

February 15, 2001

BY OVERNIGHT COURIER

Honorable Chief Justice Ronald M. George
and Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, California 94102

Re: County of Riverside v. Superior Court for the County of Riverside
(Lion's Lair Enterprises, Inc., Real Party in Interest)
Supreme Court No. S081398
4th Civil No. E024277
Riverside County Superior Court Case No. 270-191

Dear Honorable Chief Justice and Associate Justices:

Community Rights Counsel ("CRC"), as a friend of the Court, urges the Court to grant the petition for review filed in this case by the County of Riverside.¹

This case involves one of the most compelling public interests imaginable: protection of county residents from death or injury from raging fires and other natural disasters. Notwithstanding this Court's October 20, 1999 grant of review and remand, the appeal court once again has misapplied *Dolan v. City of Tigard*, 512 U.S. 374 (1994), to hold that the Just Compensation Clause prohibits the County from imposing a secondary

¹ CRC also supported the County's first petition for review in this case by letter dated September 28, 1999. CRC is a nonprofit, public interest law firm established in 1997 to assist municipalities in defending against challenges to local land use controls and other community protections, particularly challenges brought under the Just Compensation Clause of the Fifth Amendment. CRC began as a project of the International City/County Management Association, a national association representing more than 8,000 city and county managers. We have represented municipal interests in takings challenges to state and local laws before the U.S. Supreme Court, this Court, federal appeals courts, and state supreme courts across the country.

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access requirement designed to provide safe access to and from the Lion's Lair residential subdivision in the event of a fire or similar emergency.

After erroneously finding a taking, the appeal court took the extraordinary step -- to our knowledge unprecedented in the annals of takings jurisprudence -- of requiring the County to issue the permit without the access requirement, running roughshod over the county's authority to decide whether permit issuance without the condition is in the public interest. Instead, the appeal court took it upon itself to engage in land use planning by requiring the permit to issue, an activist usurpation of policymaking authority that should be exercised only by local officials.

The end result is a severe misapplication of constitutional precedent that could improperly chill public safety protections and a wide range of other land use planning efforts. Review should be granted once again due to the exceptional importance of the public safety protections for as many as 22 families that would live in the Lion's Lair subdivision, as well as the sweeping implications that the appeal court's ruling has for future cases.

I. THE APPEAL COURT'S INVALIDATION OF VITAL PUBLIC SAFETY PROTECTIONS WARRANTS REVIEW BY THIS COURT.

At the outset, it is critical to emphasize what is at stake in this proceeding. Notwithstanding Lion's Lair's protestations to the contrary, the secondary access requirement constitutes a vital public safety requirement imposed to protect the future residents of the Lion's Lair subdivision. The Riverside County Fire Department

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recommended the requirement because the proposed development is in a "Hazardous Fire Area." (Petition at 9.) The site also falls within a "State Responsibility Land Area," which makes secondary access a "minimum fire safety standard" under section 4290 of the Public Resources Code. (*Id.* at 10.) The County's consideration of the access requirement was infused with concern about the need to allow emergency vehicles to get to the site and provide residents an alternative means of escape. (*Id.* at 10-17, 22-28.) Indeed, "every single [supervisor] has a concern about secondary access for safety purposes on the record." (*Id.* at 17 (citing Exh. 2, p. 345).) The Petition ably sets forth overwhelming evidence of the County's concern with the safety of the future subdivision residents.

In an apparent effort to minimize the stakes involved, Lion's Lair latches onto a single phrase used by the trial court in an attempt to recast this case as involving a mere "traffic circulation" requirement. (Answer at 4.) The effort is entirely baseless. In its December 6, 2000 Opinion, the court of appeal concluded unequivocally that the County Board of Supervisors "made findings that the tract is located in a hazardous fire area . . . subject to regulation pursuant to Public Resources Code section 4290," which requires the adoption of "minimum fire safety standards." (Opinion at 5 & n.5.) The court also stressed that the Board found that Lion's Lair "failed to show that granting a modification [of the access requirement] will not be detrimental to the public health, safety or welfare" of future subdivision residents. (Opinion at 7.)

To be sure, once it concluded -- erroneously, as we show below -- that the County's findings were constitutionally deficient, the court of appeal stated that it was "not surprising" that the trial court might conclude that the access requirement was a traffic circulation requirement. (*Id.* at 20-21.) But notwithstanding its ultimate disposition, the court of appeal itself expressly recognized the severe fire hazards involved in this case, emphasizing that it did "not intend to minimize these important concerns." (*Id.* at 20.)

Lion's Lair further distorts the record by repeatedly asserting that the County Fire Department supported an alternative requirement. (Answer at 8.) This assertion is based on the statement of a single department official, Mr. Wes Alston. Although Lion's Lair repeatedly refers to Alston as "Fire Chief Alston," we are reliably informed that Alston was not the Fire Chief and that nowhere in the administrative record is he referred to as Fire Chief. So effective are Lion's Lair distortions in this regard that the appeal court first referred to Alston as a mere department official but then erroneously promoted him to "Fire Chief" without any record citation. (Opinion at 19 (referring to Alston as "the official from the fire department" and then as "the fire chief").) Moreover, Alston's opinion was flatly contrary to the County Fire Department's official position, which recommended inclusion of the secondary access requirement. (Petition at 9 (citing Exh. 1, p. 18B).) Furthermore, Alston was mistaken as a matter of law in asserting (Exh. 2, p. 162) that a single point of access was allowed under the Public Resources Code up to a mile from a highway. In fact, state regulations permit a mile-long single access to a

subdivision only where the minimum density is 20 acres or larger. (Petition at 10; Cal. Code Regs., tit. 14, section 1273.09, subd. (a).) Alston either misconstrued the rule or failed to realize that the Lion's Lair subdivision permits lots as small as 5 acres, thereby precluding use of a single-access road longer than one-half mile. Alston also disregarded section 3.2(I) of County Ordinance 460.78 and 460.105, which prohibits any single-access road longer than 660 feet.²

This case involves nothing less than the health and safety of the future residents of up to 22 homes in the Lion's Lair subdivision. Any suggestion to the contrary cannot withstand scrutiny in the teeth of the overwhelming record evidence of severe fire risk.

II. THE LOWER COURT RULINGS VIOLATE BASIC TENETS OF TAKINGS JURISPRUDENCE AND IMPROPERLY USURP MUNICIPAL LAND USE PLANNING AUTHORITY.

The lower courts not only invalidated the secondary access requirement, but ordered the County to delete the condition from the Tentative Map, which effectively allows the project to proceed without the requirement. Unless reversed by this Court, these rulings will permit Lion's Lair to build as many as 22 homes in harm's way, and prevent the County from considering whether the subdivision should be built at all or whether to continue to impose the access condition and pay compensation for any taking.

The result is startling, and to our knowledge unprecedented. We are aware of no other case in which a court has used the Just Compensation Clause to force a

² The County outlined these facts in greater detail in its Dec. 20, 2000 Petition for Rehearing (pp. 5-6).

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municipality to allow residential development to proceed notwithstanding compelling public safety concerns.

As the U.S. Supreme Court repeatedly has made clear, the Just Compensation Clause does not authorize courts to usurp municipal land use planning authority, but rather simply requires compensation for otherwise valid government action that rises to the level of a taking:

As its language indicates, and as the Court has frequently noted, [the Just Compensation Clause] does not prohibit the taking of private property, but instead places a condition on the exercise of that power. This basic understanding of the Amendment makes clear that it is designed not to limit the government interference with property rights per se, but rather to secure compensation in the event of otherwise proper interference amounting to a taking.

(First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 314-15 (1987) (emphasis and citations omitted); *accord, Preseault v. ICC*, 494 U.S. 1, 11 (1990); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985).)

Assuming *arguendo* that the County failed to make constitutionally adequate findings under *Dolan* (*but see* Section III, below), the Just Compensation Clause is simply a *remedial* provision. It does not authorize a court to compel a municipality to allow development to go forward, as the lower courts did here. In *Dolan*, and in the closely related case of *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), the U.S. Supreme Court found that the challenged permit conditions lacked the requisite nexus to the risks posed by the proposed development, but in neither case did the Court

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order the government to issue the permit without the offending condition. Indeed, in both cases, it was either assumed or undisputed that the government could have denied the permit outright without effecting a taking. (*See Dolan*, 512 U.S. at 396 (Stevens, J., dissenting) (stating that it is undisputed that the permit could have been denied); *Nollan*, 483 U.S. at 835-36 (assuming that the permit could have been denied).) In both cases, the Court expressly reaffirmed the government's authority to impose the challenged condition if it paid compensation for any taking. (*Dolan*, 512 U.S. at 396; *Nollan*, 483 U.S. at 842.)

So too here. The County of Riverside, not the state judiciary, should retain ultimate authority over land use planning in the County. A reviewing court must, of course, invalidate an unconstitutional condition, but it should not then unilaterally decide that the permit should issue without the stricken condition. A court lacks both the authority and institutional competence to determine whether such permit issuance complies with applicable laws and is in the public interest. Even though the County allegedly failed to make constitutionally sufficient findings under *Dolan*, it retains the right and authority to pursue several options: 1) deny the permit; 2) issue the permit without the secondary access requirement; 3) keep the challenged condition and pay just compensation; or 4) keep the condition and pay nothing if the condition may be justified by appropriate findings under *Dolan*.

The lower court rulings in the case at hand contravene not only fundamental principles of federal takings jurisprudence, but also California restrictions on the use of a

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writ of mandate. As discussed in the Petition for Review (pp. 29-30), Section 1094.5(f) of the Code of Civil Procedure provides that a writ of mandate "shall not limit or control in any way the discretion legally vested in the respondent." By ordering the County to delete the access condition, the lower courts improperly deprived the County of its discretion to deny the permit altogether, or to retain the condition upon payment of compensation for any taking, thereby violating Section 1094.5(f).

The result here is all the more troubling because the appeal court initially recognized that the proper response to insufficient municipal findings under *Dolan* is a remand. In its Tentative Opinion (Petition, Appendix IV), the court of appeal concluded that the trial court's decision to require permit issuance without the access requirement was "too extreme." (Tentative Opinion at 20.) The appeal court recognized that "[t]he record suggests that the secondary access road requirement may be warranted," but that the County had acted under the misconception that Lion Lair's contentions could be rejected on procedural grounds. (*Id.* at 20-21.) Emphasizing "the grave public safety issues involved," the Tentative Opinion concludes that the "appropriate" course is to return the matter to the County for reconsideration in light of the court's reading of *Dolan*. (*Id.* at 21.)

Incredibly, in its final opinion, the appeal court turned 180 degrees and concluded that a remand "would serve no useful purpose." (Opinion at 21.) The final opinion is virtually identical to the Tentative Opinion except for the refusal to remand the matter to the County for further consideration.

The appeal court's only explanation for this disposition consists of six words. It asserted that a remand was unnecessary "[g]iven the state of the record." (Opinion at 21.) This purported justification is directly at odds with the balance of the opinion, which criticizes the Board's findings but nowhere states that the record could not support appropriate findings. More importantly, the court's failure to remand precludes the Board from determining whether the development should proceed at all without the secondary access requirement.

The appeal court's unexplained about-face violates the essence of reasoned decision-making, and it eviscerates the County's rightful authority to determine whether it will attempt to make findings that comply with *Dolan*, deny the permit altogether, or retain the condition and pay Lion's Lair for any taking.³ If left uncorrected, this disposition could improperly chill California municipalities from granting permits with protective conditions for fear that the permit automatically will take effect if the protective conditions are invalidated by the courts. This unprecedented result warrants review.

³ Lion's Lair argues that remand is unnecessary because its application already has been the subject of several hearings (Answer at 28), but this contention completely misses the point. The purpose of a remand would not be to hold further hearings to expand the record, but instead to allow the Board to decide whether to (1) deny the permit; (2) allow the project to go forward without the secondary access requirement; (3) retain the challenged condition and pay Lion's Lair just compensation; (4) retain the condition and pay nothing if the record supports appropriate findings under *Dolan*. (See page 7, above.) The appeal court's ruling effectively compels the County to allow the project to go forward without secondary access, a disposition that wrongfully deprives the County of its authority over local land use planning.

III. THE APPEAL COURT FUNDAMENTALLY MISAPPLIED *DOLAN*.

Dolan is a narrow, limited decision designed to serve only as an "outer limit[]" on municipal land use planning. (*Dolan*, 512 U.S. at 396.) The lower courts' application of *Dolan* to this case conflicts with U.S. Supreme Court pronouncements regarding *Dolan*'s limited scope in three ways.

First, just last Term, the Court emphatically reaffirmed that *Dolan* applies only to "land-use decisions conditioning approval of development on the dedication of property to public use." (*City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 119 S. Ct. 1624, 1635 (1999).) Unlike other land use controls, a compelled dedication requires special scrutiny. Absent an adequate nexus to the proposed development, a compelled dedication constitutes an "unconstitutional condition" because it requires the landowner to convey land to the public without just compensation. (*Dolan*, 512 U.S. at 385.) Here, the County has not compelled Lion's Lair to dedicate its own property, but rather to assist the County in acquiring property from others to be used for secondary access. Because no dedication is required from Lion's Lair, *Dolan*'s rough proportionality test is inapplicable.

Second, the County imposed the safety access requirement because the legislature has classified the location of the proposed subdivision as a hazardous fire area. (Petition at 9-11, 15-17.) State regulations, which specify the "minimum fire safety standards" for fire-prone areas (Pub. Resources Code § 4290, subd. (a)), require secondary access for the Lion's Lair development. (Petition at 10, 15.) Riverside County Ordinance 460.78 requires secondary access as well. (Ordinance 460.78, section 3.2, subd. I.). *Dolan*

makes clear, however, that the rough proportionality test applies only to an adjudicative decision. (*Dolan*, 512 U.S. at 385 (distinguishing legislatively determined land use controls from the individualized adjudicative decision in *Dolan*); *id.* at 391 n.8 (rough proportionality test applies to adjudicative dedications, not legislatively imposed land use controls).) This Court, too, recognizes that legislatively imposed requirements are subject to less exacting scrutiny under the Just Compensation Clause than adjudicative requirements. (*See Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 911 P.2d 429, 443-44, 50 Cal. Rptr. 2d 242 (1996) (legislatively imposed fees are subject to less demanding scrutiny than fees imposed on an individual and discretionary basis).)

The reason is clear: an adjudicated dedication requirement raises the special concern that the stated justification is a ruse and the landowner is being unfairly singled out to bear a burden disproportionate to the harms associated with the proposed development. No such "singling out" risk arises, however, where a requirement is imposed legislatively upon many landowners across a broad area. Here, the safety access requirement applies equally to every County landowner in a hazardous fire area, and comparable requirements apply to similarly situated landowners throughout the State. Thus, the County cannot be said to have singled out Lion's Lair for unfair or disproportionate treatment, and *Dolan* is inapplicable.

The appeal court recognized that *Dolan* is inapplicable to legislative requirements, but it concluded that the secondary access requirement is not legislative because County Ordinance 460.78 contains a waiver provision. (Opinion at 18.) This

conclusion, however, fails to consider that the applicable state regulations also require secondary access. Furthermore, the existence of a waiver provision in a legislative mandate like the County Ordinance cannot so easily shift the applicable constitutional standard of review, particularly where the landowner makes no effort to meet the requirements of the waiver provision. Lion's Lair did not formally request a waiver under Ordinance 460, and the Board concluded that even if Lion's Lair request for a "minor change" might be construed as a request for a waiver, Lion's Lair failed altogether to demonstrate that a waiver was consistent with the health, safety, and welfare of future residents. (Opinion at 6-7.) Under these circumstances, the flat legislative mandate of the state regulations and County Ordinance 460 required secondary access. The County had no discretion. Thus, Lair should not be allowed to insist on the higher standard of constitutional scrutiny that applies to truly adjudicative decisions.

Third, in *Dolan* the city required the landowner to dedicate a strip of land for public use to reduce flood risks and traffic congestion expected from the landowner's proposed expansion of a store. The required dedication was plainly designed to benefit the entire community. In such cases, it makes sense to ask whether the harm to the community attributable to the new development is roughly proportional to the required dedication. Here, however, secondary access is not being required for the safety of the community at large, but the safety of the subdivision residents themselves. The lower courts' reading of *Dolan* would require courts to perform a cost-benefit analysis of myriad requirements imposed on subdivision developers primarily for the benefit of the

subdivision residents. Even ordinary street and sidewalk dedication requirements would become subject to judicial second-guessing as to whether they are somehow "proportional" to the proposed development. *Dolan's* rough proportionality test is ill-suited to evaluate such requirements.

Consider the application of the test here. The lower courts evidently would have the County quantify the value of human life, evaluate the risk of death in the event secondary access is not required, and weigh those risks against the cost of providing secondary access. Nothing in the Just Compensation Clause requires such an unworkable and macabre analysis.

Lion's Lair asserts, without any supporting authority, that the access requirement "borders on being *per se* unconstitutional" because it requires Lion's Lair to acquire someone else's property. (Answer at 1-2, 25.) This odd *per se* rule has no basis in case law and directly contravenes everyday land use planning techniques. Subdivision developers often are required to acquire land from third parties for community needs, sometimes far more land than is needed for the houses. Requirements for open space, sidewalks, wetland mitigation, streets, and other features typically compel the developer to purchase additional land from third parties. Consider a developer who wants to build a subdivision on a landlocked parcel with no access roads; he would have no right to complain if required to provide a primary access route to public roads even if this requirement forced the developer to purchase land or an easement from a third party. The

case at hand is no different, but instead of primary access it involves secondary access compelled by the public safety risks raised by locating in a high fire hazard area.

Moreover, Lion's Lair's purported *per se* rule has no application to the present case. The contested condition requires Lion's Lair to assist the County in obtaining the necessary land. Lion's Lair could acquire the property itself, but it need do nothing more than make adequate funds available to the County to facilitate acquisition by the County. The suggestion that the County has unfairly subjected Lion's Lair to the whim of other landowners is untrue.

Finally, even if *Dolan* applied to these facts, the County has satisfied its requirements on the present record. In *Dolan*, the compelled dedication failed to pass constitutional muster in part because the record failed to reveal the extent to which the bikepath would actually reduce traffic congestion. (512 U.S. at 395.) It was in this context that the Court required the city to "quantify" its findings to show that at least some people would use the bikepath instead of the streets, thereby reducing traffic congestion. Without this connection, the bikepath would be little more than a recreational amenity, rather than an alternate commuter route. In the case at hand, there is no question that the subdivision residents would use the access road to escape a raging fire that has cut off their only other escape route. The critical deficiency in *Dolan* simply does not exist on these facts.

The County made an "individualized determination," in the words of *Dolan* (512 U.S. at 391), that the Lion's Lair site is situated so far away from Highway 371 that state

regulations required secondary access as a *minimum* fire safety standard. In these circumstances, *Dolan* does not impose on a municipality any additional quantification requirement or the impossible burden of proving the negative by ruling out alternative proposals no matter how meritless or inconsistent with applicable law.

Remarkably, the appeal court admonished the County for failing to make "findings" of obvious facts, such as whether secondary access "was required by the regulations." (Opinion at 20.) But when the regulations and the record as a whole make clear that condition is required, it elevates form over substance to insist on a specific finding to this effect. The *Dolan* Court reviewed the entire record, not just the municipality's findings, and concluded that "on the record before [the Court]" the City of Tigard had failed to justify the permit conditions at issue in that case. (512 U.S. at 395.) Here, the record before the Court shows beyond reasonable debate that the state regulations require secondary access as a minimum fire safety precaution. (Petition at 9-10.) The record further shows that secondary access is related both in nature and extent to fire risk that the County is seeking to address. Indeed, the access condition represents the bare "minimum" that has been legislatively determined to provide safe access in a hazardous area. That is all that *Dolan* and the Just Compensation Clause require.

CONCLUSION

By imposing unworkable demands on the County, the lower courts have transformed *Dolan*'s "outer limit" on land use planning into a constitutional straightjacket at the expense of public safety. The appeal court ruling has injected disturbing

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uncertainty into land use planning throughout the County with respect to critical efforts to reduce the loss of human life from devastating fires. This Court should grant the County's petition for review and reverse the ruling below.

Respectfully submitted,

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