oak Bayou, but they do not argue to us, and did not argue to the court of appeals, *see* 445 S.W.3d at 248 n.2, that the structure contributed to the flooding of their properties. The homeowners' expert Larry Mays discussed the structure in his first expert report, but did not rely on it in his final report assessing the causes of the flooding and responding to criticisms of the County's experts. In an affidavit Mays attested that the control structure was built to ensure that the homeowners' neighborhoods "received no benefit" from a portion of the Pate Plan, but he did not attest that the completed portions of the Pate Plan and/or the Klotz Plan, including the control structure, made the flooding of the homeowners' properties worse than if the County had undertaken no flood-control efforts. He further clarified in his deposition that he did not believe the structure "was a causation of flooding for Jersey Village." To the extent the homeowners ever claimed that construction of the control structure was affirmative conduct actionable as a taking, we consider the claim abandoned.

<sup>6</sup> The beginning of the time frame of the alleged unmitigated development is unclear. The County points out that, according to the homeowners' live petition, the County adopted the "Master Flood Control Plan," another name for the Pate Plan, in 1984, and "[p]rior to adoption of this Master Flood Control Plan, the [District] required all new development projects to incorporate on-site storm water detention into their development plans." The County characterizes this statement as a judicial admission. The homeowners disagree, and point out that Mays, in his final expert report, relied on developments approved without detention requirements after 1976. Regardless, the record is clear that the date the alleged unmitigated development *ended* was no later than 1990. Mays' first expert report on the 1998 Tropical Storm Francis flooding relied on a model of rainfall and runoff based on 1990 land use conditions, and asserted that "differences in flows that would result by updating to 1998 conditions are minimal." His second report, discussing the two later storms, asserted that "[t]he causations of flooding" of the two later storms "are the same as pointed out in my 2001 report for the Tropical Storm Francis." May also at least twice confirmed in his deposition that development after 1990 did not cause additional flooding, agreeing that "for those subdivisions that were developed between 1990 and 1998, you assumed that they did not contribute any additional flows into White Oak Bayou," and "it is fair to say that you have no evidence that development between 1990 and 1998 had any effect, any impact on the Plaintiffs' flooding in this case."

The County filed a combined plea to the jurisdiction and motion for summary judgment, contending that no genuine issue of material fact had been raised on the elements of the takings claim. The trial court grudgingly denied the motion,<sup>7</sup> and the court of appeals affirmed.<sup>8</sup>

### **B. Contentions of the Parties on Appeal**

The parties raise many arguments. Briefly, the County contends the homeowners failed to raise a fact issue on the issues of intent, causation, and public use.

On intent, the County argues that it never intended to cause flood damage to the homeowners' properties. The County disputes that the evidence raised a fact issue on whether the County was substantially certain that flooding would result from approval of development or failure to fully implement the Pate Plan. It argues that Mays' opinion regarding intent and causation is conclusory, suffers from analytical gaps, and therefore is not competent expert evidence.

On causation, the County contends that Mays opined that full implementation of the Pate Plan would have prevented flooding of the homeowners' properties, because the three floods were all less than the 100-year flood and the Pate Plan would have prevented flooding up to the 100-year event. The County contends Mays made no attempt to show, with scientifically reliable analysis, that full implementation of the Plan would have met this goal. The County offered evidence that

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<sup>7</sup> The trial court felt obliged, under the law of the case doctrine, to deny the motion based on an earlier court of appeals decision, but stated that it found the appellate decision "contradictory to Aristotle's Posterior Analytics in as much as the opinion flats the presupposition that foreknowledge of possible future flooding is evidence of a forewill to take when a Governmental entity elects to expend its financial resources on other venues rather than proscriptively expending funds on the project at hand (a traditionally exempt exercise of legislative discretion—arguably thus the robbery victim may sue for funds spent upon fire prevention and home fire victim for funds spent upon police protection)."

<sup>8</sup> 445 S.W.3d 242.

assumptions in the Pate Plan became outdated, and argues that the Plan’s goal of preventing flooding for anything less than a 100-year event was aspirational only. It points out that Mays, in his deposition, could not say that full implementation would have contained “the 100-year flood,” only that “the intent of [the Pate Plan] was to contain” such a flood. The County also disputes that it ever authorized “unmitigated” development as described by Mays. It further complains of “Mays’ failure to connect any particular unmitigated development to any particular flooded property.”

On public use, the County argues that when, as here, property damage is merely the accidental result of the government’s acts, there is no public benefit and the property is not taken or damaged for public use under the Texas Constitution. The County also argues there was no evidence the County consciously sacrificed the homeowners’ properties for a perceived public use.

The homeowners respond to all of these arguments, contending that the trial court’s denial of summary judgment on the takings claim was proper. They argue that the County’s failure to fully implement the Pate Plan, combined with its approval of unmitigated development, resulted in flooding of their homes and amounted to a constitutional taking of their property. On the issue of intent, the homeowners contended in the trial court that Mays provided reliable expert testimony that unmitigated development “was substantially certain to result in increased flooding along the bayou in the vicinity of the Plaintiffs’ properties.” He claimed that, based on his analysis of the relevant data, the floods that damaged the homeowners’ homes were not 100-year floods, and that full implementation of the Pate Plan would have prevented flooding of all properties not in the 100-year flood plain. He stated in the last of three expert reports: “‘But for’ the actions by the County of approving this unmitigated development, and/or by not fully implementing the Pate Plan (which

would have eliminated the risk of flooding along the bayou for up to a 100-year event), the Plaintiffs' properties would not have flooded during these three flood events." The homeowners contend that the affidavit of District Director David Talbott, submitted to negate the intent element, was conclusory and self-serving.

## **II. Analysis**

Where, as here, evidence is presented with a plea to the jurisdiction, the court reviews the relevant evidence and may rule on the plea as a matter of law if the evidence does not raise a fact issue on the jurisdictional question, a standard that generally mirrors the summary-judgment standard.<sup>9</sup>

Our decision does not turn on an analysis of the reliability of expert testimony. Assuming all disputed facts in favor of the homeowners, the record is clear that the County never harbored a desire to cause flooding anywhere. Its motive was the opposite: it desired to prevent flooding and undertook extensive efforts over many years to accomplish this goal. Even under the most generous reading of the record, the County did not know which particular properties would flood. At most it was aware of a risk that properties in the White Oak watershed somewhere, someday would flood. Assuming that a cause of the flooding was the affirmative act of approving private development, there indisputably were other causes: heavy rainfall, and, according to the homeowners themselves, the failure to fully implement the flood-control measures of the Pate Plan. The confluence of these circumstances, in our view, does not give rise to a takings claim.

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<sup>9</sup> *Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 227–28 (Tex. 2004).

## A. General Principles of Takings Law and the Intent Element

Article I, section 17 of our Constitution provides:

No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person.<sup>10</sup>

Generally, plaintiffs seeking recovery for a taking must prove the government "intentionally took or damaged their property for public use, or was substantially certain that would be the result."<sup>11</sup> Sovereign immunity does not shield the government from liability for compensation under the takings clause.<sup>12</sup>

Much of our takings jurisprudence focuses on mens rea. We have made clear that a taking cannot be established by proof of mere negligent conduct by the government.<sup>13</sup> "[T]he requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result."<sup>14</sup>

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<sup>10</sup> TEX. CONST. art. I, § 17(a).

<sup>11</sup> *City of Keller v. Wilson*, 168 S.W.3d 802, 808 (Tex. 2005).

<sup>12</sup> *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001). For convenience, our references to "sovereign immunity" refer to the related doctrines of sovereign immunity and governmental immunity. See *City of Houston v. Williams*, 353 S.W.3d 128, 134 n.5 (Tex. 2011) (explaining that governmental immunity protects political subdivisions of the State).

<sup>13</sup> *City of Tyler v. Likes*, 962 S.W.2d 489, 505 (Tex. 1997).

<sup>14</sup> *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004). See also *City of Dallas v. Jennings*, 142 S.W.3d 310, 314 (Tex. 2004).

## **B. Other Elements of Takings Jurisprudence: Affirmative Conduct, Specificity, and Public Use**

Much of the briefing focuses on the element of intent, but there are other elements of a taking that render the homeowners' claim problematic.

### **1. Affirmative Conduct**

Only affirmative conduct by the government will support a takings claim. We have always characterized a takings claim as based on some affirmative “act” or “action” of the government. For example, in *Gragg*, we held “that the requisite intent is present when a governmental entity knows that a specific *act* is causing identifiable harm . . .”<sup>15</sup> In *Gragg*, the damage to the plaintiffs’ ranch was caused by the water district’s affirmative acts of constructing a reservoir and releasing water from the reservoir’s floodgates.<sup>16</sup> Or as we stated in *Jennings*, “the parties agree that only an *intentional act* can give rise to such a taking . . . There may well be times when a governmental entity is aware that its *action* will necessarily cause physical damage to certain private property, and yet determines that the benefit to the public outweighs the harm caused to that property.”<sup>17</sup> A government cannot be liable for a taking if “it committed no intentional acts.”<sup>18</sup> We have not recognized a takings claim for nonfeasance. The homeowners conceded this point in their briefing

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<sup>15</sup> 151 S.W.3d at 555 (emphasis added).

<sup>16</sup> *Id.* at 550, 552.

<sup>17</sup> 142 S.W.3d at 14 (emphasis added). *See also id.* (“Our earlier jurisprudence has left open the possibility that liability may be predicated on damage that is necessarily an incident to, or necessarily a consequential result of, the *act*” of the governmental entity.”) (emphasis added, internal quotation marks omitted); *State v. Hale*, 146 S.W.2d 731, 736 (Tex. 1941) (holding that to be liable for a taking, the government must “perform certain acts in the exercise of its lawful authority . . . which resulted in the taking or damaging of plaintiffs’ property”) (emphasis added).

<sup>18</sup> *Likes*, 962 S.W.2d at 505.

to the trial court, stating, “One of the elements of an ‘inverse condemnation’ case that a plaintiff must prove is that the government performed intentional act(s).” This element is important in today’s case because the homeowners have consistently based their claim on the *failure* of the County to fully implement the Pate Plan, *combined with* its alleged approval of “unmitigated” private development. Mays’ third expert report, for example, assigns two causes for the flooding: “[u]nmitigated land development, approved by the County,” and “[f]ailure of the [District] to fully implement the 1984 Pate Plan.” But the law does not recognize takings liability for a failure to complete the Pate Plan, despite the homeowners’ attempt to somehow bundle that inaction with the affirmative conduct of approving development. Assuming all other elements are met, liability for the taking of the homeowners’ properties can derive, if at all, from the County’s affirmative acts of approving development.

## 2. Specificity

In addition, a specificity element runs through our jurisprudence. The caselaw indicates that in order to form the requisite intent, the government ordinarily knows which property it is taking. For example, *Jennings* describes the intent requirement as covering situations where “a governmental entity is aware that its action will necessarily cause physical damage to *certain* private property.”<sup>19</sup> The government must know that “a *specific* act is causing *identifiable* harm” or know that “*specific property damage* is substantially certain to result from an authorized government action.”<sup>20</sup> We have not recognized liability where the government only knows that someday,

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<sup>19</sup> *Jennings*, 142 S.W.3d at 314 (emphasis added).

<sup>20</sup> *Id.* (emphasis added); *accord City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex.2009).

somewhere, its performance of a general governmental function, such as granting permits or approving plats, will result in damage to some unspecified parcel of land within its jurisdiction.

### **3. Public Use in this Anti-Regulatory Takings Case**

This most certainly is not an ordinary regulatory takings case, one where the plaintiff complains that the government through regulation so burdened his property as to deny him its economic value or unreasonably interfere with its use and enjoyment.<sup>21</sup> Today's case does not fit this body of takings jurisprudence and is in a sense its antithesis. First, the homeowners are not complaining about regulation of their property but regulation of other private properties. Second, the complaint is not excessive regulation, but insufficient regulation via the alleged approval of "unmitigated development." The homeowners similarly complain that in abandoning the Pate Plan the County did not regulate enough.

This uncharted theory should give us pause to ponder whether the claim, even if factually supported, is the stuff of a constitutional taking. If a private developer, after routine approval of its plat, uses its property in a manner causing damage to other properties, might the remedy lie against the developer rather than the county?<sup>22</sup> One can certainly argue that if the government's alleged affirmative conduct is nothing beyond allowing private developers to use their property as they wish, the more appropriate remedy is a claim against the private developers rather than a novel takings

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<sup>21</sup> See *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 935 (Tex. 1998) ("A compensable regulatory taking can also occur when the governmental agencies impose restrictions that either (1) deny landowners of all economically viable use of their property, or (2) unreasonably interfere with landowners' rights to use and enjoy their property.").

<sup>22</sup> See *City of Keller*, 168 S.W.3d at 833 (O'Neill, J., concurring) (stating that review of subdivision plats "is intended to protect the city's residents; it is not intended to transfer responsibility for a flawed subdivision design from the developers to the municipality").

claim against the government. The homeowners in fact sued private developers and other private parties, and neither side contends that remedies against such parties do not exist.<sup>23</sup>

One way of analyzing this question is through the element of public use. Article I, section 17 of our Constitution provides for compensation where the property is “taken, damaged or destroyed for or applied to public use.” We have recognized that a taking may occur “if an injury results from either the construction of public works or their subsequent maintenance and operation,”<sup>24</sup> but we have not held that the public-use element is met where the government does nothing more than approve plats or building permits for private development.

The homeowners argue that the public-use element is met here because it was met in *City of Keller v. Wilson*. That case is factually distinguishable. In *City of Keller*, the city adopted a master drainage plan that called for a drainage easement on land belonging to the plaintiffs, the Wilsons.<sup>25</sup> The easement was to contain a ditch, and the plan originally called for the city to condemn 2.8 acres of the Wilson property for construction of the ditch.<sup>26</sup> The ditch would traverse the Wilson property and other properties and terminate in a creek.<sup>27</sup> Developers were required to comply with the plan, and built a ditch on an adjacent property, the Sebastian property, but made no provision for a

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<sup>23</sup> See *id.* at 835 (O’Neill, J., concurring) (“[W]hen a private development floods neighboring land, the owner of the damaged property will ordinarily have recourse against the private parties causing the damage.”) (citing TEX. WATER CODE § 11.086).

<sup>24</sup> *Likes*, 962 S.W.2d at 505.

<sup>25</sup> 168 S.W.3d at 809.

<sup>26</sup> See *City of Keller v. Wilson*, 86 S.W.3d 693, 702 (Tex. App.—Fort Worth 2002), reversed, 168 S.W.3d 802 (Tex. 2005).

<sup>27</sup> *Id.*; *City of Keller*, 168 S.W.3d at 808.

drainage easement across the Wilson property.<sup>28</sup> The city built a culvert to the creek, but it did not connect the ditch to the culvert as planned because neither the city nor the developers purchased an easement on the Wilson property, nor did they extend the ditch across the Wilson property as planned.<sup>29</sup> The result was that the Wilson property would flood when it rained.<sup>30</sup> Without analysis of the public-use element, we agreed with the court of appeals that this element had been satisfied,<sup>31</sup> but we ultimately held that the intent element had not been established, due to lack of “proof that the City knew the plans it approved were substantially certain to increase flooding on the” Wilson property.<sup>32</sup>

*City of Keller* is factually distinguishable because the city there planned to condemn an easement and build a ditch across the plaintiffs’ property, knowing drainage across that specific property was part of the master plan. The jury found that the failure to build that leg of the ditch resulted in flooding on the Wilson property. As the court of appeals reasoned:

Clearly, had the City used its powers of eminent domain to condemn a portion of the Wilson property for an easement, that use would have been a “public use” to implement the City’s Master Drainage Plan. The fact that the City chose not to condemn any of the Wilson property and to instead, in violation of the Plan, allow the water flowing from the Sebastian easement to discharge, uncontrolled, across the

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<sup>28</sup> *City of Keller*, 168 S.W.3d at 808.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 830.

<sup>32</sup> *Id.*

Wilson property shows that the invasion of the Wilson property by the water flowing from the Sebastian easement was for “public use.”<sup>33</sup>

Hence, the public-use element as to the particular plaintiffs was not established merely by the approval of private development on other properties.<sup>34</sup> In today’s case, there was no comparable proof that the County intended to purchase easements on the homeowners’ particular properties and construct drainage facilities as part of a master plan, such that with or without such easements and drainage facilities runoff would under the plan traverse the homeowners’ properties. The public-use element was more apparent in *City of Keller* because with or without the easement and ditch the plaintiffs’ land would by city design be available to carry runoff to the creek. Similarly, in *Gragg*, the defendant water district denied that it had inversely condemned ranch property by releasing water through reservoir floodgates, but counterclaimed for a flowage easement if the court found that the property had been inversely condemned. The trial court granted such an easement on the portion of the ranch subject to flooding.<sup>35</sup> And in *Kopplow Development, Inc. v. City of San Antonio*, when the City decided to build a detention facility it “knew the project would inundate part of [plaintiff] Kopplow’s property before it ever began construction, prompting the City to seek a drainage easement from Kopplow.”<sup>36</sup> In today’s case, in contrast, whether viewed through the lens of intent

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<sup>33</sup> *City of Keller*, 86 S.W.3d at 708.

<sup>34</sup> The court of appeals expressly held that “the City’s liability is not based merely on its approval of the developer’s plans.” *Id.* at 701 n.2. *See also City of Keller*, 168 S.W.3d at 833 (O’Neill, J. concurring) (“[T]he City’s mere approval of the private development plans did not result in a taking for public use, as the constitutional standard requires for a compensable taking.”).

<sup>35</sup> *Gragg*, 151 S.W.3d at 550.

<sup>36</sup> 399 S.W.3d 532, 537 (Tex. 2013).

or public use, there was no evidence that the County ever had designs on the homeowners' particular properties, and intended to use those properties to accomplish specific flood-control measures.

We also find the United States Supreme Court's landmark decision in *Kelo v. City of New London*<sup>37</sup> factually and legally distinguishable.<sup>38</sup> In *Kelo*, a city authorized a private nonprofit entity to condemn property as part of an economic revitalization plan.<sup>39</sup> The city claimed and the Court accepted that the public-use requirement was met because the plan would enhance the overall economic health of the community.<sup>40</sup> But *Kelo* was not an inverse condemnation case like today's case. There, the government, through an agent, condemned plaintiffs' properties for an alleged public purpose. Indisputably the plaintiffs' properties were taken from them by government action. In today's case, where the only affirmative conduct that allegedly damaged the homeowners' properties was the approval of private development, there is in our view a real question whether a taking by the government even occurred, that is, whether the homeowners' claim even belongs in the world of takings jurisprudence and is properly analyzed as a takings claim.<sup>41</sup> In *Kelo* the plaintiffs argued that there was no public use within the ambit of the federal Takings Clause, in hopes of disallowing the

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<sup>37</sup> 545 U.S. 469 (2005).

<sup>38</sup> *Kelo* was a federal takings case, but we have recognized that federal and Texas takings jurisprudence are generally consistent. See *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012); *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 838 (Tex. 2012).

<sup>39</sup> *Kelo*, 545 U.S. at 473–75.

<sup>40</sup> *Id.* at 483–84.

<sup>41</sup> We understand JUSTICE LEHRMANN's concurrence to urge that if a taking for public use is compensable, then surely a taking for private use would also be compensable. We agree. Our point here, however, is to question, under the rubric of public use, whether the Court should recognize that a taking even occurred under the facts of today's case.

taking of their land. Here the homeowners are in a completely different posture, arguing that the approval of private development was undertaken for the benefit of the public at large, with the result that the homeowners' properties *were* damaged for a public use, so as to establish a taking within the ambit of the Texas Takings Clause. In light of these factual and legal distinctions, *Kelo* does not compel a result one way or the other in today's case.

The Washington Supreme Court considered a case similar to today's case where plaintiffs filed an inverse condemnation claim against a county, alleging that plaintiffs' property flooded after the county approved a development plat for a neighboring property. The court held that mere approval of the plat could not support a takings claim:

If all the County had done was to approve private development, then one of the elements of an inverse condemnation claim, that the government has damaged the [plaintiffs'] property for a public purpose, would be missing. There is no public aspect when the County's only action is to approve a private development under then existing regulations. Furthermore, the effect of such automatic liability would have a completely unfair result.<sup>42</sup>

The approval of private development in this case—doing nothing more than allowing private parties to use their properties as they wish—presents at best a highly attenuated basis for meeting the public-use element of a takings claim.

### C. The Unavoidable Tension Between Takings Jurisprudence and Sovereign Immunity

While compensation to those whose property is taken for public use is an important and constitutionally imposed obligation of democratic government, governments must also be allowed to survive financially and carry out their public functions. They cannot be expected to insure against

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<sup>42</sup> *Phillips v. King Cnty.*, 968 P.2d 871, 878 (Wash. 1998).

every misfortune occurring within their geographical boundaries, on the theory that they could have done more. No government could afford such obligations. Justices Jackson and Goldberg both recognized that the Bill of Rights is not a suicide pact.<sup>43</sup>

This Court has repeatedly, recently, and unanimously recognized that strong judicial protection for individual property rights is essential to “freedom itself.”<sup>44</sup> Locke deemed the preservation of property rights “[t]he great and chief end” of government,<sup>45</sup> a view we echoed almost 300 years later, calling it “one of the most important purposes of government.”<sup>46</sup> Individual property rights are “a foundational liberty, not a contingent privilege.”<sup>47</sup> They are, we reaffirm today, “fundamental, natural, inherent, inalienable, [and] not derived from the legislature,” and “preeexist[] even constitutions.”<sup>48</sup>

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<sup>43</sup> *Terminiello v. City of Chicago*, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (“There is danger that, if the Court does not temper its doctrinaire logic with a little practical wisdom, it will convert the constitutional Bill of Rights into a suicide pact.”); *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 160 (1963) (“[W]hile the Constitution protects against invasions of individual rights, it is not a suicide pact.”).

<sup>44</sup> *Texas Rice Land Partners, Ltd. v. Denbury Green Pipeline-Texas, LLC*, 363 S.W.3d 192, 204 (Tex. 2012).

<sup>45</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT, Chap. IX, Sec. 124 (C.B. MacPherson, ed., Hackett Publishing Co. 1980) (1690).

<sup>46</sup> *Eggemeyer v. Eggemeyer*, 554 S.W.2d 137, 140 (Tex. 1977).

<sup>47</sup> *Texas Rice Land Partners, Ltd.*, 363 S.W.3d at 204 n.34.

<sup>48</sup> *Id.* (quoting *Eggemeyer*, 554 S.W.2d at 140).

But there is always tension between the compensation obligation of the Takings Clause and the necessary doctrine of sovereign immunity, also a doctrine of constitutional significance.<sup>49</sup> We long ago recognized that where government conduct caused damage to a plaintiff's property,

One's normal reaction is that he should be compensated therefor. On the other hand, the doctrine of the non-suability of the state is grounded upon sound public policy. If the state were suable and liable for every tortious act of its agents, servants, and employees committed in the performance of their official duties, there would result a serious impairment of the public service and the necessary administrative functions of government would be hampered.<sup>50</sup>

#### **D. Application of Takings Law to the Facts Presented**

Because inaction cannot give rise to a taking, we cannot consider any alleged failure to take further steps to control flooding, such as the failure to complete the Pate Plan. Because a taking cannot be premised on negligent conduct, we must limit our consideration to affirmative conduct the County was substantially certain would cause flooding to the homeowners' properties and that would not have taken place otherwise. The only affirmative conduct on which the homeowners rely is the approval of *private* development. Further, the homeowners offered no proof that the County was substantially certain that the homeowners' particular properties would flood if the County approved new housing developments. The homeowners did not even assert such a claim, alleging instead that the County was substantially certain that its actions in approving "unmitigated development" would result in flooding "in the vicinity of Plaintiffs' properties." They never explained whether the

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<sup>49</sup> See, e.g., *Alden v. Maine*, 527 U.S. 706, 733 (1999) ("Although the sovereign immunity of the States derives at least in part from the common-law tradition, the structure and history of the Constitution make clear that the immunity exists today by constitutional design.").

<sup>50</sup> *Tex. Highway Dep't v. Weber*, 219 S.W.2d 70, 71–72 (Tex. 1949).

“vicinity” is a few square miles or hundreds of square miles. They never identified precisely or even approximately the area of unmitigated development. The Pate Plan described the White Oak Bayou watershed as 110 square miles in size. The homeowners’ expert Mays admitted that “I haven’t been asked to do anything concerning specific plaintiffs.” A County expert, Melvin Spinks, agreed that “Mays was unable to demonstrate that any actions of Defendants were the proximate cause of flooding of any particular Plaintiff’s property,” nor did Mays “determine the causation of flooding subdivision by subdivision.” In the trial court, the County accurately described the homeowners’ particular parcels as “scattered in a checker board fashion in the upper White Oak Bayou watershed, stretching several miles.”

Further, the homeowners offered no evidence that the County was consciously aware that approval of unmitigated development in one defined area, such as a specific block or neighborhood, was substantially likely to cause flooding in another specifically defined area of the White Oak Bayou watershed that included the homeowners’ properties. The County offered evidence to the contrary. District Director David Talbott attested that “[t]he District did not approve of land development knowing that there was inadequate stormwater runoff mitigation associated with a particular development,” and pointed out that the District was tasked with addressing severe flooding problems not only in the White Oak Bayou watershed where the homeowners resided, but also in the Clear Creek, Greens Bayou, Cypress Creek, and Brays Bayou watersheds. While the homeowners number 400 who suffered flood damage during three events, Talbott pointed out that Tropical Storm Allison alone flooded 73,000 residences. Talbott and the vice president of Klotz both attested that it is against District policy to “move a flood”—sparing one neighborhood that would otherwise flood

by causing another neighborhood to flood. Talbott also attested: “Although White Oak Bayou was always a high priority, with limited District funding the District also had to consider other high priority projects throughout the County. District funds that were available were allocated to various projects around the County, with White Oak Bayou receiving an appropriate share.”

This case is qualitatively different from recent cases like *Kopplow* and *Gragg* where we recognized a taking. In *Kopplow*, the city “knew the project would inundate part of [plaintiff] Kopplow’s property” and sought a drainage easement from Kopplow, the city’s project resulted in only one other property being placed below the 100-year flood plain, and the city obtained a drainage easement on that other property.<sup>51</sup> In *Gragg*, one of the flood-control district’s experts acknowledged that his own modeling showed that higher than natural flooding would occur on the plaintiffs’ particular ranch in 10 out of 16 floods, the district’s records showed hundreds of releases by the district sufficient to cause flooding on the ranch, and there was evidence that the ranch had suffered “a large number of floods” after the district began the releases, whereas before the district’s actions the ranch had never suffered from extensive flood damage.<sup>52</sup> In today’s case, in contrast, the record is devoid of evidence the County knew, at the time it allegedly approved of “unmitigated” development, that the homeowners’ particular properties would suffer from recurrent flooding. We recognized in *Jennings* that a taking occurs when property is “damaged for public use” in circumstances where “a governmental entity is aware that its action will necessarily cause physical

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<sup>51</sup> *Kopplow*, 399 S.W.3d at 537–38.

<sup>52</sup> *Gragg*, 151 S.W.3d at 550, 552.

damage to certain private property.”<sup>53</sup> A conscious decision to damage certain private property for a public use is absent here.

The homeowners contend that *Kopplow* and *Gragg* are helpful to their case because both decisions recognized that the recurrence of flooding is probative on the issue of intent.<sup>54</sup> But we also held, in *City of San Antonio v. Pollock*, that when deciding intent in the takings context, “[t]he government’s knowledge must be determined as of the time it acted, not with [the] benefit of hindsight.”<sup>55</sup> This rule limits the persuasiveness of the homeowners’ argument. The homeowners alleged in their petition that “[m]ost, if not all of the plaintiffs herein, had never flooded before September, 1998,” the Tropical Storm Francis flooding and the first of three flood events about which they complain. Their recurrence argument to us is that “Plaintiffs’ homes flooded three times in five years in 1998, 2001, and 2002.” They contend these three floods are “probative evidence of intent under this Court’s holdings in *Kopplow* and *Gragg*.” But their expert, Mays, opined that the unmitigated development that caused the flooding of their homes ended no later than 1990, years before the three flooding events.<sup>56</sup> The homeowners’ recurrence argument is made with the benefit of hindsight.

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<sup>53</sup> 142 S.W.3d at 314.

<sup>54</sup> See *Kopplow*, 399 S.W.3d at 537 (stating that “[w]ith flood water impacts, recurrence is a probative factor in assessing intent and the extent of the taking”); *Gragg*, 151 S.W.3d at 555 (stating that “[i]n the case of flood-water impacts, recurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur”).

<sup>55</sup> 284 S.W.3d 809, 821 (Tex. 2009).

<sup>56</sup> See *supra* note 6.

The determination of whether a taking has occurred is ultimately a question of law.<sup>57</sup> The determination is not formulaic given the legal and factual complexities sometimes presented, and may turn on the confluence of particular circumstances.<sup>58</sup> We hold that the homeowners have not presented a cognizable takings claim where (1) the County never desired to cause flooding, but desired only the opposite, (2) it undertook significant efforts to prevent flooding, spending tens of millions of dollars over many years, (3) the County never intended, as part of a flood-control plan, to use the homeowners' particular properties for detention ponds, drainage easements, or the like, (4) the only affirmative conduct allegedly causing the flooding was approval of private development, (5) the homeowners offered no proof that the County was substantially certain its approval of development would result in the flooding of the homeowners' particular lots, and (6) even by the homeowners' reckoning the flooding resulted from multiple causes—Acts of God,<sup>59</sup> the activities of other defendants,<sup>60</sup> the alleged failure to complete the Pate Plan, and the approval of private

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<sup>57</sup> *City of Austin v. Travis Cnty. Landfill Co.*, 73 S.W.3d 234, 241 (Tex. 2002).

<sup>58</sup> For example, courts have recognized their inability to state a “set formula” for when regulatory takings occur. *Edwards Aquifer Auth.*, 369 S.W.3d at 839 (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). “The [United States] Supreme Court has frequently noted that whether a particular property restriction is a taking depends largely upon the particular circumstances in that case.” *Hearts Bluff Game Ranch, Inc. v. State*, 381 S.W.3d 468, 477 (Tex. 2012) (brackets, internal quotation marks omitted).

<sup>59</sup> Their brief to us, for example, states the obvious: “Of course, without excessive rainfall no flooding would have occurred.”

<sup>60</sup> See, e.g., *Kerr v. Harris Cnty.*, 177 S.W.3d 290, 295 (Tex. App.—Houston [1st Dist. 2005, no pet.] (“Plaintiffs also sued Jones & Carter, an engineering company involved in the development of Brookhollow subdivision, alleging that Jones & Carter ‘was negligent in failing to provide for adequate storm water detention/retention facilities or in some other manner [to] adequately mitigate the increased storm water runoff created in conjunction with their developments in the White Oak Bayou watershed upstream of Plaintiffs’ properties.’”); *Kerr v. Tex. Dep’t of Transp.*, 45 S.W.3d 248, 249 (Tex. App.—Houston [1st Dist.] 2001, no pet.) (“Plaintiffs specifically pleaded that TxDot’s construction of feeder lanes on Beltway 8 and reconstruction of portions of Highway 290 in the 1980s and 1990s increased stormwater runoff that ‘detrimentally impacted’ plaintiffs, who were downstream of these activities.”). As noted above, the homeowners also sued municipal utility districts and private developers.

development. We have never recognized a takings claim under such attenuated circumstances. This is not a case where the government made a conscious decision to subject particular properties to inundation so that other properties would be spared, as happens when a government builds a flood-control dam knowing that certain properties will be flooded by the resulting reservoir. In such cases of course the government must compensate the owners who lose their land to the reservoir.

The homeowners' theory of takings liability would vastly and unwisely expand the liability of governmental entities, a view shared by the many public and private amicus curiae who have urged rehearing of this cause.<sup>61</sup> The theory lacks any discernible limiting principle and would appear to cover many scenarios where the government has no designs on a particular plaintiff's property, but only knows that somewhere, someday, its routine governmental operations will likely cause damage to some as yet unidentified private property. The homeowners' theory would apply to myriad property-damage claims and as to them might effectively abolish much traditional fault-based tort law, swallow much of sovereign immunity, and disrupt the carefully crafted waiver of immunity found in the Tort Claims Act. We have stated that sovereign immunity is universally recognized and fundamental to the nature and functioning of government, and that we leave it to the Legislature to

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<sup>61</sup> Amicus curiae urging rehearing include the National Association of Counties, City of Houston, Port of Houston Authority, Harris County Metropolitan Transit Authority, West Houston Association, Greater Houston Builders Association, Houston Real Estate Council, Fort Bend County, Texas Conference of Urban Counties, Texas Association of Counties, Texas Municipal League, County Judges and Commissioners Association of Texas, Texas Water Conservation Association, North Texas Tollway Authority, Jeff Davis County, El Paso County, City of Austin, Texas Department of Counties, Texas Department of Transportation, and City of San Antonio. The Houston Property Rights Association opposed rehearing.

make changes to that doctrine, as it has done in the Tort Claims Act.<sup>62</sup> Therefore, we think so sweeping an expansion of takings jurisprudence should be made only for the soundest reasons—reasons that escape us here—given the corresponding and massive contraction in the scope of sovereign immunity that would follow. While the right to compensation for a taking is constitutionally mandated, sovereign immunity is also a matter of constitutional significance.

The homeowners' notion of a taking is expansive indeed. Take, for example, a government such as the City of Austin that supplies electric utility service to its citizens. It surely knows that in running power lines throughout the service area, fires or other damaging events will occasionally occur when acts of nature knock down lines or poles. Witness the recent devastating fires in the Bastrop area allegedly caused by power lines. The government also surely knows that some private properties—those adjacent to the lines, or, in the homeowners' vernacular, “in the vicinity” of the lines, are especially vulnerable to such events. Under the homeowners' theory, an Act of God, such as a bolt of lightning, that causes a high-voltage line to topple or a transformer to blow, which in turn causes damage to a private property, is arguably a taking on the notion that properties near the grid have been sacrificed for the greater public good of providing electricity service to the whole community. Negligent maintenance of the utility grid is irrelevant, so long as the city is substantially

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<sup>62</sup> We have noted that sovereign immunity is “inherent in the nature of sovereignty” and “an established principle of jurisprudence in all civilized nations.” *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 695 (Tex. 2003) (quoting THE FEDERALIST No. 81, at 487 (Alexander Hamilton) (Clinton Rossiter ed., 1961), and *Beers v. Arkansas*, 61 U.S. 527, 529 (1857)). “We have held . . . that the Legislature is better suited to balance the conflicting policy issues associated with waiving immunity.” *Id.* See also *Tex. Natural Res. Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 854 (Tex. 2002) (“We have consistently deferred to the Legislature to waive sovereign immunity from suit, because this allows the Legislature to protect its policymaking function.”); *Guillory v. Port of Houston Auth.*, 845 S.W.2d 812, 813 (Tex. 1993) (“Since the Tort Claims Act was passed in 1969, we have repeatedly held that the waiver of governmental immunity is a matter addressed to the Legislature.”) (internal quotation marks omitted).

certain that fires somewhere, someday, will occur along the grid, as surely is the case. It matters not that a storm contributed to the downed line, because in today's case storms also played an essential role. Traditional fault-based tort law, sovereign immunity, and the Tort Claims Act are irrelevant if the claim is framed as a taking. The hypothetical is arguably a stronger case for a taking than today's case, because providing an electric utility grid unquestionably involves a public use of property, whereas in today's case the only affirmative conduct allegedly resulting in a taking was granting approval of private development, perhaps not a public use at all.

Or take any large city, school district, or other governmental entity that has a fleet of vehicles. The government surely knows its vehicles regularly have accidents causing damage to private property. The government also surely knows that collisions will occur more frequently in certain areas, such as along bus routes or near the garbage truck depot, school bus lot, etc., where the government's vehicular traffic is concentrated. Under the homeowners' theory, each accident resulting in damage to private property in a higher-risk area would appear to be a compensable taking, again on the theory that this property has been sacrificed for the greater good of providing city-wide public transportation. The claim is arguably stronger than the claim in today's case, because (1) there is no Act of God that can be assigned at least part of the causation, (2) the city in the hypothetical is not just substantially certain but absolutely certain that accidents will occur, and (3) providing a city bus system is unquestionably a public use of property, unlike approval of private plats. No need to prove negligence on the city's part; the intent element is met because the city is substantially certain that accidents happen. No need to predict exactly where the accidents will occur, because in today's case the homeowners never contended or offered proof that the County formed

any intent with respect to their particular properties. The homeowners' expert on the intent element conceded, "I haven't been asked to do anything concerning specific plaintiffs."

Amicus curiae Texas Department of Transportation (TxDOT) raises a similar hypothetical. It points out that it is required by law, in determining roadway access, to balance "the needs of mobility and safety on a highway system with the needs of access to adjacent land uses."<sup>63</sup> In its own access policy manual, it recognizes that numerous studies have shown that "[a]s access density increases, crash rates increase." Thus, according to TxDOT, it "knows that the issuance of driveway access permits onto State roadways will result in more accidents, inevitably causing damage to as yet unidentified private property. Arguably, under the homeowners' theory, every accident resulting in damage to private property may be a compensable taking on the theory that the property has been sacrificed for the greater good of providing property owners and their customers or residents access to roadways."

Or take any large city with its contingent of high-rise buildings. A city may know that somewhere, someday, a fire will occur on a floor the city fire trucks cannot reach. Suppose a city has a study in hand recommending larger ladder trucks, but fails to purchase the trucks due to funding problems or other priorities. Under the homeowners' approach, if a fire occurs on a higher floor of a building, and damages adjacent properties, the adjacent property owners have a takings claim if they can show that a larger ladder truck would have contained the fire. It does not matter whether the city's conduct was reasonable given its tax base or funding priorities. In today's case, too, the

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<sup>63</sup> 43 Tex. Admin. Code § 11.50(a).

record shows that funding issues played a role in the County’s decisions. All that matters is that the city issued building permits, knowing that somewhere, someday, a fire would likely occur on an upper floor. This knowledge supplies the intent element, and the building permits supply the causation element, regardless of whether an act of nature started the fire. It does not matter whether the building in issue was privately owned, because according to the homeowners private ownership of the property approved for development is no bar to recovery.

Amicus Curiae Harris County Metropolitan Transit Authority (METRO) imagines an even more disturbing hypothetical, asking whether hurricanes allegedly caused by global warming would be a compensable taking under the homeowners’ reasoning. After all, METRO contends, “Experts can be hired who will testify that burning fossil fuels raises sea levels and makes storms more intense. Yet governments issue permits allowing exploration and production of fossil fuels, and construction and operation of the power plants that burn them.”

And, as several amici curiae fear in urging rehearing, the homeowners’ theory of takings would place governments in a unending dilemma of requiring extreme flood-control measures and facing a regulatory takings claim from the owners directly subjected to such measures, or requiring less extensive measures and facing a takings claim when downstream property owners experience flooding. In the words of amicus curiae City of San Antonio, flood-control decisions will be reduced to “picking your plaintiff rather than responsible flood control management.”

We decline to extend takings liability vastly beyond the extant jurisprudence, in a manner that makes the government an insurer for all manner of natural disasters and inevitable man-made

accidents.<sup>64</sup> Holding otherwise would encourage governments to do nothing to prevent flooding, instead of studying and addressing the problem. The homeowners do not urge the existence of a general legal duty on the part of the County to prevent flooding, breach of which would give rise to a private cause of action. Their claim instead is that the County failed to complete the Pate Plan and approved private development, behavior allegedly resulting in a taking of their properties. If various state and federal governmental entities had not commissioned and conducted detailed studies of regional flooding, the homeowners would have no basis for contending that the County was substantially certain of the link between development and flooding, and would not be able to use that knowledge against the County. If the County had undertaken no efforts to control flooding, the homeowners could not assert the failure to complete the Pate Plan as a basis for liability. Further, by framing their claim as a constitutional taking, the homeowners have asserted a claim unbounded by any statutory caps on compensatory damages the Legislature might otherwise impose. Accepting such a capacious approach to takings would endanger the ability of governments to finance and carry out their necessary functions, the basis for sovereign immunity.

### **III. Conclusion**

The plea to the jurisdiction was well-taken and should have been granted. We reverse the judgment of the court of appeals and render judgment dismissing the case.

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<sup>64</sup> See *Phillips v. King Cnty.*, 968 P.2d 871, 878 (Wash. 1998) (holding that county is not liable for a taking if it only approves a private development plat, and stating: “If the county or city were liable for the negligence of a private developer, based on approval under existing regulations, then the municipalities, and ultimately the taxpayers, would become the guarantors or insurers for the actions of private developers whose development damages neighboring properties.”).

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Don R. Willett  
Justice

**OPINION DELIVERED:** June 17, 2016

# IN THE SUPREME COURT OF TEXAS

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No. 13-0303

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HARRIS COUNTY FLOOD CONTROL DISTRICT AND  
HARRIS COUNTY, TEXAS, PETITIONERS,

v.

EDWARD A. AND NORMA KERR, ET AL., RESPONDENTS

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ON PETITION FOR REVIEW FROM THE  
COURT OF APPEALS FOR THE FIRST DISTRICT OF TEXAS

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JUSTICE LEHRMANN, concurring.

“[A]ware of the tendency of power to degenerate into abuse,” Thomas Jefferson said that “our own country [has] secured its independence by the establishment of a constitution and form of government for our nation, calculated to prevent as well as to correct abuse.” 8 THOMAS JEFFERSON, *To the Tammany Society of Columbian Order of the City of Washington* (March 2, 1809), in THE WRITINGS OF THOMAS JEFFERSON 156, 156–57 (1854). Recognizing the same need to set in stone the limits on government’s capacity to invade certain essential rights, “Texans have adopted state constitutions to restrict governmental power.” *Vinson v. Burgess*, 773 S.W.2d 263, 267 (Tex. 1989). In that sense, the constitutional bedrock underlying and supporting Texas’s legal system assumes both the possibility that the government will abuse its authority and the wisdom of curtailing that abuse from the outset.

To that end, Article I, section 17 of the Texas Constitution contains an important limitation on the government’s authority to invade Texans’ property rights, providing that “[n]o person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made.” In this case, the plaintiffs contend that the government took their property without compensation by approving private development that resulted in the flooding of their homes. I agree with the Court that the circumstances of this case do not give rise to a cognizable takings claim and join the Court’s opinion in full. I write separately to call attention to the Court’s recognition that “if a taking for public use is compensable, then surely a taking for private use would also be compensable.” *Ante* at \_\_\_\_ n.41. While not crucial to the dispute at hand, this point warrants further discussion.

In compliance with Article I, section 17’s restrictive mandate, we have consistently held that the State must justify its exercise of eminent domain by establishing the taking is for public use. *See, e.g., City of Austin v. Whittington*, 384 S.W.3d 766, 772 (Tex. 2012); *Davis v. City of Lubbock*, 326 S.W.2d 699, 702–03 (Tex. 1959). And quoting that same constitutional language—perhaps carelessly—we have also stated that an aggrieved property owner’s claim for inverse condemnation is predicated on a showing that the government “intentionally took or damaged [private] property for public use, or was substantially certain that would be the result.” *City of Keller v. Wilson*, 168 S.W.3d 802, 808 (Tex. 2005); *see also State v. Hale*, 146 S.W.2d 731, 736 (Tex. 1941); *Gulf, C. & S.F. Ry. Co. v. Donahoo*, 59 Tex. 128, 133 (1883). But we have never held that a taking that fails to satisfy the public-use element is not compensable. To the contrary, we have broadly held that when “the government takes private property without first paying for it, the owner may recover

damages for inverse condemnation.” *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 554 (Tex. 2004). Our inclusion of “public use” as an element of an inverse-condemnation claim—stated with no analysis in cases in which public use was not even at issue—should not be read to imply that an inverse-condemnation claimant would not be entitled to compensation if property were taken for private use or the public-use requirement were not satisfied. *See, e.g., City of Keller*, 168 S.W.3d at 808.

Moreover, the Court has explicitly addressed the propriety (or rather, the impropriety) of a private-use taking within other contexts. We did so with greatest clarity in *Maher v. Lasater*, 354 S.W.2d 923 (Tex. 1962). In that case, a property owner challenged the constitutionality of a commissioners court’s order declaring a private road to be a public highway. *Id.* at 924. The order was issued pursuant to a statute that permitted such a declaration if a road was deemed “of sufficient public importance.” *Id.* at 925. The road at issue traversed the plaintiff’s property from a public road and terminated at the boundary of his neighbor’s land, which was used for grazing and pasturing. *Id.* at 924. As the road allowed access solely to the neighbor’s land, the only public purpose served was “putting the products of the soil and the range of [the neighboring property] into the economy of the community.” *Id.* at 926. As such, we held that the commissioners court’s declaration violated the public-use requirement of the Texas Constitution’s Takings Clause, and that the taking was void because it was not of sufficient public importance.<sup>1</sup> *Id.* Implicit in this holding is a recognition that a taking for a private purpose would also be void.

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<sup>1</sup> This decision fits squarely with the U.S. Supreme Court’s view. *Haw. Hous. Auth. v. Midkiff*, 467 U.S. 229, 245 (1984) (“A purely private taking could not withstand the scrutiny of the public[-]use requirement; it would serve no legitimate purpose of government and would thus be void.”).

But this precedent does not clearly address whether an inverse-condemnation plaintiff is entitled to compensation for a private taking. Unlike *Maher*, in which the government’s declaration that the plaintiff’s property was no longer private was declared void, in this case the County cannot undo the water damage to the plaintiffs’ homes. The proverbial bell has been rung. *Maher* addresses what Texas courts should do when title to property is taken outright for private use, but it fails to suggest a solution when a taking for private use damages property and reduces its value.

The need for this Court to address the compensability of a private taking is particularly important in Texas because such a taking is a real possibility. *See Osburn v. Denton Cty.*, 124 S.W.3d 289, 293 (Tex. App.—Fort Worth 2003, pet. denied) (holding that a private-use taking did not warrant compensation). By contrast, private takings are ostensibly a non-issue under the federal Constitution. The Sixth Circuit has stated that “[e]xamples of a taking for a private use tend to be esoteric . . . because all that is required for the taking to be considered for public use is a rational relationship to some conceivable public purpose.” *Montgomery v. Carter Cty., Tenn.*, 226 F.3d 758, 765 (6th Cir. 2000). As such, “[v]ery few takings will fail to satisfy that standard.” *Id.* at 765–66. The Seventh Circuit has similarly characterized the burden of establishing a public use as “remarkably light.” *Daniels v. Area Plan Comm’n of Allen Cty.*, 306 F.3d 445, 460 (7th Cir. 2002).<sup>2</sup> That low bar was confirmed by the U.S. Supreme Court’s ruling in *Kelo v. City of New London* that a taking “for public use” need only serve a public purpose. 545 U.S. 469, 480 (2005). As a result,

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<sup>2</sup> However, the burden is not insurmountable. Federal courts on occasion have enjoined condemnation proceedings on federal constitutional grounds because the purported reason for the proposed taking did not satisfy the public-use requirement. *See, e.g., 99 Cents Only Stores v. Lancaster Redevelopment Agency*, 237 F. Supp. 2d 1123, 1130–31 (C.D. Cal. 2001).

the Court held that taking private property for the purpose of turning it over to private developers pursuant to a “carefully formulated . . . economic development plan” satisfied the public-use requirement of the U.S. Constitution’s Takings Clause. *Id.* at 483.

In what has widely been viewed as a response to *Kelo*, the Texas Legislature passed the Limitations on Use of Eminent Domain Act during a 2005 special session. Act of Aug. 16, 2005, 79th Leg., 2d C.S., ch. 1, § 1, 2005 Tex. Gen. Laws 1, 1–2; *see also W. Seafood Co. v. United States*, 202 F. App’x 670, 677 (5th Cir. 2006) (noting that the Act was passed in response to the *Kelo* decision). Codified as Texas Government Code section 2206.001, the Act precludes a government taking that (1) would confer “a private benefit on a particular private party through the use of the property,” (2) was “merely a pretext to confer a private benefit,” or (3) served purely “economic development purposes.” The Act was amended in 2011 to make clear that the government may not condemn property if it “is not for a public use.” Act of May 6, 2011, 82d Leg., R.S., ch. 81, § 2, sec. 2206.001, 2011 Tex. Gen. Laws 354, 354.

These provisions are aimed squarely at the federal courts’ deferential approach to the public-use requirement. The Legislature has clearly exercised its prerogative to protect Texans’ property rights by narrowly defining public use. As a result, government actions that satisfy the federal public-use requirements could very well fail to satisfy such requirements in Texas. Because the Texas Legislature has opted to give greater protection to individual property rights, any suggestion that a private-use taking might bar a property owner’s right to recovery is misplaced. The Constitution limits government power; it does not limit Texans’ rights to obtain appropriate relief when that power is exceeded.

Although a few cases from other jurisdictions addressing those states' constitutions have held that a taking for private use is not compensable, I find the reasoning in these cases unpersuasive. *E.g., Clark v. Asheville Contracting Co.*, 342 S.E.2d 832, 839 (N.C. 1986); *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972, 990 (Cal. 1935). Such a holding improperly infers from the constitutionally placed burden on the government a reciprocal burden on property owners. Just as crucially, however, it ignores the Texas Constitution's goal of anticipating and preventing potentially abusive government action. Declaring that a private-use taking is not compensable would create a perverse set of incentives for State actors by encouraging takings that do not serve a public use. In turn, a public shield against improper government action would be converted into a sword to enable that same improper action. Put simply, it makes no sense to say that a property owner is entitled to compensation if the government does the right thing but not if it does the wrong thing.<sup>3</sup>

With these additional thoughts, I join the Court's opinion and judgment.

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Debra H. Lehrmann  
Justice

**OPINION DELIVERED:** June 17, 2016

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<sup>3</sup> Such a conclusion would leave property owners injured by a private taking with little recourse, as sovereign immunity would bar alternative tort claims against the government. While *ultra vires* actions against a government official who acts without legal authority allow prospective relief, they offer little solace to a property owner faced with repairing damage that has already occurred. See *City of El Paso v. Heinrich*, 284 S.W.3d 366, 373–77 (Tex. 2009) (discussing the strictly prospective nature of the relief in an *ultra vires* action).

# IN THE SUPREME COURT OF TEXAS

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No. 13-0303

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HARRIS COUNTY FLOOD CONTROL DISTRICT AND HARRIS COUNTY, TEXAS,  
PETITIONERS,

v.

EDWARD A. AND NORMA KERR, ET AL., RESPONDENTS

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ON PETITION FOR REVIEW FROM THE  
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JUSTICE DEVINE delivered a dissenting opinion, in which CHIEF JUSTICE HECHT, JUSTICE GREEN, and JUSTICE BOYD joined.

This inverse condemnation case concerns whether homeowners raised a fact question as to the elements of a taking. The homeowners blame their county and flood control district for approving new development without mitigating resulting runoff and drainage issues, causing their homes to flood. Of course, government entities do not have a duty to prevent all flooding. But, because the homeowners here presented evidence that the government entities knew unmitigated development would lead to flooding, that they approved development without appropriately mitigating it, and that this caused the flooding, I believe that the homeowners have raised a fact issue as to their takings claim. Because the Court concludes otherwise, I respectfully dissent.

## **I. Background and Procedural History**

The plaintiffs in this case are more than 400 residents and homeowners in the upper White Oak Bayou watershed in Harris County. Their homes were built mostly in the mid-to-late 1970s and early 1980s. Despite a history of flooding in the area, they initially suffered little to no flood damage. This changed, however, when Tropical Storm Francis in 1998, Tropical Storm Allison in 2001, and an unnamed storm in 2002 flooded their homes one or more times. The homeowners blame Harris County and Harris County Flood Control District, asserting that they approved new upstream development without implementing appropriate flood-control measures, all the while being substantially certain flooding would result.

The government entities have long known that expanding development in the watershed could cause flooding. In 1976, the U.S. Army Corps of Engineers prepared a report on the upper White Oak Bayou. The report noted recurrent damaging floods, which it attributed primarily to “inadequate channel capacities of the streams.” This problem was “compounded by the continuing increases in suburban development which reduces the infiltration of rainfall and increases and accelerates runoff to the streams.” Inadequate street drainage and storm sewers also caused severe localized flooding. The report predicted: “Additional residential development is expected to occur with or without an adequate plan for controlling the floods. Although current local regulations require that new structures be built above the level of the 100-year flood, damages will increase substantially in the future with increased rainfall runoff rates.” Accordingly, the Corps proposed channel improvements and other changes to reduce flooding caused by existing and future development. The plan was to be funded primarily by the federal government.

The government entities concurred with the Corps' findings and agreed to facilitate the project. Their ostensible goal following the Corps' report was to maintain or reduce the bayou's 100-year flood plain. But federal funding was slow to materialize, even as thousands of acres were developed in the bayou's watershed and the County continued approving more. Construction in the 100-year flood plain had been prohibited since the early 1970s, meaning that almost none of the new development or the plaintiffs' homes were in the 100-year flood plain when built or approved.

The delay in federal funding for the Corps' plan led County officials to develop their own flood-control plan. The District had already begun requiring new developments in the upper part of the watershed to provide on-site detention ponds, though the parties disagree on whether the District deviated from this policy. The government entities commissioned Pate Engineers to develop a plan. The "Pate Plan," adopted by the County in 1984, proposed to eliminate flooding along the upper bayou for 100-year flood events. Like the Corps' plan, the Pate Plan called for channel improvements along the upper portion of the bayou (some near the plaintiffs' homes). But it also called for more, such as for regional detention ponds to mitigate continuing development in the upper watershed. The plan was to be funded through local taxes and impact fees, but it was never fully implemented.

A 1989 flood led residents to inquire about the flood-control measures. The District's director assured them of plans to protect their property from 100-year floods. Yet the 1989 flood revealed flaws in the Pate Plan's engineering analysis, and the District commissioned another report on the upper White Oak Bayou watershed. Klotz Associates presented their findings in the early 1990s, concluding that the Pate Plan seriously underestimated the bayou's flood flows and levels.

Though the Klotz Plan’s features were more extensive in some regards than the Pate Plan, the Klotz Plan was modeled around containing 10-year (as opposed to 100-year) flood events. The government entities adopted these changes.

The new information led FEMA to update the bayou’s flood-plain maps in the 1990s. Revisions exposed an expanding flood plain, encompassing more and more of the plaintiffs’ homes. According to the homeowners, by 1999, all of their homes were within the 100-year flood plain—something the government entities do not dispute here. Indeed, from 1998 to 2002, most of their homes were inundated in three successive floods.

The homeowners filed an inverse condemnation suit. The government entities responded with a combined plea to the jurisdiction and motion for summary judgment, contending that no genuine issue of material fact had been raised on the elements of the takings claim. The trial court denied the motion, and the court of appeals affirmed the denial of the plea to the jurisdiction. 445 S.W.3d 242, 247 (Tex. App.—Houston [1st Dist.] 2013).

## **II. Analysis**

Article I, Section 17 of the Texas Constitution provides:

No person’s property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person . . . .

TEX. CONST. art. I, § 17(a).

Those seeking recovery for a taking must prove the government “intentionally took or damaged their property for public use, or was substantially certain that would be the result.” *City of Keller v. Wilson*, 168 S.W.3d 802, 808 (Tex. 2005). Sovereign immunity does not shield the

government from liability for compensation under the takings clause. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001).<sup>1</sup> To defeat the government entities' plea to the jurisdiction, the homeowners need only raise a fact issue as to each element of their claim. *See Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 228 (Tex. 2004) (noting that plea to the jurisdiction procedure "mirrors" our summary judgment practice). That is, the homeowners must raise a fact issue as to intent, causation, and public use. *Little-Tex Insulation Co.*, 39 S.W.3d at 598. While determining whether they have met this burden, we take as true all evidence favorable to the nonmovant, indulging every reasonable inference and resolving any doubts in the nonmovant's favor. *Miranda*, 133 S.W.3d at 228.

### A. Intent

In a takings case, "the requisite intent is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result." *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004). It is not enough that the act causing the harm be intentional—there must also be knowledge to a substantial certainty that the harm will occur. *City of Dallas v. Jennings*, 142 S.W.3d 310, 313–14 (Tex. 2004). Intent, in takings cases as in other contexts, may be proven by circumstantial evidence. *See Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 435 (Tex. 1986). But a taking cannot rest on the mere negligence of the government. *City of Tyler v. Likes*, 962 S.W.2d 489, 505 (Tex. 1997). The issue here is whether the homeowners' circumstantial evidence raises a fact question as to the government entities'

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<sup>1</sup> For convenience, I use "sovereign immunity" throughout this opinion to refer to the related doctrines of sovereign immunity and governmental immunity. *See City of Houston v. Williams*, 353 S.W.3d 128, 134 n.5 (Tex. 2011) (explaining that governmental immunity protects political subdivisions of the State).

knowledge that “harm [was] substantially certain to result” to the homeowners’ homes because of the entities’ actions. *See Gragg*, 151 S.W.3d at 555.

The homeowners do not argue that the government entities have a general legal duty to prevent all flooding. Instead, they urge that the entities approved private development in the White Oak Bayou watershed without mitigating its consequences, being substantially certain the unmitigated development would bring flooding with it. The government entities respond that they did not intend the flooding; indeed, the District’s very purpose is to plan for storm-water runoff and control flooding. They assert that they cannot stop all flooding, and to the extent flooding does occur, their intent is to reduce or prevent it, not cause it.

The summary judgment evidence shows a fact question exists regarding whether the government entities were substantially certain their actions in approving development without appropriately mitigating it would cause the plaintiffs’ homes to flood. The Corps’ report, Pate Plan, and Klotz report confirm that the entities have known for several decades that development in the bayou’s watershed exacerbates flooding in the upper bayou. The homeowners point to evidence that the County approved development without the previously required on-site detention.<sup>2</sup> The Klotz

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<sup>2</sup> The government entities note that the homeowners’ pleadings specifically blamed flooding on development “[s]ince 1984.” The pleadings stated that prior to 1984, the District “required all new development projects to incorporate on-site storm water detention into their development plans.” The entities assert that the homeowners judicially admitted that on-site detention accompanied all pre-1984 development. A judicial admission, however, must be clear and unequivocal. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 905 (Tex. 2000). A possible interpretation of the homeowners’ pleadings is that the District had a requirement of on-site detention, but this says nothing about the District’s adherence to that requirement. Indeed, the homeowners’ response to the entities’ plea to the jurisdiction and summary judgment motion specifically claimed that “Defendants continued to approve new development without on-site mitigation even after this 1976 study had clearly shown them that the bayou did not have the capacity to handle any additional storm water runoff.” As evidence that some pre-1984 development was not mitigated, the homeowners rely on a table supplied by the entities’ expert, Melvin Spinks. The parties interpret the table differently, and the table itself is not clear on its face, but the homeowners’ pleadings do not contain an unequivocal admission on

report led the entities to plan for 10-year flood events rather than 100-year floods as called for by the Pate Plan. And the homeowners' expert witness, Dr. Larry Mays, opined that when the entities approved development, knowing that surface runoff would increase if the development was not mitigated, and then planned to contain only 10-year floods, the entities were substantially certain that flooding would result.

The government entities respond that their "knowledge must be determined as of the time [they] acted, not with benefit of hindsight." *City of San Antonio v. Pollock*, 284 S.W.3d 809, 821 (Tex. 2009). The entities urge that they changed from the Pate Plan to the Klotz Plan because the Pate Plan was flawed. There is no evidence they knew of the flaws at the time they adopted it or approved most of the development. In other words, no evidence exists that at the time they approved most of the development at issue, they were substantially certain the flood-control measures would fail and flooding would result. When the 1989 flood revealed the Pate Plan's flaws, the entities followed their engineers' advice and adopted the Klotz Plan. Since then, they have spent millions of dollars on drainage and infrastructure that, according to their experts, goes far beyond the Pate Plan, and no evidence exists that the Pate Plan would have stopped the floods the homeowners complain about. Michael David Talbott, an expert witness for the entities, explained that the District's knowledge of the watershed "changed significantly over time" and continued to change "with the advent of new technologies and with observations of actual events." The changing flood plains and changing plans were not premeditated; they resulted from new data and knowledge.

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the subject.

This competing evidence demonstrates, in the words of the court of appeals below, “the factual complexity surrounding this issue and the difficulty of pinpointing precisely what [the government entities] knew about flooding in the upper watershed and when they knew it.” 445 S.W.3d at 258. Evidence exists that the entities approved development without appropriately mitigating it, and that at times they deviated from their early policy of requiring on-site detention ponds. There is also evidence that they abandoned plans protecting against 100-year floods for plans targeting only 10-year floods. Though none of the evidence on its own might raise a fact question, together it raises a question of fact as to the entities’ intent to take the homeowners’ property to facilitate new development without appropriate mitigation.

The homeowners also submit that the recurring nature of these floods is probative of the government entities’ intent and the extent of the taking. *See Gragg*, 151 S.W.3d at 555 (“In the case of flood-water impacts, recurrence is a probative factor in determining the extent of the taking and whether it is necessarily incident to authorized government activity, and therefore substantially certain to occur.”); *see also Kopplow Dev., Inc. v. City of San Antonio*, 399 S.W.3d 532, 537 (Tex. 2013) (“With flood water impacts, recurrence is a probative factor in assessing intent and the extent of the taking.”). Here, the entities knew that flooding occurred frequently in the bayou, and they originally planned for 100-year events. Yet there is evidence that they later planned only for 10-year events. The fact that storms sometimes surpass 10-year events is no surprise to the entities. The recurring nature of the flood events is evidence of intent and the extent of the taking.

The government entities invoke *City of Keller v. Wilson*, where the Court held that a city could rely on engineers’ conclusions that a drainage ditch was unnecessary, even though, as it turned

out, the ditch might have stopped flooding. *See* 168 S.W.3d at 829. Here, the entities did receive engineers' advice. Yet the entities were also aware that the Klotz Plan would protect against 10-year events, whereas the prior plan had been to protect against 100-year floods. There is evidence the entities knew (based, in part, on engineers' reports) that unmitigated development would lead to flooding. Unlike in *City of Keller*, the engineers' recommendations here informed the entities of the danger.

In sum, the homeowners have raised a fact question regarding intent. This case is unlike others where there was no "evidence that the act . . . was substantially certain to lead to such damage." *Jennings*, 142 S.W.3d at 315.

## B. Causation

To prevail, the homeowners must also raise a fact issue as to whether the government entities' actions "resulted in a 'taking' of property." *Little-Tex Insulation Co.*, 39 S.W.3d at 598. The entities assert that the homeowners failed to do so. I disagree.

The homeowners' expert, Dr. Mays, performed a study that raises a fact question regarding whether the government entities' approval of development and subsequent failure to properly mitigate it caused the homes to flood. Dr. Mays investigated the effects of unmitigated development on the watershed, performing his "Effect of Urbanization on Peak Discharges" analysis to demonstrate the difference between 1982 land use conditions and 1990 land use conditions. He compared peak discharges and runoff hydrographs from conditions in 1982 to peak discharges and runoff hydrographs from conditions in 1998, concluding that the primary cause of flooding along White Oak Bayou was development "without the implementation of proper stormwater management

measures (such as detention and/or retention).” This caused “significant increases in flows and corresponding water surface elevations for an approximate 10-year flood event.” Dr. Mays determined that two of the three flood events between 1998 and 2002 were 10-year flood events. He concluded: “But for’ the actions by the County of approving this unmitigated development, and/or by not fully implementing the Pate Plan (which would have eliminated the risk of flooding along the bayou for up to a 100-year event), the Plaintiffs’ properties would not have flooded during these three flood events.”

The government entities point to purported “analytical gaps” in Dr. Mays’ study. For example, the entities point out that Dr. Mays freely admitted that he never modeled or tested the Pate Plan to show that it would have stopped the flooding. Without proving there was a way to stop the flooding, Dr. Mays could not prove the entities caused it. The entities present evidence that the expanding flood plain was caused (at least in part) by new knowledge about existing conditions as opposed to changes in conditions. The entities assert that intense, unexpected rainfall—not their own actions—caused the floods, observing that flooding occurred all over Harris County during these storms, not just in the White Oak Bayou watershed. They also challenge Dr. Mays’ method of determining the size of the storms, arguing that they were larger.

I believe the homeowners have raised a fact issue regarding whether the entities’ actions caused the flooding. The homeowners presented evidence that the Klotz Plan targeted 10-year events, whereas the Pate Plan had aspired to contain 100-year floods. Dr. Mays presented data supporting his conclusion that the flooding was caused by water exceeding the bounds of the bayou rather than by the pooling of water in the homeowners’ yards. Regarding the size of the flood events,

the entities' own expert, Andy Yung, created a fact issue. In an affidavit, Yung stated that the rainfall for the 2001 storm exceeded a 100-year event. But in a report, he concluded that the 1998 and 2001 floods were about 50-year events and the "magnitude of the 2002 flood event was considerably less." He then concluded that "in all three of these events, areas were inundated which have been historically identified in the 100-year flood plain." In other words, the entities' own expert provides evidence that the floods were less than 100-year events, but that the flooding extended into areas not anticipated even for 100-year events. A fact question exists regarding the cause of the floods.

In sum, several unresolved fact questions exist. For example, the parties dispute the nature and degree of the three flood events. The government entities have contended that two of the storms produced unprecedented rainfall, yet evidence exists that these storms were within the parameters planned for by the Pate Plan and the Corps' study. The parties also dispute the degree to which unmitigated development contributed to the 100-year flood plain's expansion, the relative benefits and shortcomings of the Pate and Klotz Plans, and the entities' ability to manage and control development in the bayou's watershed, as well as the entities' efforts to mitigate the effects of new development. Experts have weighed in on both sides of the debate, but the questions remain unsettled, and the merits of these homeowners' claims depend on their resolution.

### **C. Public Use**

The government entities assert that no evidence exists of a taking for public use. They argue that property is only "damaged for public use" if the "governmental entity is aware that its action will necessarily cause physical damage to certain private property, and yet determines that the benefit to

the public outweighs the harm caused to that property.” *Jennings*, 142 S.W.3d at 314. The entities’ arguments on this point, however, merely repeat their arguments concerning intent and causation: the entities made no conscious decision to sacrifice the plaintiffs’ property for public use, and their conduct did not cause the flooding, so it was not for public use. In response, the homeowners contend the entities approved development and made drainage-plan decisions for the sake of the public.

At least some evidence exists that in approving new development and drainage plans causing flooding, the entities’ were acting for a public use. To the extent the government entities were substantially certain the homeowners’ homes would flood because of unmitigated development, but sacrificed their homes for the sake of new development, this was for a public use. If the homeowners bore the burden of the growing community, then, “in all fairness and justice, [the burden] should be borne by the public as a whole.” *Gragg*, 151 S.W.3d at 554.

### **III. Conclusion**

A fact question exists as to each element of the homeowners’ takings claim. To conclude that there is a question of fact is not to hold that government entities have a duty to prevent all flooding. Rather, it means the plaintiffs have presented at least some evidence of their takings claim, and a jury should evaluate the evidence to reach a conclusion. In other words, the government entities’ plea to the jurisdiction should be denied. Because the Court holds otherwise, I respectfully dissent.

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John P. Devine  
Justice

Opinion Delivered: June 17, 2016

## IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA BUILDING INDUSTRY ASSOCIATION,	)	
	)	
Plaintiff and Respondent,	)	S212072
v.	)	Ct.App. 6 H038563
CITY OF SAN JOSE,	)	
	)	Santa Clara County
Defendant and Appellant;	)	Super. Ct. No. CV167289
AFFORDABLE HOUSING NETWORK OF SANTA CLARA COUNTY et al.,	)	
	)	
Intervenors and Appellants.	)	
	)	

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Health and Safety Code section 50003, subdivision (a), currently provides: “The Legislature finds and declares that . . . there exists within the urban and rural areas of the state a serious shortage of decent, safe, and sanitary housing which persons and families of low or moderate income . . . can afford. This situation creates an absolute present and future shortage of supply in relation to demand . . . and also creates inflation in the cost of housing, by reason of its scarcity, which tends to decrease the relative affordability of the state’s housing supply for all its residents.”

This statutory language was first enacted by the Legislature *over 35 years ago*, in the late 1970s. (Stats. 1975, 1st Ex. Sess., ch. 1, § 7, pp. 3859-3861, adding Health & Saf. Code, former § 41003; Stats. 1979, ch. 97, § 2, p. 225,

amending Health & Saf. Code, § 50003.) It will come as no surprise to anyone familiar with California’s current housing market that the significant problems arising from a scarcity of affordable housing have not been solved over the past three decades. Rather, these problems have become more severe and have reached what might be described as epic proportions in many of the state’s localities. All parties in this proceeding agree that the lack of affordable housing is a very significant problem in this state.

As one means of addressing the lack of a sufficient number of housing units that are affordable to low and moderate income households, more than 170 California municipalities have adopted what are commonly referred to as “inclusionary zoning” or “inclusionary housing” programs. (Non-Profit Housing Association of Northern California, *Affordable by Choice: Trends in California Inclusionary Housing Programs* (2007) p. 3 (hereafter NPH *Affordable by Choice*).) As a 2013 publication of the United States Department of Housing and Urban Development (HUD) explains, inclusionary zoning or housing programs “require or encourage developers to set aside a certain percentage of housing units in new or rehabilitated projects for low- and moderate-income residents. This integration of affordable units into market-rate projects creates opportunities for households with diverse socioeconomic backgrounds to live in the same developments and have access to [the] same types of community services and amenities . . . .” (U.S. Dept. of Housing and Urban Development, *Inclusionary Zoning and Mixed-Income Communities* (Spring 2013) Evidence Matters, p. 1, fn. omitted (hereafter 2013 *HUD Inclusionary Zoning*)

<<http://www.huduser.org/portal/periodicals/em/spring13/highlight3.html>> [as of June 15, 2015].)<sup>1</sup>

In 2010, after considerable study and outreach to all segments of the community, the City of San Jose (hereafter sometimes referred to as the city or San Jose) enacted an inclusionary housing ordinance that, among other features, requires all new residential development projects of 20 or more units to sell at least 15 percent of the for-sale units at a price that is affordable to low or moderate income households. (The ordinance is described in greater detail in pt. II., *post.*)

Very shortly after the ordinance was enacted and before it took effect, plaintiff California Building Industry Association (CBIA) filed this lawsuit in superior court, maintaining that the ordinance was invalid on its face on the ground that the city, in enacting the ordinance, failed to provide a sufficient evidentiary basis “to demonstrate a reasonable relationship between any adverse public impacts or needs for additional subsidized housing units in the City ostensibly caused by or reasonably attributed to the development of new

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<sup>1</sup> The 2013 HUD article further explains that inclusionary zoning or housing programs “vary in their structure; they can be mandatory or voluntary and have different set-aside requirements, affordability levels, and control periods. Most [inclusionary zoning] programs offer developers incentives such as density bonuses, expedited approval, and fee waivers to offset some of the costs associated with providing the affordable units. Many programs also include developer opt-outs or alternatives, such as requiring developers to pay fees or donate land in lieu of building affordable units or providing the units offsite. Studies show that mandatory programs produce more affordable housing than voluntary programs, and developer opt-outs can reduce opportunities for creating mixed-income housing. At the same time, [inclusionary zoning’s] reliance on the private sector means that its effectiveness also depends on the strength of a locality’s housing market, and researchers acknowledge that a certain degree of flexibility is essential to ensuring the success of [inclusionary zoning] programs.” (2013 *HUD Inclusionary Zoning*, *supra*, at p. 1, fns. omitted.)

residential developments of 20 units or more and the new affordable housing exactions and conditions imposed on residential development by the Ordinance.” The complaint maintained that under the “controlling state and federal constitutional standards governing such exactions and conditions of development approval, and the requirements applicable to such housing exactions as set forth in *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, and *Building Industry Assn. of Central California v. City of Patterson* (2009) 171 Cal.App.4th 886” the conditions imposed by the city’s inclusionary housing ordinance would be valid only if the city produced evidence demonstrating that the requirements were reasonably related to the adverse impact on the city’s affordable housing problem *that was caused by or attributable to the proposed new developments that are subject to the ordinance’s requirements*, and that the materials relied on by the city in enacting the ordinance did not demonstrate such a relationship. Although the complaint did not explicitly spell out the specific nature of its constitutional claim, CBIA has subsequently clarified that its challenge rests on “the unconstitutional conditions doctrine, as applied to development exactions” under the takings clauses (or, as they are sometimes denominated, the just compensation clauses) of the United States and California Constitutions. CBIA’s challenge is based on the premise that the conditions imposed by the San Jose ordinance constitute “exactions” for purposes of that doctrine. The superior court agreed with CBIA’s contention and issued a judgment enjoining the city from enforcing the challenged ordinance.

The Court of Appeal reversed the superior court judgment, concluding that the superior court had erred (1) in finding that the San Jose ordinance requires a developer to dedicate property to the public within the meaning of the takings clause, and (2) in interpreting the controlling constitutional principles and the decision in *San Remo Hotel v. City and County of San Francisco, supra*, 27

Cal.4th 643 (*San Remo Hotel*), as limiting the conditions that may be imposed by such an ordinance to only those conditions that are reasonably related to the adverse impact the development projects that are subject to the ordinance themselves impose on the city’s affordable housing problem. Distinguishing the prior appellate court decision in *Building Industry Assn. of Central California v. City of Patterson*, *supra*, 171 Cal.App.4th 886 (*City of Patterson*), the Court of Appeal held that the appropriate legal standard by which the validity of the ordinance is to be judged is the ordinary standard that past California decisions have uniformly applied in evaluating claims that an ordinance regulating the use of land exceeds a municipality’s police power authority, namely, whether the ordinance bears a real and substantial relationship to a legitimate public interest. The Court of Appeal concluded that the matter should be remanded to the trial court for application of this traditional standard.

CBIA sought review of the Court of Appeal decision in this court, maintaining that the appellate court’s decision conflicts with the prior Court of Appeal decision in *City of Patterson*, *supra*, 171 Cal.App.4th 886, and that *City of Patterson* was correctly decided and should control here. We granted review to determine the soundness of the Court of Appeal’s ruling in this case.

For the reasons discussed below, we conclude that the Court of Appeal decision in the present case should be upheld. As explained hereafter, contrary to CBIA’s contention, the conditions that the San Jose ordinance imposes upon future developments do not impose “exactions” upon the developers’ property so as to bring into play the unconstitutional conditions doctrine under the takings clause of the federal or state Constitution. Furthermore, unlike the condition that was at issue in *San Remo Hotel*, *supra*, 27 Cal.4th 643, and to which the passage in that opinion upon which CBIA relies was addressed — namely, an in lieu monetary fee that is imposed to mitigate a particular adverse effect of the

development proposal under consideration — the conditions imposed by the San Jose ordinance at issue here do not require a developer to pay a monetary fee but rather place a limit on the way a developer may use its property. In addition, the conditions are intended not only to mitigate the effect that the covered development projects will have on the city’s affordable housing problem but also to serve the distinct, but nonetheless constitutionally legitimate, purposes of (1) *increasing the number of affordable housing units in the city* in recognition of the insufficient number of existing affordable housing units in relation to the city’s current and future needs, and (2) assuring that new affordable housing units that are constructed *are distributed throughout the city as part of mixed-income developments* in order to obtain the benefits that flow from economically diverse communities and avoid the problems that have historically been associated with isolated low income housing. Properly understood, the passage in *San Remo Hotel* upon which CBIA relies does not apply to the conditions imposed by San Jose’s inclusionary housing ordinance.

Accordingly, we conclude that the judgment of the Court of Appeal in this case should be affirmed.

## **I. Statutory background**

We begin with a brief summary of the California statutes that form the background to the San Jose ordinance challenged in this case.

Nearly 50 years ago, the California Legislature enacted a broad measure requiring all counties and cities in California to “adopt a comprehensive, long-term general plan for the physical development of the county or city.” (Gov. Code, § 65300 et seq., enacted by Stats. 1965, ch. 1880, § 5, pp. 4334, 4336, operative Jan. 1, 1967.) Each municipality’s general plan is to contain a variety of mandatory and optional elements, including a mandatory housing element consisting of standards and plans for housing sites in the municipality that “shall

endeavor to make adequate provision for the housing needs of all economic segments of the community.” (Gov. Code, former § 65302, subd. (c), as amended by Stats. 1967, ch. 1658, § 1, p. 4033; see now Gov. Code, § 65580.)

A little more than a decade later, in 1980, declaring (1) that “[t]he availability of housing is of vital statewide importance,” (2) that “the early attainment of decent housing and a suitable living environment for every Californian . . . is a priority of the highest order,” (3) that “[t]he early attainment of this goal requires the cooperative participation of government and the private sector in an effort to expand housing opportunities and accommodate the housing needs of Californians of all economic levels,” and (4) that “[l]ocal and state governments have a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of all economic segments of the community” (Gov. Code, § 65580, subds. (a), (b), (d), italics added), the Legislature enacted a separate, comprehensive statutory scheme that substantially strengthened the requirements of the housing element component of local general plans. (Gov. Code, §§ 65580-65589, enacted by Stats. 1980, ch. 1143, § 3, pp. 3697-3703.) The 1980 legislation — commonly referred to as the “Housing Element Law” (see, e.g., *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1179) — sets forth in considerable detail a municipality’s obligations to analyze and quantify the locality’s existing and projected housing needs for all income levels, including the locality’s share of the regional housing need as determined by the applicable regional “[c]ouncil of governments” (Gov. Code, § 65582, subd. (b)), and to adopt and to submit to the California Department of Housing and Community Development a multiyear schedule of actions the local government is undertaking to meet these needs. (Id., §§ 65583-65588.) In particular, the legislation requires a municipality, “[i]n order to make adequate provision for the housing needs of all

economic segments of the community, . . . [to] [¶] [i]dentify actions that will be taken to make sites available during the planning period . . . with appropriate zoning and development standards and with services and facilities to accommodate that portion of the city's or county's share of the regional housing need for each income level" (Gov. Code, § 65583, subd. (c)(1)) and to "[a]ssist in the development of adequate housing to meet the needs of extremely low, very low, low-, and moderate-income households." (*Id.*, subd. (c)(2).)

In addition to adopting the Housing Element Law, the Legislature has enacted a variety of other statutes to facilitate and encourage the provision of affordable housing, for example, prohibiting local zoning and other restrictions that preclude the construction of affordable housing units (see, e.g., Gov. Code, §§ 65913.1 [least cost zoning law], 65589.5 [Housing Accountability Act]), and requiring local governments to provide incentives, such as density bonuses, to developers who voluntarily include affordable housing in their proposed development projects. (Gov. Code, § 65915.) Furthermore, with respect to two geographic categories — redevelopment areas and the coastal zone — the Legislature has enacted statutes explicitly directing that new residential development within such areas include affordable housing units. (See Health & Saf. Code, § 33413, subd. (b)(1), (2)(A)(i) [redevelopment areas]; Gov. Code, § 65590, subd. (d) [coastal zone].)

Although to date the California Legislature has not adopted a statewide statute that requires every municipality to adopt a mandatory inclusionary housing ordinance if needed to meet the municipality's obligations under the Housing Element Law, in recent decades more than 170 California cities and counties have adopted such inclusionary housing ordinances in an effort to meet such obligations. (See generally NPH Affordable by Choice, *supra*, pp. 3, 40 [listing cities and counties with inclusionary policies as of 2006]; Nat. Housing

Conference, *Inclusionary Zoning: The California Experience* (Feb. 2004) NHC Affordable Housing Policy Review, vol. 3, issue 1; Calavita et al., *Inclusionary Housing in California: The Experience of Two Decades* (1998) 64 J. Amer. Planning Assn. 150, 158-164.) The provisions and legislative history of the affordable housing statutes make it clear that the California Legislature is unquestionably aware of these numerous local mandatory inclusionary housing ordinances and that the existing state legislation is neither inconsistent with nor intended to preempt these local measures.<sup>2</sup>

## **II. Background and description of challenged San Jose inclusionary housing ordinance**

It is within the context of the foregoing statutory framework that San Jose began considering the need and desirability of adopting an inclusionary housing

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<sup>2</sup> For example, Government Code section 65589.5, subdivision (f)(1), a provision of the Housing Accountability Act, provides in this regard, in part: “Nothing in this section shall be construed to prohibit a local agency from requiring the development project to comply with objective, quantifiable, written development standards, conditions, and policies appropriate to, and consistent with, meeting the jurisdiction’s share of the regional housing need pursuant to Section 65584.” Similarly, although the legislative history of the density bonus law, Government Code section 65915, discloses a disagreement among supporters of the law with regard to how that statute would apply to developers subject to a local mandatory inclusionary housing ordinance, that history makes clear that there was agreement that the density bonus law “does not preempt the ability [of] local ordinances to require the inclusion of affordable (low, very low, or moderate-income) units within a housing development.” (Sen. Hollingsworth, letter to Sen. Pereira (Aug. 25, 2005) — Sen. J. (2005-2006 Reg. Sess.) pp. 2293-2294 [legislative intent of Sen. Bill No. 435 (2005-2006 Reg. Sess.) and Sen. Bill No. 1818 (2003-2004 Reg. Sess.)], reprinted at Historical and Statutory Notes, 36D West’s Ann. Gov. Code (2009 ed.) foll. § 65915, pp. 233-234; see Assemblymember Mullin, letter (Sept. 8, 2005) 3 Assem. J. (2005-2006 Reg. Sess.) pp. 3670-3671 [same], reprinted at Historical and Statutory Notes, 36D West’s Ann. Gov. Code, *supra*, at p. 234.)

ordinance. As noted, the statewide Housing Element Law places responsibility upon a city to use its powers to facilitate the development of housing that makes adequate provision for all economic segments of the community, in particular extremely low, very low, lower and moderate income households, including the city's allocation of the regional housing need as determined by the applicable regional council of governments. (Gov. Code, §§ 65580, subd. (d), 65583, 65584.)<sup>3</sup>

In December 2008, the Association of Bay Area Governments (ABAG), the regional council of governments within whose jurisdiction the City of San Jose falls (see Gov. Code, § 65588, subd. (e)(1)(B)), calculated San Jose's share of the regional need for new housing over the 2007-2014 planning period as approximately 34,700 units, of which approximately 19,300 units — *or about 60 percent of the new housing units in San Jose* — would be needed to house moderate, low, very low, and extremely low income households. As of February 2009, however, San Jose had met only a small percentage of its regional need allocation for moderate or lower income households (6 percent of the need for moderate income households, 2 percent for lower income households, 16 percent for very low income households, and 13 percent for extremely low income households, respectively).

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<sup>3</sup> California statutes generally define the various low and moderate income levels by reference to the levels set by federal law, but in the absence of applicable federal standards, extremely low income households are defined as those earning no more than 30 percent of the area median income (adjusted for family size) (Health & Saf. Code, § 50106); very low income households are defined as those earning no more than 50 percent of the area median income (*id.*, § 50105); lower income households are defined as those earning no more than 80 percent of the area median income (*id.*, § 50079.5); and moderate income households are defined as those earning less than 120 percent of area median income. (*Id.*, § 50093.)

Prior to the adoption of the challenged citywide ordinance in 2010, San Jose's experience with a mandatory inclusionary housing policy was limited to residential development projects that were undertaken within the redevelopment areas of the city. (At that time, redevelopment areas comprised almost 20 percent of the city's territory and included one-third of the city's population.) As noted, redevelopment areas were one of the two types of locations within which the Legislature had directed that any new residential development must include some affordable housing units. Under the applicable statute, at least 15 percent of all new or substantially rehabilitated dwelling units in a redevelopment project undertaken by a public or private entity other than the redevelopment agency were required to be made available at an affordable housing cost and to be occupied by persons and families of low or moderate income. (Health & Saf. Code, § 33413, subd. (b)(2)(A)(i).)<sup>4</sup> Between 1999 and 2009, more than 10,000 affordable housing units had been built in the redevelopment areas of San Jose under the city's redevelopment inclusionary housing policy.

In part as a result of this experience with a mandatory inclusionary housing requirement in its redevelopment areas, the city began considering the feasibility of adopting a *citywide* inclusionary housing policy. Out of concern for the potential economic impact of such a citywide requirement on developers, however, the city retained a private consulting firm to conduct an economic feasibility study of a citywide inclusionary housing policy. The very extensive 300-page study, prepared by the consulting firm with input from developers,

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<sup>4</sup> The statute also requires that when new (or substantially rehabilitated) dwelling units are developed in a redevelopment project by the redevelopment agency itself, at least 30 percent of the units must be affordable to low or moderate income families. (Health & Saf. Code, § 33413, subd. (b)(1).)

affordable housing advocates, community organizations and others, concluded that inclusionary housing could be economically feasible with certain developer incentives and under improved economic conditions.

After reviewing the study, the city council directed city staff to obtain further input from affected stakeholders and the community generally and then to bring a draft policy to the council for its consideration. Between June and December 2008, officials at the city housing department held more than 50 meetings with community members, developer and labor associations, affordable housing advocates and community organizations, and presented a draft policy to the council. In December 2008, after discussion, the city council directed staff to draft an inclusionary housing ordinance that would meet specified requirements agreed upon by the council. A draft ordinance was written and released for public review in July 2009, and between July and October 2009 nine public meetings were held throughout the city to discuss the draft ordinance. On January 26, 2010, the city council adopted the citywide inclusionary housing ordinance at issue in this case. (San Jose Ordinance No. 28689, amending San Jose Mun. Code, tit. 5 to add new ch. 5.08 adopting a “citywide inclusionary housing program”; San Jose Mun. Code, §§ 5.08.010-5.08.730.)<sup>5</sup>

We summarize the principal provisions of the lengthy ordinance, which runs 57 pages.

The ordinance begins with a list of findings and declarations, detailing the steady increase in the cost of housing in San Jose generally and the substantial

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<sup>5</sup> Hereafter, we shall cite sections of the ordinance using the following format, e.g., S.J.M.C. § 5.08.010. The ordinance is available online at <[https://www.municode.com/library/ca/san\\_jose/codes/code\\_of\\_ordinances](https://www.municode.com/library/ca/san_jose/codes/code_of_ordinances)> [as of June 15, 2015].

need for affordable housing for extremely low, very low, lower, and moderate income households to meet the city's regional housing needs allocation as determined by ABAG. The findings note that “[r]equiring affordable units within each development is consistent with the community's housing element goals of protecting the public welfare by fostering an adequate supply of housing for persons at all economic levels and maintaining both economic diversity and geographically dispersed affordable housing.” (S.J.M.C. § 5.08.010 F.) The findings further observe that requiring builders of new market rate housing to provide some housing affordable to low and moderate income families “is also reasonably related to the impacts of their projects, because: [¶] 1. Rising land prices have been a key factor in preventing development of new affordable housing. New market-rate housing uses available land and drives up the price of remaining land. New development without affordable units reduces the amount of land development opportunities available for the construction of affordable housing. [¶] 2. New residents of market-rate housing place demands on services provided by both public and private sectors, creating a demand for new employees. Some of these public and private sector employees needed to meet the needs of the new residents earn incomes only adequate to pay for affordable housing. Because affordable housing is in short supply in the city, such employees may be forced to live in less than adequate housing within the city, pay a disproportionate share of their incomes to live in adequate housing in the city, or commute ever increasing distances to their jobs from housing located outside the city. These circumstances harm the city's ability to attain employment and housing goals articulated in the city's general plan and place strains on the city's ability to accept and service new market-rate housing development.” (*Ibid.*)

The next section, setting forth the purposes of the ordinance, explains that a principal purpose is to enhance the public welfare by establishing policies

requiring the development of housing affordable to low and moderate income households in order to meet the city's regional share of housing needs and implement the goals and objectives of the city's general plan and housing element. A further purpose is to provide for the residential integration of low and moderate income households with households of market rate neighborhoods and to disperse inclusionary units throughout the city where new residential development occurs. In addition, the ordinance is intended to alleviate the impacts that would result from the use of available residential land solely for the benefit of households that are able to afford market rate housing and to mitigate the service burden imposed by households in new market rate residential developments by making additional affordable housing available for service employees. Finally, the ordinance provides residential developers with a menu of options from which to select alternatives to the construction of inclusionary units on the same site as market rate residential developments. (S.J.M.C. § 5.08.020.)

The substantive provisions of the ordinance follow. The requirements contained in the ordinance apply to all residential developments within the city that create 20 or more new, additional, or modified dwelling units. (S.J.M.C. § 5.08.250 A.) With regard to such developments, the ordinance's basic inclusionary housing requirement specifies that 15 percent of the proposed on-site for-sale units in the development shall be made available at an "affordable housing cost" to households earning no more than 120 percent of the area median income for Santa Clara County adjusted for household size. (S.J.M.C. §§ 5.08.400 A.1., 5.08.130.) The ordinance generally defines affordable housing cost by reference to the definition set forth in Health and Safety Code section 50052.5 (S.J.M.C. § 5.08.105), which in turn defines affordable housing cost as 30 percent of the area median income of the relevant income group (i.e. extremely low, very low, lower

and moderate income). (Health & Saf. Code, § 50052.5, subd. (b)(1), (2), (3), (4).)<sup>6</sup>

As an alternative to providing the required number of for-sale inclusionary units on the same site as the market rate units, the ordinance affords a developer a number of compliance options. At the same time, as an apparent incentive to encourage developers to choose to provide on-site inclusionary units, the

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<sup>6</sup> In addition to requiring 15 percent of *for-sale* units to be made available at an affordable housing cost, with respect to *rental* residential development the ordinance requires 9 percent of the units to be made available for rent at an affordable housing cost to moderate income households, and 6 percent of the units to be made available at an affordable housing cost to very low income households. (S.J.M.C. § 5.08.400 A.2..) The provision relating to rental units, however, explicitly provides that it “shall be operative [only] at such time as current appellate case law in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles*, 175 Cal.App.4th 1396 (2d Dist. 2009) is overturned, disapproved, or depublished by a court of competent jurisdiction or modified by the state legislature to authorize control of rents of inclusionary units.” (*Ibid.*)

In the 2009 decision in *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles, supra*, 175 Cal.App.4th 1396 1410-1411 (*Palmer/Sixth Street Properties*), the Court of Appeal held that the vacancy decontrol provisions of the Costa-Hawkins Rental Housing Act (Civ. Code, § 1954.53, subd. (a)) — that permit residential landlords, except in specified circumstances, to establish the initial rental rate for a dwelling or unit — precluded the City of Los Angeles from enforcing a provision of its mandatory inclusionary housing ordinance that required the developer of a residential rental development to rent some of the rental units at a specified below market, affordable rental rate. The provision of the San Jose ordinance in question recognizes that unless *Palmer/Sixth Street Properties* is judicially overturned or legislatively modified, the provisions of the San Jose ordinance applicable to rental units, limiting the initial rent that a developer can charge for a newly constructed residential rental unit, cannot be enforced.

Although, in light of *Palmer/Sixth Street Properties*, the provisions of the ordinance are not operative as to new rental units, when a residential development includes both for-sale and rental units, the ordinance provides that its provisions applicable to for-sale units shall apply to the portion of the development that consists of for-sale units. (S.J.M.C. § 5.08.440.)

ordinance provides that when a developer chooses one of the alternative compliance options, the inclusionary housing requirement increases to no less than 20 percent of the total units in the residential development, as contrasted with the no less than 15 percent requirement that applies to on-site inclusionary units.

(S.J.M.C. § 5.08.500 B.) The alternative compliance options include:

- (1) constructing off-site affordable for-sale units (S.J.M.C. § 5.08.510 A.),
- (2) paying an in lieu fee based on the median sales price of a housing unit affordable to a moderate income family (S.J.M.C. § 5.08.520), (3) dedicating land equal in value to the applicable in lieu fee (S.J.M.C. § 5.08.530), or (4) acquiring and rehabilitating a comparable number of inclusionary units that are affordable to low or very low income households. (S.J.M.C. § 5.08.550.)

As additional incentives to encourage developers to comply with the ordinance by providing affordable units on site, the ordinance permits a developer who provides all of the required affordable units on the same site as the market rate units to apply for and obtain a variety of economically beneficial incentives, including (1) a density bonus that meets the requirements of Government Code section 65915 et seq.,<sup>7</sup> (2) a reduction in the number of parking spaces otherwise required by the San Jose Municipal Code, (3) a reduction in minimum set-back requirements, and (4) financial subsidies and assistance from the city in the sale of the affordable units. (S.J.M.C. § 5.08.450.)

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<sup>7</sup> The density bonus provisions of Government Code section 65915 are very detailed, specifying a variable bonus depending upon the household income category to be served (very low income, low income, moderate income) and the percentage of units the developer agrees to include in its proposed project. (Gov. Code, § 65915, subd. (f).)

The ordinance also addresses the characteristics of the affordable units to be constructed on site. The ordinance requires that such units have the same quality of exterior design and comparable square footage and bedroom count as market rate units (S.J.M.C. § 5.08.470 B., F.), but permits some different “unit types” of affordable units (for example, in developments with detached single-family market rate units, the affordable units may be attached single-family units or may be placed on smaller lots than the market rate units) (S.J.M.C. § 5.08.470 E.), and also allows the affordable units to have different, but functionally equivalent, interior finishes, features, and amenities, compared with the market rate units. (S.J.M.C. § 5.08.470 C.)

The ordinance additionally contains a number of provisions intended to ensure that the number of affordable housing units required by the ordinance is not lost upon resale of an affordable unit. To this end, the ordinance requires that the guidelines to be adopted by city officials to implement the ordinance “shall include standard documents . . . to ensure the continued affordability of the inclusionary units approved for each residential development.” (S.J.M.C. § 5.08.600 A.) Such documents may include, but are not limited to, “inclusionary housing agreements, regulatory agreements, promissory notes, deeds of trust, resale restrictions, rights of first refusal, options to purchase, and/or other documents,” and shall be recorded against the residential development, all inclusionary units, and any site subject to the provisions of the ordinance. (*Ibid.*) The ordinance further provides that such documents shall include “subordinate shared appreciation documents permitting the city to recapture at resale the difference between the market rate value of the inclusionary unit and the affordable housing cost, plus a share of appreciation realized from an unrestricted sale in such amounts as deemed necessary by the city to replace the inclusionary unit.” (*Ibid.*) The ordinance specifies that all inclusionary units “shall remain

affordable to the targeted income group for no less than the time periods set forth in California Health and Safety Code Sections 33413(c)(1) and (2)” (S.J.M.C. § 5.08.600 B.),<sup>8</sup> and that “all promissory note repayments, shared appreciation payments, or other payments collected under this section” shall be deposited in the City of San Jose affordable housing fee fund (S.J.M.C. § 5.08.600 C.), from which funds may be expended exclusively to provide housing affordable to extremely low, very low, lower and moderate income households. (S.J.M.C. § 5.08.700 B.)

The ordinance further contains a waiver provision, declaring that the ordinance’s requirements may be “waived, adjusted, or reduced” by the city “if an applicant shows, based on substantial evidence, that there is no reasonable relationship between the impact of a proposed residential development and the requirements of this chapter, or that applying the requirements of this chapter would take property in violation of the United States or California Constitutions.” (S.J.M.C. § 5.08.720 A.) This section goes on to provide that “[t]he waiver, adjustment or reduction may be approved only to the extent necessary to avoid an unconstitutional result, after adoption of written findings, based on substantial evidence, supporting the determinations required by this section.” (S.J.M.C. § 5.08.720 E.)

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<sup>8</sup> Health and Safety Code section 33413, subdivision (c)(1) provides that affordable units shall remain available at affordable cost for not less than 45 years for home ownership units. Health and Safety Code section 33413, subdivision (c)(2) allows the sale of such units prior to the expiration of 45 years for a higher than affordable cost but only under a program that protects the public entity’s affordable housing interest by providing for the deposit of an appropriate amount of the proceeds of the sale into the entity’s low and moderate income housing fund.

Finally, although the ordinance was adopted in January 2010, the city council, in recognition of the significant disruption in the local housing market that had accompanied the nationwide recession, provided that the ordinance would not become operative until the earlier of (1) six months following the first 12-month consecutive period in which 2,500 residential building permits had been issued by the city, with a minimum of 1,250 permits issued for dwelling units outside the San Jose redevelopment area, or (2) January 1, 2013. (S.J.M.C. § 5.08.300.)

### **III. Lower court proceedings**

On March 24, 2010, just two months after the ordinance was enacted, CBIA filed the underlying lawsuit in this proceeding in superior court, seeking invalidation of the ordinance. The complaint alleged that the ordinance was invalid on its face because at no time prior to the adoption of the ordinance had the city provided substantial evidence “to demonstrate a reasonable relationship between any adverse public impacts or needs for additional subsidized housing units in the City ostensibly caused by or reasonably attributed to the development of new residential developments of 20 units or more and the new affordable housing exactions and conditions imposed on residential development by the Ordinance.” The complaint maintained that the city’s actions in enacting the ordinance were “unlawful, unconstitutional, and in violation of controlling state and federal constitutional standards governing such exactions and conditions of development approval, and the requirements applicable to such housing exactions as set forth in *San Remo Hotel L.P. v. City & County of San Francisco* (2002) 27 Cal.4th 643, and *Building Industry Association of Central California v. City of Patterson* (5th Dist. 2009) 171 Cal.App.4th 886.” The complaint sought a judicial declaration that the ordinance is invalid, and injunctive relief prohibiting the city from enforcing the ordinance.

Six nonprofit affordable housing organizations and a low-income resident of San Jose sought leave to intervene in support of the challenged ordinance.<sup>9</sup> Although CBIA opposed the motion, the trial court granted the motion and permitted intervention.

In their pretrial briefs, both the city and interveners took issue with CBIA's contention that a passage in this court's opinion in *San Remo Hotel, supra*, 27 Cal.4th 643, should properly be interpreted to apply to the San Jose affordable housing ordinance at issue. Contrary to CBIA's claim that under *San Remo Hotel* such an ordinance is valid only if the requirements that the ordinance imposes are reasonably related to the adverse effects or impacts that are caused by or attributable to the developments upon which the requirements are imposed, the city and interveners maintained that the ordinance's validity is properly evaluated under the ordinary standard of review applicable to legislative land use regulations, namely, simply that the regulation's requirements must be reasonably related to the municipality's interest in promoting the health, safety, and welfare of the community. The city and interveners argued that under this ordinarily applicable standard the challenged affordable housing ordinance was unquestionably valid.

After extensive briefing, the superior court agreed with CBIA's legal contentions, concluding that the ordinance was constitutionally invalid and enjoining its enforcement. In its order, the court rejected the city's position that

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<sup>9</sup> The following nonprofit organizations sought intervention: Affordable Housing Network of Santa Clara County, California Coalition for Rural Housing, Housing California, Non-Profit Housing Association of Northern California, San Diego Housing Federation, and the Southern California Association of NonProfit Housing.

the inclusionary ordinance did not require a developer to dedicate or convey property, and struck down the ordinance. The court determined that the city had failed to show that there was evidence in the record “demonstrating the constitutionally required reasonable relationships between the deleterious impacts of new residential developments and the new requirements to build and to dedicate the affordable housing or pay the fees in lieu of such property conveyances.”

The Court of Appeal reversed the superior court judgment. Initially, the appellate court rejected CBIA’s contention that the ordinance requires a developer seeking a permit to “ ‘dedicate or convey property (new homes) for public purposes,’ or alternatively, pay a fee in lieu of ‘such compelled transfers of property,’ ” concluding that the ordinance “does not prescribe a dedication.” The appellate court then went on to agree with the city and interveners that the ordinance’s inclusionary housing requirements must properly be evaluated under the standard ordinarily applicable to general, legislatively imposed land use regulations, namely whether the ordinance’s requirements bear a real and substantial relation to the public welfare. The Court of Appeal determined that the matter should be remanded to the trial court to permit that court to review CBIA’s challenge under the proper legal standard.

In the course of its opinion, the Court of Appeal rejected CBIA’s reliance upon the *San Remo Hotel*, *supra*, 27 Cal.4th 643, and *City of Patterson*, *supra*, 171 Cal.App.4th 886, decisions. The Court of Appeal concluded that the passage in *San Remo Hotel* relied upon by CBIA was intended to apply only to *development mitigation fees* that are intended to mitigate the deleterious impact of a proposed development, and that the passage does not apply to the affordable housing requirements imposed by the challenged San Jose ordinance because those requirements were not enacted for the purpose of mitigating the adverse impact of new development but rather to enhance the public welfare by promoting the use of

available land for the development of housing that would be available to low and moderate income households. The Court of Appeal similarly found the *City of Patterson* decision inapposite, noting that the city in that case did not propose or advocate any test different from the *San Remo Hotel* test, and that the *City of Patterson* court did not analyze the issue by reference to the city's stated general objective in imposing its affordable housing in lieu fee.

After the Court of Appeal decision, CBIA sought review in this court, maintaining that the appellate opinion in this case directly conflicted with the Court of Appeal decision in *City of Patterson, supra*, 171 Cal.App.4th 886, and that *City of Patterson* was correctly decided. We granted review to determine the soundness of the appellate court's ruling in this case.

In analyzing this question, we first consider an initial point that divided the lower court decisions in this case — whether the conditions imposed by the San Jose ordinance constitute “exactions” for purposes of the federal and state takings clauses and thus trigger the applicability of the unconstitutional conditions doctrine. (See pt. IV., *post.*) Thereafter, we consider whether the passage in this court's decision in *San Remo Hotel*, upon which CBIA relies, applies to the conditions imposed by the challenged inclusionary housing ordinance. (See pt. V., *post.*)

**IV. Does the San Jose inclusionary housing ordinance, in requiring new residential developments to sell some of the proposed new units at an affordable housing price, impose an “exaction” on developers’ property under the takings clauses of the federal and California Constitutions, so as to bring into play the unconstitutional conditions doctrine?**

We begin with the well-established principle that under the California Constitution a municipality has broad authority, under its general police power, to regulate the development and use of real property within its jurisdiction to promote the public welfare. (Cal. Const., art. XI, § 7; *Big Creek Lumber Co. v.*

*County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151-1152.) The variety and range of permissible land use regulations are extensive and familiar, including, for example, restrictions on the types of activities for which such property may be used (commercial or residential, or specific types of commercial ventures or specific types of residential developments — single family, multiunit), limitations on the density and size of permissible residential development (permissible lot size, number of units per lot, minimum or maximum square footage of units, number of bedrooms), required set-backs, aesthetic restrictions and requirements, and price controls (for example, rent control). As a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible. (See, e.g., *Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 604-607 (*City of Livermore*); *Miller v. Board of Public Works* (1925) 195 Cal. 477, 490; *Schad v. Mount Ephraim* (1981) 452 U.S. 61, 68; *Euclid v. Amber Realty Co.* (1926) 272 U.S. 365 (*Euclid*).)

We review challenges to the exercise of such power deferentially. “In deciding whether a challenged [land use] ordinance reasonably relates to the public welfare, the courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor.” (*City of Livermore, supra*, 18 Cal.3d at pp. 604-605.) Accordingly, a party challenging the facial validity of a legislative land use measure ordinarily bears the burden of demonstrating that the measure lacks a reasonable relationship to the public welfare. (See, e.g., *Goldblatt v. Hempstead* (1962) 369 U.S. 590, 596; *Building Industry Assn. of Central California v. County of Stanislaus* (2010) 190 Cal.App.4th 582, 591.) Nonetheless, as this court explained in *City of Livermore, supra*, 18 Cal.3d at p. 609, although land use regulations are generally entitled to deference, “judicial deference is not judicial abdication. The ordinance must have

a *real and substantial* relation to the public welfare. [Citation.] There must be a reasonable basis in fact, not in fancy, to support the legislative determination.

[Citation.] Although in many cases it will be ‘fairly debatable’ [citation] that the ordinance reasonably relates to the regional welfare, it cannot be assumed that a land use ordinance can *never* be invalidated as an enactment in excess of the police power.” (See also *McKay Jewelers v. Bowron* (1942) 19 Cal.2d 595, 600-601; *Skalko v. City of Sunnyvale* (1939) 14 Cal.2d 213, 215-216.)

In the present case, however, CBIA contends that this traditional standard of judicial review is not applicable and that the conditions that the ordinance imposes upon a proposed new development are valid only if those conditions bear a reasonable relationship to the amount of the city’s need for affordable housing that is attributable to the proposed development itself, rather than that the ordinance’s conditions bear a reasonable relationship to the public welfare of the city and region as a whole. It also contends that the city, rather than the party challenging the ordinance, bears the burden of proof regarding the validity of the ordinance.

As already noted, although the precise nature and source of CBIA’s constitutional claim was somewhat opaque in earlier stages of this litigation, in its briefing in this court CBIA has clarified that its facial constitutional challenge rests upon the takings clauses of the United States and California Constitutions (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § 19),<sup>10</sup> and, more

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<sup>10</sup> The Fifth Amendment of the United States Constitution provides in relevant part: “. . . nor shall private property be taken for public use without just compensation.” The United States Supreme Court has long held that the takings clause of the Fifth Amendment is made applicable to the states through the Fourteenth Amendment. (*Chicago, B. & Q. R. Co. v. Chicago* (1897) 166 U.S. 226, 239.)

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specifically, on the claim “that the Ordinance violates the unconstitutional conditions doctrine, as applied to development exactions.” As we shall explain, however, there can be no valid unconstitutional-conditions takings claim without a government exaction of property, and the ordinance in the present case does not effect an exaction. Rather, the ordinance is an example of a municipality’s permissible regulation of the use of land under its broad police power.

As a general matter, the unconstitutional conditions doctrine imposes special restrictions upon the government’s otherwise broad authority to condition the grant of a privilege or benefit when a proposed condition requires the individual to give up or refrain from exercising a constitutional right. (See, e.g., *Perry v. Sindermann* (1972) 408 U.S. 593, 597-598; *Pickering v. Board of Education* (1968) 391 U.S. 563, 568.) In the takings context, the special limitations imposed by the unconstitutional conditions doctrine upon which CBIA relies derive from the United States Supreme Court’s decisions in *Nollan v.*

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Unlike the federal takings clause, which provides simply that private property shall not be *taken* for public use without just compensation, the California takings clause provides that private property shall not be *taken or damaged* for public use without just compensation. (Cal. Const., art. I, § 19, subd. (a).) The governing California authorities make clear that the reference to “damaged” in this constitutional provision refers to physical damage and does not encompass the simple reduction in the value of real property that may result from a land use restriction or regulation or other governmental action. (See, e.g., *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 376-378; *HFH Ltd. v. Superior Court* (1975) 15 Cal.3d 508, 517-518; *Allegretti & Co. v. County of Imperial* (2006) 138 Cal.App.4th 1261, 1278-1279.) In contexts comparable to that at issue in this case, past cases of this court have interpreted the state takings clause “congruently” with the federal takings clause. (See, e.g., *San Remo Hotel, supra*, 27 Cal.4th at p. 664.)

*California Coastal Commission* (1987) 483 U.S. 825 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*).

In both *Nollan, supra*, 483 U.S. 825, and *Dolan, supra*, 512 U.S. 374, the high court considered the validity of ad hoc administrative decisions regarding individual land-use permit applications that required a property owner, as a condition of obtaining a sought-after permit, *to dedicate a portion of the property to public use*. In *Nollan*, the California Coastal Commission had conditioned its grant of a permit to allow the property owner to demolish a small beachfront bungalow and construct a three-bedroom residence upon the owner's agreement to grant an easement to the public to enter and cross the owner's beachfront property near the water's edge. In *Dolan*, the city had conditioned its grant of a permit to allow the property owner to substantially increase the size of its existing retail business upon the owner's agreement to give a strip of the property to the city for use as part of a public flood-control greenway and bike path.

In *Nollan, supra*, 483 U.S. 825, in explaining why the takings clause justified special scrutiny of the coastal commission's imposition of the challenged permit condition at issue in that case, the high court began its analysis by observing: "Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking." (*Id.* at p. 831.) Similarly, in *Dolan*, the high court noted that "had the city simply required petitioner to dedicate a strip of land . . . for public use, rather than conditioning the grant of her permit to redevelop her property on such a dedication, a taking would have occurred." (*Dolan, supra*, 512 U.S. at p. 384.) Because under the takings clause a property owner has the right to be paid just compensation when the government takes his or her property for public use, the

court in *Nollan* declared that special scrutiny of a governmental action is warranted “*where the actual conveyance of property* is made a condition for the lifting of a land-use restriction, since in that context there is heightened risk that the [government’s] purpose is avoidance of the compensation requirement, rather than the stated police-power objective” upon which the condition is ostensibly based. (*Nollan*, at p. 841, italics added.) Thereafter, the *Nollan* and *Dolan* decisions proceeded to explain and describe the nature and extent of the special scrutiny that is called for under the takings clause when the government conditions the grant of a land use permit on the property owner’s agreement to dedicate a portion of its property for public use without the payment of just compensation. Under *Nollan* and *Dolan*, the government may impose such a condition only when the government demonstrates that there is an “essential nexus” and “rough proportionality” between the required dedication and the projected impact of the proposed land use. (See *Nollan, supra*, at pp. 837-840; *Dolan, supra*, at pp. 388-395.)

More recently, in *Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. \_\_ [186 L.Ed.2d 697] (*Koontz*), the high court held that the *Nollan/Dolan* test applies not only when the government conditions approval of a land use permit on the property owner’s dedication of a portion of the property for public use but also when it conditions approval of such a permit upon the owner’s payment of money. In *Koontz*, the property owner applied for a permit to develop a portion of an undeveloped parcel of land, most of which was classified as wetlands by the state. In his application, the owner agreed to dedicate a portion of the property to the local public water management district as a conservation easement, but the district considered the size of the property owner’s proposed conservation easement to be inadequate and instead proposed that the property owner either dedicate a larger portion of the property as a conservation easement or, alternatively, pay for the

improvement of other district-owned wetlands within several miles of the owner’s property. The property owner refused to accede to the district’s proposal, and brought an action in Florida state court against the district, contending among other matters that the district’s proposal that he pay a sum of money as an alternative to dedicating an additional portion of his property was itself subject to the *Nollan/Dolan* test and thus that the district was required to show that the amount of money in question satisfied the “essential nexus” and “rough proportionality” requirements set forth in those decisions. The Florida Supreme Court rejected the property owner’s contention on the ground that a permit condition that requires a property owner to pay or spend money, as contrasted with a condition that requires the owner to give the public a tangible interest in real property, does not provide a basis for a takings claim, and thus was not subject to the *Nollan/Dolan* test.

In *Koontz, supra*, 570 U.S. at pages \_\_-\_\_ [186 L.Ed.2d at pp. 712-717], a majority of the United States Supreme Court disagreed with the Florida Supreme Court’s conclusion on this point. The majority began its analysis of this issue by noting “as an initial matter that if we accepted this argument [that the *Nollan/Dolan* test does not apply to a permit condition that requires the property owner to pay money] it would be very easy for land-use permitting officials to evade the limitations of *Nollan* and *Dolan*. Because the government need only provide a permit applicant with one alternative that satisfies the nexus and rough proportionality standards, a permitting authority wishing to exact an easement could simply give the owner a choice of either surrendering an easement or making a payment equal to the easement’s value. . . . For that reason and those that follow, we reject respondent’s argument and hold that so-called ‘monetary exactions’ must satisfy the nexus and rough proportionality requirements of *Nollan* and *Dolan*.<sup>10</sup>” (*Id.* at p. \_\_ [186 L.Ed.2d at p. 713].)

It is clear from the decision in *Koontz*, *supra*, 570 U.S. \_\_ [186 L.Ed.2d 697], that the *Nollan/Dolan* standard applies to the type of “so-called ‘monetary exactions’” (*Koontz*, at p. \_\_ [186 L.Ed.2d p. 713]) involved in *Koontz* itself — that is, a monetary payment that is a substitute for the property owner’s dedication of property to the public and that is intended to mitigate the environmental impact of the proposed project. However, the full range of monetary land-use permit conditions to which the *Nollan/Dolan* test applies under the *Koontz* decision remains at least somewhat ambiguous.<sup>11</sup> Nonetheless, the *Koontz* decision

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<sup>11</sup> As the passage quoted in the text illustrates (see *Koontz*, *supra*, 570 U.S. at p. \_\_ [186 L.Ed.2d at p. 713]), at times the court in *Koontz* appears to have relied upon the special risks imposed by monetary conditions, like the monetary payment at issue in that case, that are offered by a permitting authority *as an alternative to or substitute for the actual dedication of property for public use*. (See *id.* at p. \_\_ [186 L.Ed.2d at p. 713]; see also *id.* at p. \_\_ [186 L.Ed.2d at p. 716] [noting that “respondent has maintained throughout this litigation that it considered petitioner’s money to be a substitute for his deeding to the public a conservation easement on a larger parcel of undeveloped land”].) At other points, however, the opinion in *Koontz* speaks more broadly and suggests that the *Nollan/Dolan* test applies to monetary permit conditions even when the monetary payment is not imposed in lieu of a requirement that the property owner dedicate a property interest. (See *Koontz*, *supra*, at pp. \_\_-\_\_ [186 L.Ed.2d at pp. 713-714] [“the demand for money at issue here did ‘operate upon . . . an identified property interest’ by directing the owner of a particular piece of property to make a monetary payment. [Citation.] In this case . . . the monetary obligation burdened petitioner’s ownership of a specific parcel of land.”]; *id.* at p. \_\_ [186 L.Ed.2d at p. 714] [“when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a ‘*per se* [takings] approach’ is the proper mode of analysis under the Court’s precedent.”].) For the reasons discussed hereafter, we need not, and do not, resolve this ambiguity in the present case.

An additional ambiguity arises from the fact that the monetary condition in *Koontz*, like the conditions at issue in *Nollan* and *Dolan*, was imposed by the district on an ad hoc basis upon an individual permit applicant, and was not a legislatively prescribed condition that applied to a broad class of permit applicants. In this respect, the money payment at issue in *Koontz* was similar to the monetary

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explicitly acknowledges that “[a] predicate for any unconstitutional conditions claim is that the government could not have constitutionally ordered the person asserting the claim to do what it attempted to pressure that person into doing.” (*Koontz*, *supra*, at p. \_\_ [186 L.Ed.2d at p. 712].) Or, in other words, the condition is one that would have constituted a taking of property without just compensation if it were imposed by the government on a property owner outside of the permit process. (*Id.* at p. \_\_ [186 L.Ed.2d at pp. 712-713, 714]; see *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 547 (*Lingle*) [*Nollan* and *Dolan* both involved “dedications of property so onerous that, outside the exactions context, they would be deemed *per se* physical takings”].) Nothing in *Koontz* suggests that the unconstitutional conditions doctrine under *Nollan* and *Dolan* would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of

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recreational-mitigation fee at issue in this court’s decision in *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 (*Ehrlich*), where we held that because of the greater risk of arbitrariness and abuse that is present when a monetary condition is imposed on an individual permit applicant on an ad hoc basis, the validity of the ad hoc fee imposed in that case should properly be evaluated under the *Nollan/Dolan* test. (*Ehrlich*, *supra*, at pp. 874-885 (plur. opn. of Arabian, J.); *id.* at pp. 899-901 (conc. opn. of Mosk, J.); *id.* at pp. 903, 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.).) The *Koontz* decision does not purport to decide whether the *Nollan/Dolan* test is applicable to legislatively prescribed monetary permit conditions that apply to a broad class of proposed developments. (See *Koontz*, *supra*, 570 U.S. at p. \_\_ [186 L.Ed.2d at p. 723] (dis. opn. of Kagan, J.).) Our court has held that legislatively prescribed monetary fees that are imposed as a condition of development are not subject to the *Nollan/Dolan* test. (*San Remo Hotel*, *supra*, 27 Cal.4th at pp. 663-671; see *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 966-967 (*Santa Monica Beach*).)

property or the payment of money) as a condition of approval. It is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called “exaction” under the takings clause and that brings the unconstitutional conditions doctrine into play. (See *Lingle, supra*, at pp. 546-547; *Monterey v. Del Monte Dunes at Monterey, Ltd.* (1999) 526 U.S. 687, 702 [“[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions — land-use decisions conditioning approval of development on the dedication of property to public use.”].)

In the present case, contrary to CBIA’s contention, the San Jose inclusionary housing ordinance does not violate the unconstitutional conditions doctrine because there is no exaction — the ordinance does not require a developer to give up a property interest for which the government would have been required to pay just compensation under the takings clause outside of the permit process. As summarized above, the principal requirement that the challenged ordinance imposes upon a developer is that the developer sell 15 percent of its on-site for-sale units at an affordable housing price. This condition does not require the developer to dedicate any portion of its property to the public or to pay any money to the public. Instead, like many other land use regulations, this condition simply places a restriction on the way the developer may use its property by limiting the price for which the developer may offer some of its units for sale. (See, e.g., *Yee v. Escondido* (1992) 503 U.S. 519, 532 (*Yee*) [describing mobilehome park rent control ordinance as “a regulation of [the mobilehome park owners’] use of their property”].) Contrary to CBIA’s contention, such a requirement does not constitute an exaction for purposes of the *Nollan/Dolan* line of decisions and does not trigger application of the unconstitutional conditions doctrine.

Rather than being an exaction, the ordinance falls within what we have already described as municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large. For example, municipalities may designate certain areas of a city where only residential units may be built and other areas where only commercial projects are permitted. (See, e.g., *Euclid, supra*, 272 U.S. 365; *Lockard v. City of Los Angeles* (1949) 33 Cal.2d 453, 460.) If a municipality finds that it is in the public interest, it may specify where certain types of retail establishments may be operated and other areas where they may not. (See, e.g., *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 296-298 & fn. 10.) If a municipality concludes that the city already has a sufficient number of a specific type of business in a particular neighborhood — for example, adult entertainment businesses — it may prohibit other property owners from using their property in that area for such businesses. (See, e.g., *Young v. American Mini Theatres* (1976) 427 U.S. 50; *Renton v. Playtime Theatres, Inc.* (1986) 475 U.S. 41.) Similarly, if a municipality determines that a particular neighborhood or the community in general is in special need of a specific type of residential development or business establishment — such as a multiunit residential project or a retail shopping center — it may adopt land use regulations to serve such a need. (See, e.g., *Ensign Bickford Realty Corp. v. City Council* (1977) 68 Cal.App.3d 467, 477-478.) In addition, of course, a municipality may impose land use limitations on the height of buildings, set-back requirements, density limits (lot size and number of units per lot), bedroom requirements and a variety of other use restrictions. (See, e.g., *Griffin Development Co. v. City of Oxnard* (1985) 39 Cal.3d 256, 265-266.)

As a general matter, so long as a land use regulation does not constitute a physical taking or deprive a property owner of all viable economic use of the property, such a restriction does not violate the takings clause insofar as it governs

a property owner's future use of his or her property,<sup>12</sup> except in the unusual circumstance in which the use restriction is properly found to go "too far" and to constitute a "regulatory taking" under the ad hoc, multifactored test discussed by the United States Supreme Court in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104 (*Penn Central*). (See *Lingle, supra*, 544 U.S. at pp. 538-539.)<sup>13</sup> Where a restriction on the use of property would not constitute a taking of property without just compensation if imposed outside of the permit process, a permit condition imposing such a use restriction does not require a permit applicant to give up the constitutional right to just compensation in order to obtain the permit and thus does not constitute "an exaction" so as to bring into play the unconstitutional conditions doctrine. (See, e.g., *Powell v. County of Humboldt* (2014) 222 Cal.App.4th 1424, 1435-1441.)

As noted, the legislative history of the ordinance in question establishes that the City of San Jose found there was a significant and increasing need for affordable housing in the city to meet the city's regional share of housing needs under the California Housing Element Law and that the public interest would best be served if new affordable housing were integrated into economically diverse

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<sup>12</sup> Special considerations and principles come into play with regard to a municipality's application of such limitations to existing uses that do not conform to the municipality's newly imposed restrictions — that is, to preexisting nonconforming uses. (See generally 8 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, §§ 1040-1045, pp. 636-645.) The ordinance at issue applies only to residential units that are to be constructed or rehabilitated in the future.

<sup>13</sup> The factors identified in *Penn Central* include the "economic impact of the regulation on the claimant," "the extent to which the regulation has interfered with distinct investment-backed expectations," and "the character of the governmental action." (*Penn Central, supra*, 438 U.S. at p. 124.)

development projects, and that it enacted the challenged ordinance in order to further these objectives. The objectives of increasing the amount of affordable housing in the city to comply with the Housing Element Law and of locating such housing in economically diverse developments are unquestionably constitutionally permissible purposes. (See, e.g., *Santa Monica Beach, supra*, 19 Cal.4th at p. 970; *Home Builders Assn. v. City of Napa* (2009) 90 Cal.App.4th 188, 195 (*City of Napa*).) CBIA does not argue otherwise.

There are a variety of conditions or restrictions that a municipality could impose on new residential development in an effort to increase the community's stock of affordable housing and promote economically diverse residential developments. For example, a municipality might attempt to achieve these objectives by requiring all new residential developments to include a specified percentage of studio, one-bedroom, or small-square-footage units, on the theory that smaller units are more likely to be affordable to low or moderate income households than larger units. Although such use restrictions might well reduce the value of undeveloped property or lessen the profits a developer could obtain in the absence of such requirements, CBIA cites no authority, and we are aware of none, suggesting that such use restrictions would constitute a taking of property outside the permit process or that a permit condition that imposes such use restrictions on a proposed development would constitute an exaction under the takings clause that would be subject to the *Nollan/Dolan* test.

Here, the challenged ordinance seeks to increase the city's stock of affordable housing and promote economically diverse residential projects by placing controls on the sales price of a portion of a developer's on-site for-sale units rather than by placing restrictions on the size or other features of a portion of the for-sale units. But the fact that the ordinance imposes price controls rather than other use restrictions in order to accomplish its legitimate purposes does not

render such price controls an exaction or support application of a constitutionally based judicial standard of review that is more demanding than that applied to other land use regulations. The governing federal and state authorities plainly establish that price controls, like other forms of regulation, are, as a general matter, a constitutionally permissible means to achieve a municipality's legitimate public purposes. (See, e.g., *Nebbia v. New York* (1934) 291 U.S. 502, 539 [“Price control, like any other form of regulation, is unconstitutional only if arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty”]; *Permian Basin Area Rate Cases* (1968) 390 U.S. 747, 768 [“It is plain that the Constitution does not forbid the imposition, in appropriate circumstances, of maximum prices upon commercial and other activities. A legislative power to create price ceilings has, in ‘countries where the common law prevails,’ been ‘customary from time immemorial’ ” (italics added)]; accord, *Pennell v. San Jose* (1988) 485 U.S. 1, 11-14 (*Pennell*); *Yee, supra*, 503 U.S. at pp. 528-530; *Santa Monica Beach, supra*, 19 Cal.4th at p. 967; *Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 771-777 (*Kavanau*); *Calfarm Ins. Co. v. Deukmejian* (1989) 48 Cal.3d 805, 816 (*Calfarm*); *Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 165 (*Birkenfeld*).)

Furthermore, as we explained in *Santa Monica Beach, supra*, 19 Cal.4th 952, the United States Supreme Court has held that one of the constitutionally permissible purposes that justifies the imposition of limits on the rent a landlord may charge his or her tenants is “that of ‘ ‘prevent[ing] excessive and unreasonable rent increases’ caused by the ‘growing shortage of and increasing demand for housing’ ’ within a municipality.” (*Id.* at p. 969, quoting *Pennell, supra*, 485 U.S. at p. 12.) There is no reason that a municipality’s comparable interest in combatting the excessive sale prices of housing that are caused by the

growing shortage of and increasing demand for housing, and that deny moderate and lower income families the opportunity to reside within the city, does not similarly justify the city's imposition of price controls on a portion of the units that are offered for sale in a proposed new residential development. (Accord, *Pennell, supra*, at pp. 12-13 [recognizing that "a legitimate and rational goal of price or rate regulation is the protection of consumer welfare" and upholding a rent control ordinance that permitted "'hardship to a tenant'" to be considered in determining the reasonableness of a landlord's proposed rent increase].)

A municipality's authority to impose price controls on developers is, of course, unquestionably subject to constitutional limits. In this court's decision in *Kavanau, supra*, 16 Cal.4th at pages 771-777, we discussed the constitutional restrictions placed on price controls by the due process and takings clauses, and explained that such controls would be unconstitutional if they are found to be confiscatory, that is, if they deny a property owner a fair and reasonable return on its property. (See *Birkenfeld, supra*, 17 Cal.3d at p. 165; *Calfarm, supra*, 48 Cal.3d at pp. 816-817.) In this case, however, the ordinance has not yet been applied to any proposed development, and there is no indication that application of price controls on 15 percent of a development's on-sale units, along with the availability of economically advantageous density bonuses, exemptions from on-site parking requirements, and financial subsidies, would produce a confiscatory result. (See *Penn Central, supra*, 438 U.S. at pp. 130-131 ["'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."].) Indeed, in this facial

challenge to the ordinance, CBIA does not claim that the requirements imposed by the ordinance will have a confiscatory effect.

Further, although we explained in *Kavanau* that past decisions have generally applied a “confiscatory” analysis to challenges to price controls that are premised on either the takings clause or the due process clause — “focusing on the regulation’s impact and investors’ ability to earn a fair return” (*Kavanau, supra*, 16 Cal.4th at p. 776, citing *Duquesne Light Co. v. Barasch* (1989) 488 U.S. 299, 305; *FCC v. Florida Power Corp.* (1987) 480 U.S. 245, 250-254) — we also observed in *Kavanau* that several high court cases indicate that other takings analyses also apply to price controls (*Kavanau, supra*, at p. 777, citing *Yee, supra*, 503 U.S. at p. 529; *Pennell, supra*, 485 U.S. at pp. 8-14.) These latter cases indicate that price controls may be impermissible if found to constitute a “regulatory taking” under the ad hoc, multifactored test set forth in *Penn Central, supra*, 438 U.S. 104. (See, e.g., *Yee, supra*, 503 U.S. at p. 529-531.) Here, however, CBIA has expressly disclaimed any reliance on the *Penn Central* doctrine.

As we have explained, an ordinance that places nonconfiscatory price controls on the sale of residential units and does not amount to a regulatory taking would not constitute a taking of property without just compensation even if the price controls were applied to a property owner who had not sought a land use permit. Accordingly, the inclusionary housing ordinance’s imposition of such price controls as a condition of a development permit does not constitute the imposition of an exaction for purposes of the unconstitutional conditions doctrine under the takings clause.

In maintaining its contrary view that the San Jose inclusionary housing requirement constitutes an exaction that compels a developer to convey a property interest to the city as a condition of development, CBIA relies primarily upon the

discussion of exactions in this court’s recent decision in *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1207 (*Sterling Park*), a case which also involved an affordable housing ordinance. In part VI., *post*, we describe the specific legal issue that was presented in *Sterling Park* and this court’s holding in that case, and explain why CBIA’s reliance on the *Sterling Park* decision itself is not well founded. At this juncture, we explain why, whether or not the San Jose inclusionary housing requirement at issue here is properly viewed as an exaction for purposes of the *procedural* statute that was at issue in *Sterling Park*, the San Jose inclusionary housing requirement does not require a developer to convey or dedicate to the city a property interest as a condition of development and therefore is not an exaction for purposes of the unconstitutional conditions doctrine as applied in the takings context.

CBIA first contends that the ordinance should be viewed as requiring the owner to convey property to the city as a condition of development because, by requiring the developer to sell at a below market (affordable) price a portion of the units that it could otherwise sell at market value, the ordinance “divests the owner of the difference, in money, between the market value of the property and the affordable price of the property.” To begin with, however, because the San Jose ordinance makes available a number of economically beneficial incentives — including a density bonus, a reduction in parking requirements, and potential financial subsidies — to developers who choose to comply with the affordable housing requirements by providing on-site affordable housing units, it is not the case that the San Jose ordinance will necessarily reduce a developer’s revenue or profit from what the developer could earn by selling all of the units at market rate, or will do so either in the “great majority of cases” (see *San Remo Hotel, supra*, 27 Cal.4th at p. 673), frequently, or, indeed, in any instance. In this facial challenge

to the ordinance, CBIA has not and cannot show that the ordinance will have such an effect.<sup>14</sup>

In any event, it is well established that the fact that a land use regulation may diminish the market value that the property would command in the absence of the regulation — i.e., that the regulation reduces the money that the property owner can obtain upon sale of the property — does not constitute a taking of the diminished value of the property. Most land use regulations or restrictions reduce the value of property; in this regard the affordable housing requirement at issue here is no different from limitations on density, unit size, number of bedrooms, required set-backs, or building heights. (See, e.g., *Griffin Development Co. v. City of Oxnard*, *supra*, 39 Cal.3d at p. 267 [“most land use regulations have ‘the inevitable effect of reducing the value of regulated properties’ ”].) Although the magnitude of a regulation’s economic impact upon a property owner is one factor that is relevant in determining whether there is a regulatory taking under the *Penn Central* test (see *Penn Central*, *supra*, 438 U.S. at p. 124), as already noted CBIA explicitly does not contend that the ordinance constitutes a regulatory taking under *Penn Central*. Past cases establish that the potential reduction in a developer’s profit does not in itself amount to a taking or a required dedication of property or render the ordinance’s price controls an exaction of property, as CBIA asserts. (*Penn Central*, *supra*, at pp. 124-126; *Penna. Coal Co. v. Mahon* (1922) 260 U.S. 393, 413 [“Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the

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**14** Because the ordinance will not necessarily lead to a reduction in the profit a developer would obtain in the absence of the ordinance, CBIA cannot properly assert that the ordinance, on its face, requires a developer to “subsidize” those households who purchase affordable units.

general law”]; *Permian Basin Area Rate Cases*, *supra*, 390 U.S. at p. 769 [“No constitutional objection arises from the imposition of maximum prices merely because . . . the value of regulated property is reduced as a consequence of regulation”]; *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 685-686.)

CBIA additionally maintains that the challenged ordinance does constitute an exaction because it assertedly requires a developer to convey a property interest to the city by virtue of the section of the ordinance that is intended to ensure that the units that are initially made available as affordable housing units will continue to be affordable in the future, or at least that the city will retain the same number of affordable units upon resale. (S.J.M.C. § 5.08.600.) Contrary to CBIA’s assertion, however, this provision of the ordinance does not require a developer to convey a property interest to the city. This feature of the ordinance operates in the future on a person who has purchased an affordable unit, rather than on the developer, placing a restriction on the affordable unit owner’s use of his or her property. Because this feature of the ordinance places no additional requirement or burden on the developer, it clearly does not take, or impose an exaction upon, *the developer’s property*. Unlike the Palo Alto inclusionary housing ordinance at issue in *Sterling Park*, *supra*, 57 Cal.4th at page 1207, which CBIA analogizes to the challenged ordinance, the San Jose ordinance does not require that the developer grant the city an option to purchase each affordable unit when the unit is up for sale or resale.<sup>15</sup>

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<sup>15</sup> Although an option to purchase is one type of document that may be included to ensure the continued affordability of an affordable unit under the San Jose ordinance, the applicable section of the ordinance does not require the developer to grant an option to purchase to the city either on the initial sale or resale of an affordable housing unit, and the section lists a large number of alternative documents and mechanisms that may be used to preserve the number of affordable housing units. (See S.J.M.C. § 5.08.600 A., quoted *ante*, pp. 17-18.)

(footnote continued on next page)

Moreover, CBIA does not contend that the section of the ordinance in question constitutes a taking *of an affordable unit owner's property* that requires just compensation, and no such claim could plausibly be made. Under the provision in question, an individual who is permitted to purchase an affordable housing unit at a below market, affordable housing price will do so on the explicit condition and clear understanding that if and when he or she sells the unit, he or she is required to sell the unit at an affordable housing price, and that if, instead, the unit is sold at market rate, under the "shared appreciation document[]" that must be agreed upon by the purchaser, "the difference between the market rate value of the inclusionary unit and the affordable housing cost, plus a share of appreciation realized from an unrestricted sale in such amounts as deemed necessary by the city to replace the inclusionary unit" must be placed into an affordable housing fund that is to be used exclusively to provide housing to lower and moderate income households. (S.J.M.C. §§ 5.08.600 A., 5.08.700.)<sup>16</sup> Just as the ordinance's restriction on the developer's use of its property does not constitute a compensable taking or exaction (see, *ante*, pp. 32-37), an individual who has purchased an affordable housing unit under the use restriction imposed by this section of the ordinance cannot tenably claim that such property has been taken without just compensation when he or she is subsequently required, upon

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(footnote continued from previous page)

Accordingly, in this facial challenge, the San Jose ordinance cannot properly be equated with the ordinance at issue in *Sterling Park*.

<sup>16</sup> Thus, like the long-term rental unit in-lieu fee that was upheld by this court in *San Remo Hotel, supra*, 27 Cal.4th 643, the captured amount will be utilized to replace the affordable housing unit that would be lost if such a unit is resold at market rate, directly offsetting the adverse impact that such resale would have on the number of existing affordable housing units in the city.

resale of the unit, to comply with the use restriction — a restriction that obviously is reasonably related to preserving the affordable housing policy from which the affordable housing unit owner has directly benefited.

In addition, contrary to CBIA's contention, the fact that the ordinance requires restrictions upon resale to be recorded against the residential development and all inclusionary units does not transform these requirements into property interests possessed by the city. Recordation simply assures that would-be purchasers of the affordable units are on notice regarding the restrictions relating to resale and is no different from the routine recording of other types of land use restrictions that are intended to continue for a specified period of time.

In sum, for all of the foregoing reasons, the basic requirement imposed by the challenged ordinance — conditioning the grant of a development permit for new developments of more than 20 units upon a developer's agreement to offer for sale at an affordable housing price at least 15 percent of the on-site for-sale units — does not constitute an exaction for purposes of the takings clause so as to bring into play the unconstitutional conditions doctrine under the *Nollan*, *Dolan*, and *Koontz* decisions.

Finally, the *Koontz* decision further makes clear that so long as a permitting authority offers a property owner at least one alternative means of satisfying a condition that does not violate the takings clause, the property owner has not been subjected to an unconstitutional condition. (*Koontz, supra*, 570 U.S. at p. \_\_ [186 L.Ed.2d at pp. 712, 713].) Accordingly, because the requirement that a developer offer at least 15 percent of a development's for-sale units at an affordable housing price does not violate the *Nollan/Dolan* doctrine, it follows that the affordable housing requirement of the San Jose ordinance as a whole — including the voluntary off-site options and in lieu fee that the ordinance makes available to a

developer — does not impose an unconstitutional condition in violation of the takings clause.

**V. Does the passage in *San Remo Hotel*, *supra*, 27 Cal.4th 643, 671, relied on by CBIA, apply to the affordable housing condition imposed by San Jose's inclusionary housing ordinance?**

CBIA also rests its facial challenge to the validity of the San Jose ordinance upon a passage in this court's decision in *San Remo Hotel*, *supra*, 27 Cal.4th at page 671. CBIA characterizes this portion of the *San Remo Hotel* decision as resting upon an application of the unconstitutional conditions doctrine, but we have demonstrated that doctrine is not applicable here because the ordinance does not effect an exaction. We note, however, that the passage in question in *San Remo Hotel* did not itself refer to that doctrine and the Court of Appeal decision in *City of Patterson*, *supra*, 171 Cal.App.4th 886, upon which CBIA also relies, did not analyze the passage in *San Remo Hotel* as an aspect of the unconstitutional conditions doctrine. Accordingly, notwithstanding our rejection of CBIA's unconstitutional conditions claim, we shall consider whether the passage in *San Remo Hotel* upon which CBIA relies should properly be interpreted as applicable to the challenged inclusionary housing ordinance.

CBIA proffers its argument in the face of the holding of the Court of Appeal in *City of Napa*, *supra*, 90 Cal.App.4th 188, a case involving a facial constitutional challenge to an inclusionary housing ordinance very similar to the San Jose ordinance at issue here. There, the Court of Appeal held that the ordinance was properly evaluated pursuant to the ordinary standard of review generally applicable to land use regulations. Applying that standard, the *City of*

*Napa* court held that the challenged inclusionary housing ordinance was constitutionally valid. (90 Cal.App.4th at pp. 195-197.)<sup>17</sup>

CBIA contends, however, that this court's decision in *San Remo Hotel, supra*, 27 Cal.4th 643, which was decided after *City of Napa, supra*, 90 Cal.App.4th 188, should be interpreted to limit inclusionary housing requirements only to those that are reasonably related to the adverse impacts that are caused by or attributable to the proposed developments that are subject to the ordinance — in effect, to requirements that satisfy something similar to the *Nollan/Dolan* test.

In *San Remo Hotel, supra*, 27 Cal.4th 643, the land use restriction at issue was a legislatively adopted ordinance aimed at preserving the amount of existing long-term rental housing units in the city. The ordinance required any property owner who proposed to convert existing long-term rental units to short-term tourist units either to provide a comparable number of long-term rental units at another location or to pay an in lieu fee into a fund dedicated exclusively to the acquisition or construction of long-term rental units in the city. Evaluating the

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<sup>17</sup> At the time of the *City of Napa* decision, the controlling United States Supreme Court decision provided that a land use regulation “effects a taking if the ordinance does not substantially advance legitimate state interests . . .” (*Agins v. Tiburon* (1980) 447 U.S. 255, 260.) The *City of Napa* decision applied that standard in upholding the inclusionary housing ordinance. Three years later, in *Lingle, supra*, 544 U.S. 528, the federal high court held that the “substantially advance” standard set out in *Agins* is not an appropriate standard for determining when a taking of property has occurred, and instead that the categorical and regulatory taking categories described in *Penn Central, supra*, 438 U.S. 104, constitute the appropriate taking standards. (*Lingle, supra*, 544 U.S. at pp. 540-545.) After *Lingle*, the California Court of Appeal, in *Action Apartment Assn. v. City of Santa Monica* (2008) 166 Cal.App.4th 456, 467-471, upheld the validity of an inclusionary housing ordinance against a facial constitutional challenge, rejecting the plaintiffs' claim that under *Lingle* the ordinance was subject to the *Nollan/Dolan* standard of review.

validity of the in lieu fee that had been imposed on the property owner in that case, this court held in *San Remo Hotel* that the challenged fee was valid because it was reasonably related to mitigating the impact that the landowner's proposed conversion would have on the preservation of long-term rental housing in the city. (*San Remo Hotel, supra*, 27 Cal.4th at pp. 672-679.)

CBIA relies on one passage in the *San Remo Hotel* opinion that it asserts indicates the conditions or requirements imposed by San Jose's inclusionary housing ordinance are valid solely if they bear a reasonable relationship to the deleterious public impacts attributable to the developments that are subject to the ordinance. As we explain, properly interpreted, the passage in *San Remo Hotel* does not support CBIA's contention.

The passage in question in *San Remo Hotel* is contained in a paragraph responding to and rejecting an argument, based upon a hypothetical ordinance, that had been advanced by the plaintiffs in that case. In asserting that the legislatively prescribed long-term rental replacement fee before the court in *San Remo Hotel* should be evaluated under the *Nollan/Dolan* heightened scrutiny standard, the plaintiffs in *San Remo Hotel* warned of "the danger a local legislative body will use such purported mitigation fees — unrelated to the impacts of development — simply to fill its coffers" and hypothesized that "absent careful constitutional scrutiny a city could 'put zoning up for sale' by, for example, 'prohibit[ing] all development except for one-story single-family homes, but offer[ing] a second story permit for \$20,000, an apartment building permit for \$10,000 per unit, a commercial building permit for \$50,000 per floor, and so forth.' " (*San Remo Hotel, supra*, 27 Cal.4th at p. 670.)

In response to the plaintiffs' argument, the opinion in *San Remo Hotel* first declined "to extend heightened takings scrutiny to all development fees" and instead adhered to the distinction drawn in earlier decisions of this court "between

ad hoc exactions and legislatively mandated, formulaic mitigation fees.” (*San Remo Hotel, supra*, 27 Cal.4th at pp. 670-671, citing *Ehrlich, supra*, 12 Cal.4th 854, *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, and *Santa Monica Beach, supra*, 19 Cal.4th 952.) The opinion explained: “While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustified by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.” (*San Remo Hotel, supra*, at p. 671.)

The following paragraph in *San Remo Hotel* then set forth the court’s response to the plaintiffs’ hypothetical: “Nor are plaintiffs correct that, without *Nollan/Dolan/Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. *As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development.* (Gov. Code, § 66001; *Ehrlich, supra*, 12 Cal.4th at pp. 865, 867 (plur. opn. of Arabian, J.); *id.* at p. 897 (conc. opn. of Mosk, J.); *Associated Home Builders etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 640.) Plaintiffs’ hypothetical city could only ‘put [its] zoning up for sale’ in the manner imagined if the ‘prices’ charged, and the intended use of the proceeds, bore a reasonable relationship to the impacts of the various development intensity levels on public resources and interests. While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees subject to *Ehrlich*, the arbitrary and extortionate use of purported mitigation fees, even

where legislatively mandated, will not pass constitutional muster.” (*San Remo Hotel, supra*, 27 Cal.4th at p. 671, italics added.)

CBIA contends that the italicized sentence just quoted should be interpreted to mean that the conditions imposed by the San Jose ordinance — requiring developments of 20 or more units to make 15 percent of their on-site for-sale units available for sale at affordable housing prices — would be valid only if those requirements “bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development.” (*San Remo Hotel, supra*, 27 Cal.4th at p. 671.) For several reasons, we conclude that CBIA’s contention lacks merit.

First, there is no indication that the passage in *San Remo Hotel* was intended to apply to permit conditions, like the price controls imposed by the challenged inclusionary housing ordinance, that regulate or place limits upon the use of a property owner’s property, rather than solely to conditions that require an applicant to pay a monetary fee as a condition of obtaining a permit. The language of the passage itself speaks specifically of “fees,” not to conditions limiting the use of property, and, as noted, the passage in *San Remo Hotel* was a direct response to the concern expressed by the plaintiffs in that case that a permitting authority would “use such purported mitigation fees — unrelated to the impacts of development — simply to fill its coffers.” (*San Remo Hotel, supra*, 27 Cal.4th at p. 670.) In light of “the special vulnerability of land use permit applicants to extortionate demands for money” (*Koontz, supra*, 570 U.S. at p. \_\_ [186 L.Ed.2d at p. 717]), the passage is reasonably understood as applying to permit conditions that require the payment of monetary fees.

Second, as we explain, a close reading of the entire paragraph containing the italicized sentence discloses that the paragraph is explicitly addressed and applies only to “development mitigation fees” (*San Remo Hotel, supra*, 27 Cal.4th

at p. 671, italics added) — that is, to fees whose purpose is to mitigate the effects or impacts of the developments on which the fee is imposed — and does not purport to apply to price controls or other land use restrictions that serve a broader constitutionally permissible purpose or purposes unrelated to the impact of the proposed development.

To begin, the initial sentence of the paragraph is explicitly limited to “legislatively imposed development *mitigation* fees . . .” (*San Remo Hotel*, *supra*, 27 Cal.4th at p. 671, italics added.) Next, the term “fee” as used in the statute cited after the second sentence of the passage — Government Code section 66001, a key provision of California’s Mitigation Fee Act — is statutorily defined to mean “*a monetary exaction . . . that is charged* by a local agency to the applicant in connection with approval of a development project *for the purpose of defraying all or a portion of the cost of public facilities related to the development project . . .*” (Gov. Code, § 66000, subd. (b), italics added.) The term “fee” does not purport to encompass use restrictions, and certainly not use restrictions that are imposed for a different purpose. Further, the portions of the plurality and concurring opinion in *Ehrlich*, *supra*, 12 Cal.4th at pages 865, 867, 895, and of the majority opinion in *Associated Home Builders*, *supra*, 4 Cal.3d at page 640, to which this paragraph in *San Remo Hotel* refers, similarly all involved development mitigation fees whose purpose was to mitigate the effects of the proposed developments, not use restrictions that were designed to serve other purposes. Finally, the concluding sentence of the paragraph again refers explicitly to “purported *mitigation fees*” (italics added), not to other types of permit conditions.

Viewed in isolation, the third sentence of the paragraph — referring to the plaintiffs’ suggestion that a hypothetical city might put up its zoning for sale — could conceivably be read broadly to refer to *any* type of development fee. However, when viewed in the context of the paragraph as a whole, and

particularly having in mind the paragraph's focus on a "meaningful means-end review" (*San Remo Hotel*, *supra*, 27 Cal.4th at p. 671), it appears clear that the entire paragraph applies only to development mitigation fees — and not to price controls or other land use conditions or requirements (i.e., "means") that are imposed on proposed developments for a constitutionally permissible purpose (i.e., "end") other than mitigating the impact of the proposed development.

Nothing in *San Remo Hotel* purported to repudiate existing authority such as the decision in *City of Napa*, *supra*, 90 Cal.App.4th 188, applying ordinary judicial standards of review to land use regulations of the type involved in the present case.<sup>18</sup>

In *San Remo Hotel*, *supra*, 27 Cal.4th 643, the long-term rental unit replacement requirement (and the related in-lieu fee) that was at issue was explicitly intended to mitigate the adverse effect that a proposed conversion of long-term rental units into tourist units would have on the city's stock of long-term rental units. (*Id.* at p. 650.) Thus, the court's means-end analysis in that case was understandably and properly focused upon whether the fee was reasonably related to mitigating the impact of the proposed conversion. In the present case, as well, one of the purposes of the challenged ordinance is to alleviate the impacts that

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**18** In stating that "[a]s a matter of both statutory and constitutional law, [legislatively imposed development mitigation] fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development" (*San Remo Hotel*, *supra*, 27 Cal.4th at p. 671), the opinion in *San Remo Hotel* did not indicate whether the "constitutional law" to which the passage refers was a reference to due process or takings principles. Because the ordinance in this case does not impose a development mitigation fee, we have no occasion to explore that jurisprudential question, or to discuss how the constraints imposed on legislatively prescribed development mitigation fees by the federal or state Constitution compare with the constraints imposed by the Mitigation Fee Act.

proposed market-rate residential development would have on the city's affordable housing needs.<sup>19</sup>

Here, however, the ordinance makes clear that its purpose goes beyond mitigating the impacts attributable to the proposed developments that are subject to the ordinance. The San Jose ordinance is additionally aimed at a number of distinct but nonetheless important and constitutionally permissible public purposes, namely (1) to increase the amount of affordable housing in San Jose so that the municipality can meet its responsibility of providing an adequate supply of housing for individuals and families at all income levels and, at the same time, (2) to assure that new affordable housing is distributed throughout the city in economically diverse developments, avoiding the problems and detrimental effects that municipalities have experienced in the past when low income housing is relegated to separate, isolated locations within the community. Like other zoning or land use regulations that are intended to shape and enhance the character and quality of life of the community as a whole, San Jose's inclusionary housing ordinance is intended to advance purposes beyond mitigating the impacts or effects that are attributable to a particular development or project and instead "to

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<sup>19</sup> As noted above (*ante*, p. 13), the ordinance identifies two distinct adverse impacts that new market rate residential developments have upon the city's existing affordable housing problem. First, new market rate housing developments without affordable units use a portion of the limited existing land in the city that is available for affordable housing and drive up the price of the remaining land, reducing the opportunities for the construction of affordable housing. Second, new residents of market rate housing create a demand for new employees to service the needs of the new residents, and many of the needed new employees (for example, teachers, transportation workers, etc.) will earn incomes that are not adequate for market rate housing in the city. As a result, new market rate housing exacerbates the city's affordable housing problem.

produce a widespread public benefit” (*Penn Central, supra*, 438 U.S. at p. 134, fn. 30) that inures generally to the municipality as a whole, providing such benefits to residents of new market-rate housing as well as to the other residents of the community.

When a municipality enacts a broad zoning law that designates different areas of the community for single-family housing, multiunit residences, and commercial ventures, the validity of the law does not depend upon a judicial means-end determination that focuses exclusively on the restrictions’ relationship to the adverse impact that would result from an alternative use of a particular parcel or a particular proposed project. (See, e.g., *Lingle, supra*, 544 U.S. at pp. 544-545; *Penn Central, supra*, 438 U.S. at pp. 133-135; *HFH, Ltd. v. Superior Court, supra*, 15 Cal.3d at pp. 520-521.) Similarly, when a municipality enacts a broad inclusionary housing ordinance to increase the amount of affordable housing in the community and to disperse new affordable housing in economically diverse projects throughout the community, the validity of the ordinance does not depend upon a showing that the restrictions are reasonably related to the impact of a particular development to which the ordinance applies. Rather, the restrictions must be reasonably related to the broad general welfare purposes for which the ordinance was enacted.

Unlike the decision in *San Remo Hotel*, in which we addressed a development fee that was intended solely to mitigate the adverse effect of the proposed conversion of long-term rental units to tourist units, in this court’s earlier decision in *Ehrlich, supra*, 12 Cal.4th 854, we had occasion to consider, among other issues, the validity of a land use permit condition or requirement that was intended, like the affordable housing condition at issue here, to serve a constitutionally permissible public purpose other than mitigating the impact of the proposed development project. For this reason, the *Ehrlich* decision provides

useful guidance in ascertaining the standard under which the validity of the San Jose inclusionary housing ordinance is properly evaluated.

In *Ehrlich, supra*, 12 Cal.4th 854, the developer challenged the validity of two different types of development conditions that the defendant city had imposed as a condition of the plaintiff's proposed development: (1) a recreational-facility replacement fee and (2) a public art requirement. The court in *Ehrlich* first held that the ad hoc recreational-facility replacement fee that had been imposed in that case should properly be evaluated under the *Nollan/Dolan* standard (*Ehrlich, supra*, at pp. 874-881 (plur. opn. of Arabian, J.); *id.* at pp. 899-901 (conc. opn. of Mosk, J.)), and, as such, the amount of the fee was required to be roughly proportional to the adverse public impact attributable to the loss of property reserved for private recreational use that would result from the developer's proposed project. (*Id.* at pp. 882-885 (plur. opn. of Arabian, J.); *id.* at pp. 901-902 (conc. opn. of Mosk, J.)) Applying the *Nollan/Dolan* standard, the court in *Ehrlich* concluded that the record was insufficient to support the amount of the recreational-facility replacement fee that had been imposed in that case. (*Id.* at pp. 884-885 (plur. opn. of Arabian, J.); *id.* at pp. 901-902 (conc. opn. of Mosk, J.).)

By contrast, with respect to the public art condition — which required the developer either (1) to pay into the city art fund a fee equal to 1 percent of the total building valuation, or (2) to contribute an approved work of public art of an equivalent value that could be placed on site or donated to the city for placement elsewhere — the court in *Ehrlich* did not evaluate the validity of the condition by asking whether or not the amount of the required fee or value of the work of art was reasonably related to the adverse impact that the proposed development would have on the existing state of public art in the city. The purpose of the public art requirement in question was not to replace existing public art that would be

eliminated by a proposed project or to mitigate any adverse impact on the amount of public art in the community that would result from the proposed development. Instead, the purpose of the public art requirement was to increase the works of public art that are present in the community for the general benefit of the community as a whole, by requiring all future large development projects to provide some public art or to pay an in lieu fee to be used for the acquisition of public art in another location. Given this purpose, application of a legal test that would limit all public art requirements only to those requirements that mitigate the impact of a proposed project would have resulted in the invalidation of the challenged condition. Instead, in *Ehrlich* this court upheld the validity of the public art requirement (including the related in lieu public art fee) upon finding that the requirement (and related in lieu fee) was reasonably related to the constitutionally legitimate public purpose of increasing the amount of publicly accessible works of art for the benefit of the community and the public as a whole. (*Ehrlich, supra*, 12 Cal.4th at pp. 885-886 (plur. opn. of Arabian, J.); *id.* at p. 902 (conc. opn. of Mosk, J.); *id.* at p. 907 (conc. & dis. opn. of Kennard, J.); *id.* at p. 912 (conc. & dis. opn. of Werdegar, J.))

CBIA argues that this court’s decision upholding the validity of the public art condition in *Ehrlich, supra*, 12 Cal.4th 854, is not applicable to the affordable housing requirement at issue here because, unlike the public art requirement, the affordable housing requirement challenged in this case is not an “aesthetic control.” CBIA, however, fails to identify a persuasive constitutional or other legal justification for limiting our holding in *Ehrlich* to development restrictions that constitute “aesthetic controls.” CBIA maintains that the requirement in *Ehrlich* that a developer provide public art or pay an in lieu fee was more like ordinary land use restrictions commonly contained in zoning or building codes than the price controls imposed by San Jose’s inclusionary housing ordinance.

Whether or not that is true, as already explained, it is well established that price controls are a constitutionally permissible form of regulation with regard to real property as well as to other types of property or services. (See, *ante*, pp. 35-36.) Accordingly, just as it would be permissible for a municipality to attempt to increase the amount of affordable housing in the community and to promote economically diverse developments by requiring all new residential developments to include a specified percentage of studio, one-bedroom, or small-square-footage units, there is no reason why a municipality may not alternatively attempt to achieve those same objectives by requiring new developments to set aside a percentage of its proposed units for sale at a price that is affordable to moderate or low income households. So long as the price controls are not confiscatory and do not constitute a regulatory taking, there is no reason such price controls should not be evaluated under the same standard applicable to the public art requirement in *Ehrlich* and other land use measures that are not subject to the *Nollan/Dolan* test, namely, that such regulations must be reasonably related to a constitutionally permissible public purpose.

Finally, the fact that the San Jose ordinance provides a developer with the option of paying an in lieu fee instead of providing the required on-site affordable housing units does not provide a basis for applying the test advocated by CBIA to the ordinance's affordable housing requirements as a whole. No developer is required to pay the in lieu fee and may always opt to satisfy the ordinance by providing on-site affordable housing units. Because an in lieu fee option is often included in inclusionary housing ordinances to satisfy the demands of developers who seek the flexibility that an in lieu fee alternative affords, CBIA cannot properly rely upon the inclusion of such an option as a basis for challenging the validity of the San Jose inclusionary housing ordinance as a whole. (Accord, *Koontz, supra*, 570 U.S. at p. \_\_ [186 L.Ed.2d at p. 712] ["We agree with

respondent that, so long as a permitting authority offers the landowner at least one alternative that would satisfy *Nollan* and *Dolan*, the landowner has not been subjected to an unconstitutional condition.”].)

Moreover, as we have explained above, the validity of the ordinance’s requirement that at least 15 percent of a development’s for-sale units be affordable to moderate or low income households does not depend on an assessment of the impact that the development itself will have on the municipality’s affordable housing situation. Consequently, the validity of the in lieu fee — which is an alternative to the on-site affordable housing requirement — logically cannot depend on whether the amount of the in lieu fee is reasonably related to the development’s impact on the city’s affordable housing need.

In sum, we conclude that the requirements of the inclusionary housing ordinance at issue here do not conflict with the passage in *San Remo Hotel* upon which CBIA relies. Accordingly, there is no merit to CBIA’s contention that, under *San Remo Hotel*, the ordinance is invalid on its face because the city failed to show that the ordinance’s inclusionary housing requirements are reasonably related to the impact on affordable housing attributable to such developments.<sup>20</sup>

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<sup>20</sup> In *Holmdel Builders Assn. v. Township of Holmdel* (N.J. 1990) 583 A.2d 277, the New Jersey Supreme Court reached a similar conclusion in upholding the validity of municipal ordinances that imposed an affordable-housing fee on new development that was to be used to satisfy the municipality’s obligation to provide its “fair share” of low and moderate income housing as set forth in earlier New Jersey Supreme Court decisions. (See *Southern Burlington County NAACP v. Mount Laurel Township* (N.J. 1975) 336 A.2d 713 *Southern Burlington County NAACP v. Mount Laurel Township* (N.J. 1983) 456 A.2d 390.)

Rejecting the claim that the affordable-housing fees imposed by such an ordinance require “a but-for causal connection or direct consequential relationship between the private activity that gives rise to the exaction and the public activity to which it is applied” (*Holmdel Builders Assn.*, *supra*, 583 A.2d at p. 288), the court held that “[i]nclusionary zoning through the imposition of development fees is

(footnote continued on next page)

We acknowledge that in *City of Patterson, supra*, 171 Cal.App.4th 886, a panel of the Court of Appeal reached a contrary conclusion regarding the applicability of the passage in *San Remo Hotel* to an inclusionary housing ordinance. But, as we explain, for a number of reasons we conclude that the *City of Patterson* decision was incorrect in this respect.

In *City of Patterson, supra*, 171 Cal.App.4th 886, the applicable ordinance gave a developer the option of building affordable housing units or paying an in lieu fee (*id.* at p. 890), but the appellate court decision in that case focused solely on the question of the validity of the in lieu fee viewed in isolation. (See *id.* at pp. 894-899.) At the time the development in question was first approved by the city, the in lieu affordable-housing fee required by the applicable ordinance was set at \$734 per affordable housing unit. Three years later, however, when the developer applied for the required building permit, the applicable in lieu fee had increased (as a result of a very substantial reduction in the federal and state affordable housing subsidies available to the city) to \$20,946 per affordable unit. The development agreement that had been entered into by the developer explicitly specified that the applicable in lieu fee would be the fee in effect at the time the building permit was issued, and further noted that the city was then in the process of preparing an updated affordable-housing fee. In the development agreement, the developer agreed to be bound by the revised fee schedule “ ‘provid[ed] the same is reasonably justified.’ ” (*Id.* at p. 895.) In bringing the *City of Patterson*

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permissible because such fees are conducive to the creation of a realistic opportunity for the development of affordable housing; development fees are the functional equivalent of mandatory set-asides; and it is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land, which constitutes the primary resource for housing.” (*Ibid.*)

lawsuit, the developer contended that the increased in lieu fee was not “reasonably justified” within the meaning of the agreement.

In addressing the proper interpretation of the term “reasonably justified” as used in the development agreement, the Court of Appeal in *City of Patterson, supra*, 171 Cal.App.4th 886, initially concluded that the term should be interpreted to mean “that any increase in the affordable housing in lieu fee would conform to existing law” (*id.* at p. 896), or, in other words, that the revised in lieu fee imposed by the city would be permissible so long as the amount of the revised fee would not violate the established legal principles governing a city’s in lieu affordable-housing fee. (*Ibid.*)

Thereafter, in analyzing that issue, the *City of Patterson* court concluded that the requirements set forth in the passage in *San Remo Hotel, supra*, 27 Cal.4th 643, discussed above, constituted the applicable legal test governing the validity of the in lieu housing fee at issue in that case. In reaching this conclusion, the *City of Patterson* court reasoned: “Upon examination, it appears that the affordable housing in-lieu fee challenged here is not substantively different from the replacement in-lieu fee considered in *San Remo*. Both are formulaic, legislatively mandated fees imposed as conditions to developing property, not discretionary ad hoc exactions. [Citation.] We conclude, for this reason, that the level of constitutional scrutiny applied by the court in *San Remo* must be applied to City’s affordable housing in-lieu fee and is one of the legal requirements incorporated into the Development Agreement.” (*City of Patterson, supra*, 171 Cal.App.4th at p. 898.) The *City of Patterson* court noted that the city “argues for no different test.” (*Ibid.*) Applying the *San Remo Hotel* test, the *City of Patterson* court found that because nothing in the record “demonstrates or implies the increased fee was reasonably related to the need for affordable housing associated with the project”

(*City of Patterson*, at p. 899), the increased fee was not reasonably justified within the meaning of the development agreement.

Although the affordable-housing in lieu fee at issue in *City of Patterson*, *supra*, 171 Cal.App.4th 886, and the long-term rental replacement fee at issue in *San Remo Hotel*, *supra*, 27 Cal.4th 643, shared the characteristics noted by the Court of Appeal in *City of Patterson* (both were formulaic, legislatively mandated fees), the court in *City of Patterson* overlooked a critical difference between the two. Unlike the long-term rental replacement in lieu fee in *San Remo Hotel*, the affordable-housing in lieu fee in *City of Patterson* was not imposed for the purpose of mitigating an adverse effect that was caused by the developer but was imposed to further the very different public purpose of increasing the stock of affordable housing in the city to meet the need for affordable housing as determined by the relevant county council of governments. (171 Cal.App.4th at p. 892.) In *City of Patterson*, the defendant city apparently did not raise this point or object to the application of the *San Remo Hotel* test, and the *City of Patterson* court did not take into account this difference from the *San Remo Hotel* case on its own. Moreover, the *City of Patterson* decision did not evaluate the ordinance's affordable housing condition as a whole, and, in particular, failed to consider how the fact that the ordinance afforded the developer the option of complying with the condition by providing affordable housing units within the development affected the validity of the alternative methods of complying with the ordinance's affordable housing condition, including the optional in lieu fee.

For the reasons discussed above, we disapprove the decision in *Building Industry Assn. of Central California v. City of Patterson*, *supra*, 171 Cal.App.4th 886, to the extent it indicates that the conditions imposed by an inclusionary zoning ordinance are valid only if they are reasonably related to the need for affordable housing attributable to the projects to which the ordinance applies. At

the same time, because the question is not before us, we express no opinion regarding the validity of the amount of the particular in lieu fee at issue in *City of Patterson* or of the methodology utilized in arriving at that fee. (See *id.* at pp. 891-893.)

**VI. Is this court's recent decision in *Sterling Park*, *supra*, 57 Cal.4th 1193, inconsistent with the conclusions reached above?**

Finally, CBIA asserts that this court's recent decision in *Sterling Park*, *supra*, 57 Cal.4th 1193, supports its contention that the test set forth in *San Remo Hotel*, *supra*, 27 Cal.4th 643, applies to the affordable housing requirement of the San Jose inclusionary housing ordinance at issue here. As we explain, the legal issue that was presented and decided in *Sterling Park* bears no relationship to the issue presented here, and we conclude the *Sterling Park* decision does not support CBIA's position in this case.

In *Sterling Park*, *supra*, 57 Cal.4th 1193, the issue before this court was which of two statutes of limitation applied to the lawsuit at issue in that case. One of the potentially applicable statutes of limitation — Government Code section 66499.37, a part of the Subdivision Map Act — was a general statute of limitations requiring lawsuits challenging the validity of conditions attached to the approval of a tentative or final map to be filed “within 90 days after the date of the decision” attaching the condition. The other potentially applicable statute of limitations — Government Code section 66020, a part of the Mitigation Fee Act — permitted a developer to protest “the imposition of any fees, dedications, reservations, or other exactions” by “[t]endering any required payment in full” under protest and thereafter to file a lawsuit within 180 days after receiving notice of the required payment.

The underlying facts in *Sterling Park*, *supra*, 57 Cal.4th 1193, arose out of an inclusionary housing ordinance adopted by the City of Palo Alto that required

housing projects involving the development of five or more acres to provide at least 20 percent of all units as affordable units or alternatively to pay an in lieu fee equal to 10 percent of the actual sales price or fair market price of the market rate units. The plaintiff developer, who wished to construct 96 residential condominiums on 6.5 acres of land in the city, entered into a development agreement with the city in which the developer agreed to provide 10 below market rate units and to pay an in lieu fee equal to 5.3488 percent of the actual selling price or fair market value of the market rate units. More than a year after the development agreement had been entered into and the developer's application for a final subdivision map had been approved, at a time when construction of the new units was nearing completion, the city demanded compliance with the below market rate conditions set forth in the development agreement. At that juncture, the developer, claiming that the prior agreement had been signed under duress and that the below market rate requirements imposed by the ordinance were invalid, submitted "a notice of protest" with the city. When the city failed to respond to the protest, the developer filed the lawsuit at issue in *Sterling Park*, seeking a declaration that the below-market rate requirements were invalid and praying for equitable relief.

In the trial court proceedings in *Sterling Park*, the city moved for summary judgment on the ground that the developer's lawsuit was untimely, contending that the applicable limitations period was that set out in Government Code section 66499.37, and that under that provision the lawsuit had been filed too late. The trial court agreed with the city and granted summary judgment in the city's favor; on appeal, the Court of Appeal affirmed, holding that the provisions of Government Code section 66020, relied upon by the developer, were not applicable and that the action was untimely under section 66499.37. We granted review to determine which statute of limitations — section 66020 or section

66499.37 — governed the lawsuit in question. (*Sterling Park, supra*, 57 Cal.4th at p. 1197.)

In *Sterling Park* we concluded that the statute of limitations provisions of Government Code section 66020 (part of the Mitigation Fee Act) should properly be interpreted to apply to the affordable housing requirements imposed by the Palo Alto inclusionary housing ordinance. In reaching that conclusion, we relied heavily on the background and legislative purpose of the protest and statute of limitations provisions of section 66020. We noted that section 66020 was enacted to permit a developer who wished to challenge a fee that was a condition of development to pay the contested fee under protest and to continue with the construction of the development while its legal challenge to the fee went forward. This statutory procedure embodied in section 66020 replaced the prior procedural rule that required a developer either (1) to delay any construction until its legal challenge to a development condition or fee was finally resolved or (2) to go forward with the construction and be treated as having waived any challenge to the contested requirement. (*Sterling Park, supra*, 57 Cal.4th at p. 1200.)

In finding the provisions of Government Code section 66020 applicable to the affordable housing requirement at issue in that case, we explained: “The procedure established in section 66020, which permits a developer to pay or otherwise ensure performance of the exactions, and then challenge the exactions while proceeding with the project, makes sense regarding monetary exactions. By the nature of things, some conditions a local entity might impose on a developer, like a limit on the number of units [citation], cannot be challenged while the project is being built. Obviously, one cannot build a project now and litigate later how many units the project can contain — or how large each unit can be, or the validity of other use restrictions a local entity might impose. But the validity of monetary exactions, or requirements that the developer later set aside a certain

number of units to be sold below market value, can be litigated while the project is being built. In the former situation — where the nature of the project must be decided before construction — it makes sense to have tight time limits to minimize the delay. In the latter situation — where the project can be built while litigating the validity of fees or other exactions — it makes sense to allow payment under protest followed by a challenge and somewhat less stringent time limits.”

(*Sterling Park, supra*, 57 Cal.4th at pp. 1206-1207.)

In the course of the *Sterling Park* opinion, we rejected the city’s contention that the requirements of its inclusionary housing ordinance should not be considered “exactions” as that term is used in Government Code section 66020. We stated in this regard: “The below market rate program is different from a land use regulation of the type at issue in *Fogarty [v. City of Chico* (2007) 148 Cal.App.4th 537] (a limit on the number of units that can be built); instead, it is similar to a fee, dedication, or reservation under section 66020. The program offers developers two options, either of which, by itself, would constitute an exaction. The imposition of the in-lieu fees is certainly similar to a fee. Moreover, the requirement that the developer sell units below market rate, including the City’s reservation of an option to purchase the below market rate units, is similar to a fee, dedication, or reservation. It may be, as the City argues, that under traditional property law, an option to purchase creates no estate in the land. But a purchase option is a sufficiently strong interest in the property to require compensation if the government takes it in eminent domain. [Citation.] Compelling the developer to give the City a purchase option is an exaction under section 66020. Because of this conclusion, we need not decide whether forcing the developer to sell some units below market value, by itself, would constitute an exaction under section 66020.” (*Sterling Park, supra*, 57 Cal.4th at p. 1207.)

As the quoted passage indicates, our decision in *Sterling Park, supra*, 57 Cal.4th 1193, left open the question whether the protest procedure and statute of limitations set forth in Government Code section 66020 would apply to the affordable housing requirements of *all* inclusionary housing ordinances, including inclusionary housing ordinances, like the San Jose ordinance at issue here, that do not require the developer to give the city an option to purchase the affordable housing units the developer is obligated to provide. (See, *ante*, p. 40, & fn. 15.) But whether or not the affordable housing requirements of the San Jose ordinance should be considered “exactions” as that term is used in Government Code section 66020, and thus are subject to the procedural protest and statute of limitations provisions of that statute — an issue we need not and do not decide — it is clear that our decision in *Sterling Park* did not address or intend to express any view whatsoever with regard to the legal test that applies in evaluating the substantive validity of the affordable housing requirements imposed by an inclusionary housing ordinance. The opinion in *Sterling Park* focused exclusively on the procedural issue presented in that case and made no mention of the passage in *San Remo Hotel, supra*, 27 Cal.4th 643, or any other substantive legal test. Nothing in *Sterling Park* supports CBIA’s claim that the challenged San Jose ordinance is subject to a judicial standard of review different from that traditionally applied to other legislatively mandated land use development requirements.

## **VII. Conclusion**

As noted at the outset of this opinion, for many decades California statutes and judicial decisions have recognized the critical need for more affordable housing in this state. Over the years, a variety of means have been advanced and undertaken to address this challenging need. We emphasize that the legal question before our court in this case is not the wisdom or efficacy of the particular tool or method that the City of San Jose has adopted, but simply whether, as the Court of Appeal held, the San Jose ordinance is subject to the ordinary standard of judicial review to which legislative land use regulations have traditionally been subjected.

For the reasons discussed above, the judgment of the Court of Appeal is affirmed.

**CANTIL-SAKAUYE, C. J.**

### **WE CONCUR:**

**WERDEGAR, J.  
CORRIGAN, J.  
LIU, J.  
CUÉLLAR, J.  
KRUGER, J.**

## **CONCURRING OPINION BY WERDEGAR, J.**

I concur fully in the majority opinion, which I have signed. I write separately to speak to the current status and meaning of the “reasonable relationship” constitutional standard set out in *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643 (*San Remo Hotel*), a decision I authored for the court.

As explained in the majority opinion (maj. opn., *ante*, at pp. 45–47), in *San Remo Hotel* we addressed the constitutional standard for reviewing legislatively prescribed, formulaic mitigation fees. We first determined such fees were not subject to the heightened means-ends scrutiny established under the takings clause in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 (*Nollan*) and *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*) for ad hoc, discretionary exactions. (*San Remo Hotel*, *supra*, 27 Cal.4th at pp. 665–671.) In reaching this conclusion, we rejected the plaintiffs’ contention that a lack of heightened scrutiny would mean legislatively imposed development mitigation fees would not be subject to meaningful means-ends review, stating: “As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. . . . While the relationship between means and ends need not be so close or so thoroughly established for legislatively imposed fees as for ad hoc fees subject to *Ehrlich*, the arbitrary and extortionate use of purported mitigation fees, even where legislatively mandated, will not pass constitutional muster.” (*San Remo*

*Hotel*, *supra*, 27 Cal.4th at p. 671, citing *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854 (*Ehrlich*) [applying *Nollan and Dolan* to ad hoc fees].) Applying the constitutional standard, we then concluded the challenged housing replacement fee bore a reasonable relationship to the loss of housing caused by conversion of hotel rooms from residential to tourist use. (*San Remo Hotel*, at p. 673.)

As the majority opinion observes, the court in *San Remo Hotel* did not specify whether the constitutional provision from which it drew the reasonable relationship test for legislatively formulated development mitigation fees was the due process clause, the takings clause, or both. (Maj. opn., *ante*, at p. 49, fn. 18.) Because the ordinance at issue in this case does not impose a mitigation fee, the court today has no occasion to address the constitutional derivation or exact dimensions of this reasonable relationship standard. (*Ibid.*) For future cases, however, it may be helpful to note a significant change in federal constitutional law since *San Remo Hotel*'s decision, a change that suggests the reasonable relationship test for mitigation fees may be no more demanding than the deferential standard applicable to ordinary land use regulations under the due process clause. (See maj. opn., *ante*, at pp. 23–24 [land use regulation meets due process limitations if it bears a reasonable relationship to the public welfare].)

At the time we decided *San Remo Hotel*, the United States Supreme Court's takings doctrine held a land use regulation "effects a taking if the ordinance does not substantially advance legitimate state interests . . ." (*Agins v. Tiburon* (1980) 447 U.S. 255, 260 (*Agins*)). After our decision, the high court in *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 540–545 (*Lingle*) clarified that this means-ends standard stated a due process principle, not a test for a regulatory taking. But in the meantime, the *Agins* standard appears to have played a leading role in *San Remo Hotel*'s statement of a reasonable relationship standard for legislatively formulated development mitigation fees.

In *San Remo Hotel*, we outlined the broad categories of recognized takings claims, listing last the "substantially advance" standard; we then introduced the

plaintiffs' claims as implicating "the last-mentioned prong of the high court's takings analysis." (*San Remo Hotel*, *supra*, 27 Cal.4th at p. 665.) And as decisional authority for the reasonable relationship test we applied to those claims, we cited portions of the plurality opinion and of Justice Mosk's concurrence in *Ehrlich*, both of which directly or indirectly invoked the *Agins* "substantially advance" takings test. (*San Remo Hotel*, *supra*, 27 Cal.4th at p. 671; see *Ehrlich*, *supra*, 12 Cal.4th at pp. 865–867, 870, fn. 7 (plur. opn.) [equating reasonable relationship takings standard with *Nollan/Dolan* scrutiny and viewing latter as derived from "'substantially advance'" test], 897 (conc. opn. of Mosk, J.) [viewing reasonable relationship takings standard as closer to rational basis test than to *Nollan/Dolan* scrutiny, but deriving it from *Agins*'s means-ends takings principle].)

*San Remo Hotel*'s use of a means-ends analysis to evaluate the plaintiffs' takings claims was appropriate in light of the then-extant "substantially advance" prong of federal takings law. But three years later, in *Lingle*, the high court "correct[ed] course" (*Lingle*, *supra*, 544 U.S. at p. 548) and eliminated means-ends analysis as a distinct prong of takings law. The court determined that *Agins*'s formula "prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence." (*Lingle*, at p. 540.) The court explained that *Agins* had drawn its standard from due process cases, not takings ones, and that means-ends testing of this nature belonged solely to due process analysis: "The 'substantially advances' formula suggests a means-ends test: It asks, in essence, whether a regulation of private property is *effective* in achieving some legitimate public purpose. An inquiry of this nature has some logic in the context of a due process challenge, for a regulation that fails to serve any legitimate governmental objective may be so arbitrary or irrational that it runs afoul of the Due Process Clause. . . . But such a test is not a valid method of discerning whether private property has been 'taken' for purposes of the Fifth Amendment." (*Lingle*, at p. 542.) The *Lingle* court

further explained that *Nollan* and *Dolan*, though they both quoted the *Agins* formula, actually rested on the very different principle of “ ‘ ‘unconstitutional conditions.’ ’ ” (*Lingle*, at pp. 547-548; see maj. opn., *ante*, at pp. 25–27.)

Given the high court’s abandonment of the idea that a regulation works a taking of private property if it does not substantially advance a legitimate government interest, how should our statement in *San Remo Hotel*—that legislatively formulated mitigation fees must, as a constitutional as well as a statutory matter, be reasonably related to the development’s impacts—be understood? Does *San Remo Hotel* state a takings test or a due process test?

Theoretically, one could argue *Lingle* makes no difference, as it addressed federal constitutional law while the plaintiffs in *San Remo Hotel* brought their challenge solely under the California Constitution. (*San Remo Hotel, supra*, 27 Cal.4th at p. 664.) But we observed in *San Remo Hotel* that the two Constitutions’ takings clauses are, with some exceptions, generally construed congruently, and we therefore analyzed the plaintiffs’ takings claim “under the relevant decisions of both this court and the United States Supreme Court.” (*San Remo Hotel*, at p. 664.) Had *Lingle* already been decided, we would have considered it in our analysis.

In light of *Lingle*, I believe, *San Remo Hotel*’s reasonable relationship test for legislatively formulated mitigation fees is best understood to state a due process standard, not a takings one. As the *Lingle* court emphasized, regulatory takings law is centrally concerned not with the “fit” between a regulation and its goals but with the burdens the regulation imposes on a property owner, both absolutely and relative to others in the community. “The owner of a property subject to a regulation that *effectively* serves a legitimate state interest may be just as singled out and just as burdened as the owner of a property subject to an *ineffective* regulation. . . . Likewise, an ineffective regulation may not significantly burden property rights at all, and it may distribute any burden broadly and evenly among property owners.” (*Lingle, supra*, 544 U.S. at p. 543.) *San*

*Remo Hotel*'s reasonable relationship test does not focus on the absolute or relative burden of a mitigation fee, but on whether it is reasonably justified by the legislative goal of mitigating development impacts. As such, it relates most naturally not to whether private property has been taken but to whether the fee regulation is "so arbitrary or irrational that it runs afoul of the Due Process Clause." (*Lingle*, at p. 542.)

As explained in the majority opinion, in a due process challenge to police power regulations, the burden of proof is on the party challenging the ordinance, rather than on the government: the challenger must demonstrate that the measure lacks a reasonable relationship to the public welfare. (Maj. opn., *ante*, at p. 23.) A developer challenging a legislatively mandated mitigation fee under *San Remo Hotel* would thus need to show the fee lacks a substantial relationship to the deleterious impacts of, or public resource needs created by, the development. This mode of means-ends scrutiny has been generally equated to the rational-basis standard. (See *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 978–980 (conc. opn. of Kennard, J.).) Under this deferential form of analysis, for the challenger to show that the city or other entity imposing a fee had not undertaken individualized studies to determine the size of fee needed for mitigating the impacts of each development presumably would not be enough. I am unaware of any decisions suggesting a mitigation fee is arbitrary or irrational merely because it is not demonstrably proportionate to individual development impacts, so long as the fee schedule's overall scale and structure has a real and substantial relationship to the public measures needed to accommodate and mitigate the effects of the development. (See *San Remo Hotel*, *supra*, 27 Cal.4th at p. 672 [reasonable relationship standard does not "open to searching judicial scrutiny the wisdom of myriad government economic regulations"].)

Again, I concur without qualification in the majority opinion, which appropriately refrains from addressing in detail issues that are not before us here. I add the above discussion only as a potentially useful reference point for analysis in any future case where the constitutionality of a legislatively mandated development mitigation fee is at issue.

**WERDEGAR, J.**

## **CONCURRING OPINION BY CHIN, J.**

I agree that the inclusionary housing ordinance at issue here is not an exaction of property for takings purposes and thus is not subject to the test this court established in *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643. Instead, “the ordinance falls within . . . municipalities’ general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large.” (Maj. opn., *ante*, at p. 32.) But my reasons for upholding the ordinance are narrow.

The ordinance requires the developer to provide a certain number of units that are more affordable, i.e., less expensive, than the unrestricted units presumably will be. This requirement might cause the developer to make a smaller profit on these affordable units than on other units, but so do many valid zoning requirements. What the ordinance does *not* do, at least on a facial challenge, is require the developer to provide *subsidized* housing.

The ordinance does not prohibit the developer from building the affordable units in a less expensive way than the other units. It does restrict the ways the developer can build the affordable units more cheaply than other units. As the majority summarizes it, the ordinance requires that the affordable units “have the same quality of exterior design and comparable square footage and bedroom count as market rate units.” (Maj. opn., *ante*, at p. 17.) But the ordinance also “permits

some different ‘unit types’ of affordable units (for example, in developments with detached single-family market rate units, the affordable units may be attached single-family units or may be placed on smaller lots than the market rate units) [citation], and also allows the affordable units to have different, but functionally equivalent, interior finishes, features, and amenities, compared with the market rate units.” (*Ibid.*)

Thus, the ordinance leaves room for the developer to build the affordable units more cheaply than the other units. Accordingly, it is not clear to me, and certainly not on a facial challenge, that the developer could not turn a profit even on the affordable units, although probably a smaller one than on the unrestricted units. Because of this, I agree with the majority that the ordinance is a valid land use regulation.

But an ordinance that did require the developer to provide subsidized housing, for example, by requiring it to sell some units below cost, would present an entirely different situation. Such an ordinance would appear to be an exaction, and I question whether it could be upheld as simply a form of price control. (See, e.g., maj. opn., *ante*, at pp 36-37.)

Providing affordable housing is a strong, perhaps even compelling, governmental interest. But it is an interest of the *government*. Or, as the majority puts it, it is an interest “of the general public and the community at large.” (Maj. opn., *ante*, at p. 32.) The community as a whole should bear the burden of furthering this interest, not merely some segment of the community. “All of us must bear our fair share of the public costs of maintaining and improving the communities in which we live and work. But the United States Constitution, through the takings clause of the Fifth Amendment, protects us all from being arbitrarily singled out and subjected to bearing a disproportionate share of these

costs.” (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 912 (conc. & dis. opn. of Kennard, J.).)

With this caveat, I join the majority in upholding the ordinance in question.

**CHIN, J.**

*See last page for addresses and telephone numbers for counsel who argued in Supreme Court.*

**Name of Opinion** California Building Industry Association v City of San Jose

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**Unpublished Opinion**

**Original Appeal**

**Original Proceeding**

**Review Granted** XXX 216 Cal.App.4th 1373

**Rehearing Granted**

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**Opinion No.** S212072

**Date Filed:** June 15, 2015

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**Court:** Superior

**County:** Santa Clara

**Judge:** Socrates Peter Manoukian

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**Page 2 – S212072 – counsel continued**

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THOMAS, J., concurring

## SUPREME COURT OF THE UNITED STATES

CALIFORNIA BUILDING INDUSTRY ASSOCIATION *v.*  
CITY OF SAN JOSE, CALIFORNIA, ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME  
COURT OF CALIFORNIA

No. 15–330. Decided February 29, 2016

The petition for writ of certiorari is denied.

JUSTICE THOMAS, concurring in the denial of certiorari.

This case implicates an important and unsettled issue under the Takings Clause. The city of San Jose, California, enacted a housing ordinance that compels all developers of new residential development projects with 20 or more units to reserve a minimum of 15 percent of for-sale units for low-income buyers. See San Jose Municipal Ordinance No. 28689, §§5.08.250(A), 5.08.400(A)(a) (2010). Those units, moreover, must be sold to these buyers at an “affordable housing cost”—a below-market price that cannot exceed 30 percent of these buyers’ median income. §§5.08.105, 5.08.400(A)(a); see Cal. Health & Safety Code Ann. §§50052.5(b)(1)–(4) (West 2014). The ordinance requires these restrictions to remain in effect for 45 years. San Jose Municipal Ordinance No. 28689, §5.08.600(B); Cal. Health & Safety Code Ann. §33413(C). Petitioner, the California Building Industry Association, sued to enjoin the ordinance. A California state trial court enjoined the ordinance, but the Court of Appeal reversed, and the Supreme Court of California affirmed that decision. 61 Cal. 4th 435, 351 P. 3d 974 (2015).

Our precedents in *Nollan v. California Coastal Comm’n*, 483 U. S. 825 (1987), and *Dolan v. City of Tigard*, 512 U. S. 374 (1994), would have governed San Jose’s actions had it imposed those conditions through administrative action. In those cases, which both involved challenges to administrative conditions on land use, we recognized that

THOMAS, J., concurring

governments “may not condition the approval of a land-use permit on the owner’s relinquishment of a portion of his property unless there is a ‘nexus’ and ‘rough proportionality’ between the government’s demand and the effects of the proposed land use.” *Koontz v. St. Johns River Water Management Dist.*, 570 U. S. \_\_\_, \_\_\_ (2013) (slip op., at 1) (describing *Nollan/Dolan* framework).

For at least two decades, however, lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one. See *Parking Assn. of Georgia, Inc. v. Atlanta*, 515 U. S. 1116, 1117 (1995) (THOMAS, J., dissenting from denial of certiorari). That division shows no signs of abating. The decision below, for example, reiterated the California Supreme Court’s position that a legislative land-use measure is not a taking and survives a constitutional challenge so long as the measure bears “a reasonable relationship to the public welfare.” 61 Cal. 4th, at 456–459, and n. 11, 351 P. 3d, at 987–990, n. 11; compare *ibid.* with, e.g., *Home Builders Assn. of Dayton and Miami Valley v. Beavercreek*, 89 Ohio St. 3d 121, 128, 729 N. E. 2d 349, 356 (2000) (applying the *Nollan/Dolan* test to legislative exaction).

I continue to doubt that “the existence of a taking should turn on the type of governmental entity responsible for the taking.” *Parking Assn. of Georgia, supra*, at 1117–1118. Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.

Yet this case does not present an opportunity to resolve the conflict. The City raises threshold questions about the timeliness of the petition for certiorari that might preclude

THOMAS, J., concurring

us from reaching the Takings Clause question. Moreover, petitioner disclaimed any reliance on *Nollan* and *Dolan* in the proceedings below. Nor did the California Supreme Court’s decision rest on the distinction (if any) between takings effectuated through administrative versus legislative action. See 61 Cal. 4th, at 461–462, 351 P. 3d, at 991–992. Given these considerations, I concur in the Court’s denial of certiorari.

## Resource Materials

These are the cases selected for the most recent update of **RATHKOPF'S THE LAW OF ZONING AND PLANNING, 4<sup>TH</sup>** Dwight Merriam and Sara Bronin, co-editors.

<http://legalsolutions.thomsonreuters.com/law-products/Treatises/Rathkopfs-The-Law-of-Zoning-and-Planning-4th/p/100027828>

1:22 See Vermont Railway, Inc. V. Town Of Shelburne, Dist. Court, D. Vermont 2016 (buffer zones not the only means of protecting wetlands)

**Vermont Ry., Inc. v. Town of Shelburne, No. 2:16-CV-16, 2016 WL 3629081, (D. Vt. June 29, 2016)**

2:5 A violation of the Fair Housing Act may also be a violation of the equal protection clause. Avenue 6e Investments, LLC v. City of Yuma, Court of Appeals, 9th Circuit, 2016 **Ave. 6E Invs., LLC v. City of Yuma, 818 F.3d 493, (9th Cir. Ariz. 2016)**

3:3 Selig v. North Whitehall Township Zoning Hearing Board, Court of Appeals, 3rd Circuit 2016

**Michael B. Selig, Appellant v. North Whitehall Township Zoning Hearing Board, No. 16-1072, 2016 WL 3440450 (3d Cir. June 23, 2016)**

4:4 ZIA Shadows, LLC v. City of Las Cruces, Court of Appeals, 10th Circuit 2016

**Zia Shadows, L.L.C. v. City of Las Cruces, No. 15-2009, 2016 WL 3960827 (10th Cir. July 22, 2016)**

7:21 MAR-DEL Holdings, LLC v. Orange Township Board of Supervisors, Pa: Commonw (2016)

**Mar-Del Holdings, LLC v. Orange Twp. Bd. of Supervisors, 136 A.3d 1112 (Pa. Commw. Ct. 2016)**

7:32 United States Army Corps of Engineers v. Hawkes, No. 15-290, (May 31, 2016) **United States Army Corps of Eng'rs v. Hawkes Co., 136 S. Ct. 1807, (U.S. 2016)**

8:2 and 9:24 Union of Medical Marijuana Patients, Inc. v. City of Upland, Cal: Court of Appeal,

**Union of Medical Marijuana Patients, Inc. v. City of Upland, 245 Cal. App. 4th 1265, 200 Cal. Rptr. 3d 62 (Cal. App. 4th Dist. 2016)**

10:8 Petroplex International v. Parish, Dist. Court, ED Louisiana 2016

**Petroplex Int'l v. St. James Par., 158 F. Supp. 3d 537 (E.D. La. 2016)**

11:8 Step by Step, Inc. V. City of Ogdensburg, Dist. Court, ND New York 2016  
**Step By Step, Inc. v. City of Ogdensburg, No. 7:15-CV-925, 2016 WL 1319081 (N.D.N.Y. Apr. 5, 2016)**

11:19 Caruso v. Zoning Bd. of Appeals, 130 A. 3d 241 - Conn: Supreme Court 2016  
**Caruso v. Zoning Bd. of Appeals, 320 Conn. 315, 130 A.3d 241, (Conn. 2016)**

12:1 note 15 Harrington v. Hall County Nebraska, Dist. Court, D. Nebraska 2016  
**Harrington v. Hall Cty. Bd. of Supervisors, No. 4:15-CV-3052, 2016 WL 1274534, (D. Neb. Mar. 31, 2016)**

13:3 City of Bellevue v. Greensun Group, LLC, Wash: Court of Appeals, 1st Div. 2016  
**City of Bellevue v. Greensun Grp., LLC, No. 73646-9-I, 2016 WL 3338073, (Wash. Ct. App. June 13, 2016)**

14:1 Friends of Black Forest Preservation Plan, Inc. V. Board Of County Commission, Court of Appeals of Colorado, Division I.  
Announced April 7, 2016.  
**Friends of the Black Forest Pres. Plan, Inc. v. Bd. of County Comm'rs, 2016 COA 54 (Colo. Ct. App. 2016)**

15:8 City Of Airway Heights V. Eastern Washington Growth Management Hearings B Court of Appeals of Washington, Division Three.  
Filed: April 12, 2016  
**City of Airway Heights v. E. Wash. Growth Mgmt. Hr'gs Bd., 193 Wn. App. 282, (Wash. Ct. App. 2016)**

16:17 Recycle for Change v. City of Oakland, Dist. Court, ND California 2016  
**Recycle v. City of Oakland, 2016 WL 344751 (N.D. Cal. Jan. 28, 2016)**

17:8 Central Radio Co. Inc. v. City of Norfolk, Va., 811 F. 3d 625 - Court of Appeals, 4th Circuit 2016  
**Cent. Radio Co. v. City of Norfolk, 811 F.3d 625, (4th Cir. 2016)**

18:13 Bench Billboard Co. v. City of Cincinnati, 2016 Ohio 1040 - Ohio: Court of Appeals, 1st Appellate  
**Bench Billboard Co. v. City of Cincinnati, 2016-Ohio-1040, (Ohio Ct. App., Hamilton County Mar. 16, 2016)**

19:39 Presidio Historical Ass'n v. Presidio Trust, 811 F. 3d 1154 - Court of Appeals, 9th Circuit 2  
**Presidio Historical Ass'n v. Presidio, 811 F.3d 1154, (9th Cir. Cal. 2016)**

20: 43 Ark Initiative v. Tidwell, 816 F. 3d 119 - Court of Appeals, Dist. of Columbia Circuit 2016  
**Ark Initiative v. Tidwell, 816 F.3d 119, (D.C. Cir. 2016)**

21:68 Miami-Dade County v. Florida Power & Light Co., Fla: Dist. Court of Appeals, 3rd Dist. 2016      [2016 WL 1578462](#)

22:28 California Bldg. Industry Assn. v. City of San Jose, 136 S.Ct. 928 (2016)

24:20 Pittsfield Tshp Gifts, LLC V. Charter Township Of Pittsfield, Dist. Court, ED Michigan

[Pittsfield Tshp Gifts, LLC v. Charter Twp. of Pittsfield](#), No. 14-14276, 2016 WL 739810, (E.D. Mich. Feb. 25, 2016)

25:22 City of Joliet v. New West, LP, Court of Appeals, 7th Circuit 2016  
United States Department

[City of Joliet, Illinois v. New W., L.P.](#), No. 15-2183, 2016 WL 3361519 (7th Cir. June 17, 2016)

26:25 Matter Of Lavender v. Zoning Bd. of Appeals of the Town of Bolton, 2016 NY Slip

27:15 Lauderdale v. Desoto County, Miss: Court of Appeals 2016

[Lauderdale v. Desoto Cty. ex rel. Bd. of Supervisors](#), No. 2014-CA-00744-COA, 2016 WL 3892329, (Miss. Ct. App. July 19, 2016)

28:32 Wimer v. Cook, 2016 WY 29 - Wyo: Supreme Court 2016

[Wimer v. Cook](#), 2016 WY 29, 369 P.3d 210 (Wyo. 2016)

29:

30:5 Livingston Christian Schools v. Genoa Charter Township, Dist. Court, ED Michigan 2016.

[Livingston Christian Sch. v. Genoa Charter Twp.](#), No. 15-12793, 2016 WL 3549357, (E.D. Mich. June 30, 2016)

31:12 Cranford Development Associates, LLC v. Township of Cranford, NJ

[Cranford Dev. Associates, LLC v. Twp. of Cranford](#), 445 N.J. Super. 220, 137 A.3d 543 (App. Div. 2016)

32:24 Black Gold Oilfield v. City of Williston, 875 NW 2d 515 – ND

33:3 Matter Of Lavender v. Zoning Bd. of Appeals of the Town of Bolton, 2016 NY  
(duplicate, don't need cite)

33:73A Kobyluck Brothers, LLC v. Planning and Zoning Commission, Conn: Appellate Court 2016

Kobyluck Bros., LLC v. Planning & Zoning Comm'n of Town of Waterford, 167 Conn. App. 383 (2016)

34:4 Clyde Development Co., LLC v. Town of Smithfield Zoning Board of Review, Ri: Superior.

Clyde Development Co., LLC v. Town of Smithfield Zoning Bd. of Review, 2016 WL 4151888 (R.I.Super.).

35:7 Town of Lakewood Village v. Bizios, Tex: Supreme Court 2016  
Town of Lakewood Vill. v. Bizios, No. 15-0106, 2016 WL 3157476 (Tex. May 27, 2016)

36:23 Friends of Black Forest Preservation Plan, Inc. v. Board of County Commissioners Court of Appeals of Colorado, Division I. April 7, 2016.

Friends of the Black Forest Pres. Plan, Inc. v. Bd. of Cty. Commissioners of El Paso Cty., 2016 COA 54

37:11 Embreeville v. Bd. of Sup'rs Of W. Bradford, 134 A. 3d 1122 - Pa: Commonwealth Court

38:9 City of Airway Heights v. Eastern Washington Growth Management Hearings

39:15 Jiang v. Porter, Dist. Court, ED Missouri 2016  
Jiang v. Porter, No. 4:15-CV-1008 (CEJ), 2016 WL 193388 (E.D. Mo. Jan. 15, 2016)

40:9 EMAC, LLC v. County of Hanover, 781 SE 2d 181 - Va: Supreme Court 2016

41:2 Powers v. Falmouth Zoning Board of Appeals, Mass: Appeals Court 2016  
Powers v. Falmouth Zoning Bd. of Appeals, No. 15-P-1178, 2016 WL 4070627 (Mass. App. Ct. July 29, 2016)

42:2 Edwards v. Harrison Cty. Bd. of Sup'rs, 22 So. 3d 268, 274 (Miss. 2009);  
Edwards v. Harrison Cty. Bd. of Supervisors, 22 So. 3d 268 (Miss. 2009)

Little v. Mayor and Board of Aldermen, Miss: Court of Appeals 2016  
Little v. Mayor, No. 2015-CA-00579-COA, 2016 WL 3391552 (Miss. Ct. App. June 21, 2016)

43:2 County of Kern v. TCEF, INC., Cal: Court of Appeal, 5th Appellate Dist. 2016  
Cty. of Kern v. T.C.E.F., Inc., 246 Cal. App. 4th 301, 200 Cal. Rptr. 3d 714 (2016), review denied (June 29, 2016)

44: 17 Snohomish Cnty. v. Pollution Control, 368 P. 3d 194 - Wash: Court of Appeals, 2nd Div.

Snohomish Cty. v. Pollution Control Hearings Bd., 192 Wash. App. 316, 368 P.3d 194, review granted sub nom. Snohomish Cty. v. Pollution Control Hearings Bd., 185 Wash. 2d 1026 (2016)

45:1 Town Center v. E. Newark Bor., 29 NJ Tax 164 - NJ: Tax Court 2016  
E. Newark Town Ctr., LLC v. E. Newark Borough, 29 N.J. Tax 164 (2016)

46:3 Spokane Entrepreneurial Ctr. v. Spokane, 369 P. 3d 140 - Wash: Supreme Court 2016

Spokane Entrepreneurial Ctr. v. Spokane Moves to Amend Constitution, 185 Wash. 2d 97, 369 P.3d 140 (2016)

47:1 Lyons v. Planning Board of Andover, Mass: Appeals Court 2016  
Lyons v. Planning Bd. of Andover, 89 Mass. App. Ct. 1126, 51 N.E.3d 509 (2016)

49:16 Matter of Harn Food, LLC v. DeChance, 2016 NY Slip Op 30173 - NY: Supreme Court 2016

Harn Food, LLC v. DeChance, 2016 WL 452182 (N.Y.Sup.)

50:11 Kirby v. North Carolina Department of Transp., NC 2016  
Kirby v. N. Carolina Dep't of Transp., 786 S.E.2d 919 (N.C. 2016)

51:9 People for Proper Planning v. City of Palm Springs, Cal: Court of Appeal, 4th Appellate

People for Proper Planning v. City of Palm Springs, 247 Cal. App. 4th 640, 202 Cal. Rptr. 3d 528 (2016), as modified (June 17, 2016)

52:11 An Act to Regulate Height Of Buildings in the District of Columbia (1899), P.L. 55-322.

Building Height Amendment Act of 1910, 36 Stat. 452 DC ST § 6-601.05

Metropole Condominium Association v. District of Columbia Board of Zoning Adjustment,

Metropole Condo. Ass'n v. D.C. Bd. of Zoning Adjustment, No. 14-AA-1109, 2016 WL 3569366 (D.C. June 30, 2016)

53:8 See Dunn v. Middletown Township Zoning Hearing Board, Pa: Commonwealth Court 2016

Dunn v. Middletown Twp. Zoning Hearing Bd., No. 1436 C.D. 2015, 2016 WL 3668007 (Pa. Commw. Ct. July 11, 2016)

Matter of Harris v. Zoning Bd. of Appeals of Town of Carmel

Harris v. Zoning Bd. of Appeals of Town of Carmel, 137 A.D.3d 1130, 27 N.Y.S.3d 660 (N.Y. App. Div. 2016)

55:3 Sumner v. Board of Adjustment of City of Spring Valley Village, Tex: Court of Sumner v. Bd. of Adjustment of City of Spring Valley Vill., No. 14-15-00149-CV, 2016 WL 2935881 (Tex. App. May 17, 2016)

56:6 Cranford Development Associates, LLC v. Township of Cranford, NJ: Appellate D

Cranford Dev. Associates, LLC v. Twp. of Cranford, 445 N.J. Super. 220, 137 A.3d 543 (App. Div. 2016)

57:9 Hanlon v. Town of Sheffield, Mass: Appeals Court 2016  
Hanlon v. Town of Sheffield, 89 Mass. App. Ct. 392, 50 N.E.3d 443 (2016)

58:21 Snyder v. New Castle County, Del: Supreme Court 2016  
Snyder v. New Castle Cty., 135 A.3d 763 (Del. 2016)

59:10 Florida Panthers v. Collier County, Dist. Court, MD Florida 2016  
Florida Panthers v. Collier Cty., Florida, No. 213CV612FTM29DNF, 2016 WL 1394328 (M.D. Fla. Apr. 8, 2016)

60:20A Linear Retail Smithfield# 1, Llc V. Zoning Board Of Review Of The Town Of Smithf 2016).

Linear Retail Smithfield #1, LLC v. Zoning Bd. of Review of the Town of Smithfield, 2016 R.I. Super. LEXIS 87 (R.I. Super. Ct. 2016)

\*\* RI Superior not on Westlaw – docket: C.A. No. PC-2014-2361

61:22 Lake Hendricks Improvement Association v. Brookings County Planning and Zoning Commission 2016 Sd 48 - SD: Supreme Court, 2016  
Lake Hendricks Imp. Ass'n v. Brookings Cty. Planning & Zoning Comm'n, 2016 S.D. 48

62:37 Tarbox v. Zoning Board of Review of Town of Jamestown  
Tarbox v. Zoning Bd. of Review of Town of Jamestown, 2016 WL 984044 (R.I.,2016)

63:4 CAYUGA NATION v. Tanner, Court of Appeals, 2nd Circuit 2016  
Cayuga Nation v. Tanner, 824 F.3d 321 (2d Cir. 2016)

64:2 Zweber v. Credit River Township, Minn: Supreme Court 2016  
Zweber v. Credit River Twp., No. A14-0893, 2016 WL 4051613 (Minn. July 27, 2016)

65:27 Siegle v. Lee County, Fla: Dist. Court of Appeals, 2nd Dist. 2016  
Siegle v. Lee Cty., No. 2D15-3293, 2016 WL 802649 (Fla. Dist. Ct. App. Mar. 2, 2016)

66:59 Tri-Corp Housing Incorporated v. Bauman, Court of Appeals, 7th Circuit 2016  
Tri-Corp Hous. Inc. v. Bauman, No. 14-1358, 2016 WL 3248397 (7th Cir. June 13, 2016)

67:11 Gomez v. KANAWHA COUNTY COMMISSION, W Va: Supreme Court of Appeals 2016  
Gomez v. Kanawha Cty. Comm'n, No. 15-0342, 2016 WL 3207683 (W. Va. June 3, 2016)

68:23 Ex Parte Chesnut, Ala: Supreme Court 2016.  
Ex parte Chesnut, No. 1140731, 2016 WL 280753 (Ala. Jan. 22, 2016), reh'g denied (Mar. 18, 2016)

69:4 Salman v. City of Phoenix, Dist. Court, D. Arizona 2016

Salman v. City of Phoenix, No. CV-12-01219-PHX-JAT, 2016 WL 3144155 (D. Ariz. June 6, 2016)

70:26 State Ex Rel. Earney v. Buffalo County Board of Adjustment, Wis: Court of Appeals  
State ex rel. Earney v. Buffalo Cty. Bd. of Adjustment, No. 2015AP1762, 2016 WL 3884048 (Wis. Ct. App. July 19, 2016)

71:4 Snohomish Cnty. v. Pollution Control, 368 P. 3d 194 - Wash: Court of Appeals, 2nd Div. 2

Snohomish Cty. v. Pollution Control Hearings Bd., 192 Wash. App. 316, 368 P.3d 194, review granted sub nom. Snohomish Cty. v. Pollution Control Hearings Bd., 185 Wash. 2d 1026 (2016)

72:6 Osprey Family Trust v. Town Of Owls Head, 2016 ME 89 - Me:  
Osprey Family Trust v. Town of Owls Head, 2016 ME 89

73:16 Osprey Family Trust v. Town Of Owls Head, 2016 ME 89 - Me: [duplicate]

73:16 Whitehurst v. Alexander County, NC: Court of Appeals 2016  
Whitehurst v. Alexander Cty., 782 S.E.2d 121 (N.C. Ct. App. 2016)

74:8 Itama Development v. Zoning Hearing Bd., 132 A. 3d 1040 - Pa: Commonwealth Court 2016

Itama Dev. Associates, LP v. Zoning Hearing Bd. of Twp. of Rostraver, 132 A.3d 1040 (Pa. Commw. Ct. 2016)

75:6 US Ex Rel Tennessee Valley Authority v. 1.72 Acres of Land in Tennessee, Court U.S. ex rel. Tennessee Valley Auth. v. 1.72 Acres of Land In Tennessee, 821 F.3d 742 (6th Cir. 2016)

Matter of Town of Oyster Bay v. Bpj Marine Corporation, 2016 NY Slip Op 3515 – N  
In re Town of Oyster Bay, 139 A.D.3d 741, 30 N.Y.S.3d 699 (N.Y. App. Div. 2016)

77:4 City of Longmont v. Colo. Oil and Gas Assn., 369 P. 3d 573 - Colo: Supreme Court 2016

City of Longmont v. Colorado Oil & Gas Ass'n, 2016 CO 29, 369 P.3d 573

78:5 In Re Petition of Rutland Renewable Energy, LLC, 2016 VT 50 – Vt  
In re Rutland Renewable Energy, LLC, 2016 VT 50 (Vt. Apr. 29, 2016)

79: [to Judd]

80:5 Bagley v. Molly McKee, LLC, 2016 NY Slip Op 50749 - NY: Supreme Court, Broome 2016

Bagley v. Molly McKee, LLC, 51 Misc. 3d 1220(A) (N.Y. Sup. Ct. 2016)

81:7 Desimone v. Town Bd. of Town of Islip, 2016 NY Slip Op 30189 - NY: Supreme Court

**Desimone v. Town Bd. of the Town of Islip, 2016 WL 510389 (N.Y.Sup.)**

82: 15 Palmer Ranch Holdings LTD v. Commissioner of Internal Revenue Service, Court  
**Palmer Ranch Holdings Ltd v. C.I.R., 812 F.3d 982 (11th Cir. 2016)**

83:29 426 Royal, LLC v. PLANNING BOARD OF Township of South Brunswick, NJ:  
Appellate

**426 Royal, LLC v. Planning Bd. of Twp. of S. Brunswick, No. A-1334-14T4, 2016 WL 3263209 (N.J. Super. Ct. App. Div. June 15, 2016)**

84:4 Dunbar v. Zoning Hearing Board, Pa: Commonwealth Court 2016

**Dunbar v. Zoning Hearing Bd. of City of Bethlehem, No. 1907 C.D. 2015, 2016 WL 3878471 (Pa. Commw. Ct. July 18, 2016)**

85:3 Hanlon v. Town of Sheffield, Mass: Appeals Court 2016 [duplicate]

**Hanlon v. Town of Sheffield, 89 Mass. App. Ct. 392, 50 N.E.3d 443 (2016)**

85:2 City of Airway Heights v. Eastern Washington Growth Management Hearings  
[duplicate]

**City of Airway Heights v. E. Wash. Growth Mgmt. Hr'gs Bd., 193 Wn. App. 282, (Wash. Ct. App. 2016)**

86:2 Biggs v. Zoning Bd. of Appeals of Town of Pierrepont, 2016 NY Slip Op 26139 - NY:  
S

**Biggs v. Zoning Bd. of Appeals of Town of Pierrepont, N.Y., 30 N.Y.S.3d 797 (N.Y. Sup. Ct. 2016)**

87:8 CBDA Development, LLC v. Town of Thornton, NH: Supreme Court 2016

**CBDA Dev., LLC v. Town of Thornton, 137 A.3d 1107 (N.H. 2016)**

88:1 PEOPLE FOR PROPER PLANNING v. City of Palm Springs, Cal: Court of Appeal,  
4th Appellate

**People for Proper Planning v. City of Palm Springs, 247 Cal. App. 4th 640, 202 Cal. Rptr. 3d 528 (2016), as modified (June 17, 2016)**

89:15 Olsen v. Park City Municipal Corporation, 2016 UT App 106 - Utah: Court of Appeals 2016

**Olsen v. Park City Mun. Corp., 2016 UT App 106, 374 P.3d 52**

90:43 GOLF COURSE ASSOC, LLC v. New Castle County, Del: Superior Court 2016  
**Golf Course Assoc, LLC v. New Castle Cty., No. CV 15A-02-007 JAP, 2016 WL 1425367, at \*1 (Del. Super. Mar. 28, 2016)**

91:20 LEYLAND-JONES v. City of Brunswick, Dist. Court, SD Georgia 2016

**not available on Westlaw – docket: 2:14-cv-00154**

**Leyland-Jones v. City of Brunswick, 2016 U.S. Dist. LEXIS 47659 (S.D. Ga. Mar. 31, 2016)**

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# SNEAPA 2016

— ENGAGE - PLAN - GROW —  
CULTIVATING GREAT COMMUNITIES

## Land Use Law Developments of the Last Year

Thursday, October 20, 2016

## Resource Materials for Land Use Law

### Alternative Dispute Resolution

Lincoln Institute of Land Policy

[http://cbuilding.org/sites/cbi.drupalconnect.com/files/Mediating%20Land%20Use%20Disputes\\_o.pdf](http://cbuilding.org/sites/cbi.drupalconnect.com/files/Mediating%20Land%20Use%20Disputes_o.pdf)

**Fanning v. Alexander**, MISC 14-484762 (Mass. Land Court 2016)  
<http://masscases.com/cases/land/2016/2016-14-484762-DECISION.html>

**Theodore W. Kheel Center on the Resolution of Environmental Interest Disputes**  
<http://law.pace.edu/edr-resources>

## Comprehensive Plan

**In re Rutland Renewable Energy, LLC** (VT 2016)  
<http://tinyurl.com/zo6yx82>

## Easements

**Francini v. Goodspeed Airport LLC** (Conn. App. 2016)  
<http://jud.ct.gov/external/supapp/cases/AROAP/AP150/150AP365.pdf>

**Melrose Fish & Game Club v. Tennessee Gas Pipeline Company** (Mass. App. 2016)  
[www.masscases.com/cases/app/89massappct594.html](http://www.masscases.com/cases/app/89massappct594.html)

## Eminent Domain / Expert Testimony

**United States ex rel. Tennessee Valley Authority v. 1.72 Acres of Land in Tennessee**, 821 F.3d 742 (6<sup>th</sup> Cir. 2016)  
<http://tinyurl.com/z8ltogz>

**U.S. Constitution 5<sup>th</sup> Amendment**  
<http://tinyurl.com/32cryl>

## Endangered Species

**Kuehl v Sellner** (N.D. Iowa 2016)  
<http://tinyurl.com/hpzyzl7>

## **Grandfathering**

***The RDM Trust v. Town of Milford*** No. 2015-0495 (N.H. 2016)  
<http://tinyurl.com/zbwsp1k>

***Almeida v. Arruda*** (Mass. App. 2016) <http://tinyurl.com/hcmm7lm>

## **Historic Preservation**

**Restore Oregon**  
<http://restoreoregon.org/lessons-learned-carman-house/#lightbox/3/>

***Lake Oswego Preservation Society v. City of Lake Oswego***, 360 Or. 115 (2016)  
<http://tinyurl.com/gp4ucqa>

**Lake Oswego Preservation Society**  
<http://lakeoswegopreservationsociety.org/land-use-testimony/>

## **Preemption**

***City of Longmont v. Colorado Oil and Gas Association*** (Colo. 2016)  
<http://tinyurl.com/zd5ckcd>

## **Protected Speech – First Amendment**

***Buehler v. City of Key West*** (11<sup>th</sup> Cir. 2015)  
<http://tinyurl.com/h82pmq7>

## **Public Trust Doctrine**

**Hackensack Riverkeeper, North Jersey's Leading Clean Water Advocate**  
<http://www.hackensackriverkeeper.org/2503-2/>

***Hackensack Riverkeeper v. New Jersey Department of Environmental Protection***, (NJ App. Div. 2015)  
<http://tinyurl.com/jd6w7yd>

**New Jersey Coastal Management Program**  
<http://www.nj.gov/dep/cmp/>

**New Jersey Municipal Public Access Plans, FAQ's**  
<http://www.nj.gov/dep/cmp/access/faqs.html>

## Railroads

***Murray v. Department of Conservation & Recreation*** (Mass. 2016)  
[www.masscases.com/cases/sjc/475mass99.html](http://www.masscases.com/cases/sjc/475mass99.html)

## RLUIPA

See, generally and frequently: [rluipa-defense@rc.com](mailto:rluipa-defense@rc.com)

## Signs – First Amendment

**Rocky Mountain Sign Law Blog**  
<http://www.rockymountainsignlaw.com/2016/08/tampa-panhandling-ban-found-unconstitutional/#more-2058>

**Homeless Helping Homeless, Inc.**  
<http://www.homelesshhh.com>

**Tampa repeals parts of panhandling law**  
<http://www.wtsp.com/news/local/tampa-repeals-parts-of-panhandling-ban/236451926>

***Reed v. Town of Gilbert***, 135 S. Ct. 2218 (2015)  
<http://tinyurl.com/zroq4g8>

## Standing

***Cherry v. Weisner***, 781 S.E.2d 871 (NC App. 2016)  
<http://tinyurl.com/j8ecw9t>

**NC Modernist Houses Website: Timeline for the Louis Cherry / Marsha Gordon House**  
<http://www.ncmodernist.org/2014oakwood.htm>

Lovelady, Can the neighbor speak? Can the neighbor appeal? Standing and quasi-judicial hearings” Coates' Canons (Sept. 27, 2016)  
<http://tinyurl.com/gwm8tks>

Arieff, **Don't Like Your Neighbors' House? Sue Them**, New York Times (July 12, 2014)  
<http://tinyurl.com/z2yong7>

## Takings

**Kirby v. North Carolina Department of Transportation** (NC 2016)  
<http://tinyurl.com/jkrt28z>

**California Bldg. Indus. Ass'n v. City of San Jose, California** (US 2016) Cert. Denied  
<http://tinyurl.com/ja6dojx>

## Variances

**Assateague Coastal Trust, Inc v. Schwalbach** (MD App. 2016)  
<http://tinyurl.com/hyfqjb2>

**Caruso v. City of Meriden** (CT App. 2016)  
<http://jud.ct.gov/external/supapp/cases/AROAP/AP150/150AP365.pdf>

## Zoning

**Macdonough v Spaman** (D. N.Y. 2016)  
<http://tinyurl.com/jx5fm95>

More...

**The Inclusive Communities Project, Inc., v. The Texas Department Of Housing And Community Affairs** (USDC ND Texas 2016)

[https://scholar.google.com/scholar\\_case?q=%22inclusive+communities%22&hl=en&as\\_sdt=8006&as\\_ylo=2016&case=6959655764297786930&scilh=0](https://scholar.google.com/scholar_case?q=%22inclusive+communities%22&hl=en&as_sdt=8006&as_ylo=2016&case=6959655764297786930&scilh=0)

**Murr v. Wisconsin** (US 2016)

<http://www.scotusblog.com/case-files/cases/murr-v-wisconsin/>

Petition for certiorari

<http://www.scotusblog.com/wp-content/uploads/2015/11/Murr-petition-for-cert.pdf>

**California Bldg. Indus. Ass'n v. City of San Jose, Calif.**, 136 S. Ct. 928, 928-29 (2016)

Thomas dissent

[https://www.supremecourt.gov/opinions/15pdf/15-330\\_1q24.pdf](https://www.supremecourt.gov/opinions/15pdf/15-330_1q24.pdf)

**Gail B. Litz v. Maryland Department of the Environment, et al.**, (Md. 2016)

<http://www.mdcourts.gov/opinions/coa/2016/23a15.pdf>

**Harris County Flood Control District and Harris County, Texas, v. Edward A. and Norma Kerr** (Tex. 2016)

Complaint

<https://dl.dropboxusercontent.com/u/9361152/RAF%20Complaint%205-25-16.pdf>

Opinion

<http://docs.texasappellate.com/scotx/op/13-0303/2016-06-17.willett.pdf>

Dissent

<http://docs.texasappellate.com/scotx/op/13-0303/2016-06-17.devine.pdf>

Concurring

<http://docs.texasappellate.com/scotx/op/13-0303/2016-06-17.lehrmann.pdf>

**United States Army Corps of Eng'rs v. Hawkes Co.** (U.S. 2016)

[https://www.supremecourt.gov/opinions/15pdf/15-290\\_6k37.pdf](https://www.supremecourt.gov/opinions/15pdf/15-290_6k37.pdf)