

September 28, 1999

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
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, writes to support the petition for review filed in this case by the County of Riverside. CRC is a non-profit, 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 municipalities across the country in takings challenges to local laws.

The lower courts ruled that under *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Just Compensation Clause prohibits the County of Riverside from imposing a secondary access requirement designed to provide safe access to and from a residential

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subdivision in the event of a fire or similar emergency. For the reasons set forth below, we urge this Court to grant the County's petition and reverse the rulings below.

I. THE LOWER COURT RULINGS VIOLATE FUNDAMENTAL TENETS OF TAKINGS JURISPRUDENCE AND IMPROPERLY USURP MUNICIPAL LAND-USE PLANNING AUTHORITY.

This case involves one of the most compelling government interests imaginable: protection against death or injury from raging fires and other natural disasters. The lower courts applied *Dolan* to invalidate a permit condition requiring Lion's Lair Enterprises, Inc., to provide safe, secondary access for residents of a proposed subdivision in a remote location designated by state and local authorities as a high-risk fire area. The lower courts not only invalidated the 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, the rulings below will permit Lion's Lair to build 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 in the annals of takings jurisprudence. We are aware of no other case in which a court has used the Just Compensation Clause to compel a 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

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usurp municipal land-use planning authority, but 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 Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 194-95 (1985).

Because 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 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) (it was undisputed that the permit could have been denied); *Nollan*, 483 U.S. at 835-36 (assuming that the permit could have denied). And 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.

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 writ of mandate. As discussed in the Petition for Review (pp. 28-30), 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).

II. THE COURTS BELOW 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

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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 ensure that the County is able to acquire 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. *See* Petition at 6, 10. *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

to every County property owner in a hazardous fire area, and comparable requirements apply to similarly situated landowners throughout the State. Petition at 10, 15-16. Thus, the County cannot be said to have singled out Lion's Lair for unfair or disproportionate treatment, and *Dolan* is inapplicable.

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, 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.

Finally, even if *Dolan* applied to these facts, the County clearly 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.

Had the County required Lion's Lair to build a six-lane highway on the pretext of fire safety enhancement, one might legitimately question whether the condition would be justified. The condition at issue, however, 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. By imposing unworkable demands on the County, the lower courts have transformed *Dolan's* "outer limit" on land-use planning into a straightjacket at the expense of public safety.

In the wake of *Del Monte Dunes*, other state Supreme Courts are carefully inspecting the use of *Dolan's* rough proportionality test by lower courts. For example, in *Benchmark Land Co. v. City of Battle Ground*, 972 P.2d 944 (Wash. Ct. App. 1999), an intermediate appeals court applied *Dolan* to strike down a permit condition requiring the developer to make street improvements. The city petitioned the Washington Supreme Court, and it submitted *Del Monte Dunes* as supplemental authority on the inapplicability of *Dolan* to non-dedication requirements. On August 31, 1999, the Washington Supreme Court unanimously granted the petition and remanded the proceeding for further consideration in light of *Del Monte Dunes*. See *Benchmark*, No. 67901-1, 1999 Wash. LEXIS 590 (Wash., Aug. 31, 1999). This Court should do the same here, given the lower courts' application of *Dolan* notwithstanding the absence of any requirement that Lion's Lair dedicate its property to the public.

III. THE JUST COMPENSATION CLAUSE DOES NOT APPLY TO A GENERALIZED MONETARY OBLIGATION TO ASSIST THE COUNTY IN ACQUIRING LAND.

The 1998 ruling in *Eastern Enterprises v. Apfel*, 118 S. Ct. 2131 (1998), also demonstrates that the lower courts erred in applying the Just Compensation Clause to this case. There, five Justices concluded that a generalized monetary obligation imposed by the government does not trigger the Just Compensation Clause. *Id.* at 2154-58 (Kennedy, J., concurring in part and dissenting) (generalized monetary obligation imposed by federal coal miner health benefits law does not implicate the Just Compensation Clause because it does not operate on a specific property interest); *id.* at 2161-64 (Breyer,

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Stevens, Souter, and Ginsburg, JJ., dissenting) (same). This five-Justice rejection of the takings claim in *Eastern Enterprises* constitutes binding precedent on lower courts.

Unity Real Estate Co. v. Hudson, 178 F.3d 649, 658-59 (3d Cir. 1999) ("we are bound to follow the five-four vote against the takings claim in *Eastern*").

As noted above, the permit here does not require Lion's Lair to dedicate its property to the public, but instead imposes a generalized monetary obligation to assist the County in buying property from others to provide safe, secondary access. Petition at 13. *Eastern Enterprises* makes clear that the Just Compensation Clause does not apply to such a monetary requirement.

CONCLUSION

The lower court rulings have injected disturbing 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 rulings below.

Respectfully submitted,

COMMUNITY RIGHTS COUNSEL

By: _____
Timothy J. Dowling
Chief Counsel