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JOHN F. KRATTLI
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April 16, 2014

Paul J. Beard II
Principal Attorney
Pacific Legal Foundation
930 G Street
Sacramento, California 95814

Re: Correspondence Regarding Los Angeles County's Draft Hillside Management Area Ordinance

Dear Mr. Beard:

Supervisor Antonovich forwarded your letter dated November 21, 2013, regarding Los Angeles County's ("County's") draft hillside management area ("HMA") ordinance and asked our office to respond directly to you.[1] A copy of your letter is enclosed for your reference.

In your letter, you question whether several provisions in the draft ordinance would violate the takings clauses under the Fifth Amendment of the United States Constitution and article I, section 19 of the California Constitution based on *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994).[2] These United States Supreme Court cases, referred to as "*Nollan/Dolan,*" establish standards for determining whether a condition of approval imposed by the government in a quasi-adjudicative land use permit process violates the Takings Clause.

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[1] You should note that the draft ordinance is a work in progress and is part of the County's General Plan Update effort. Revisions to the draft ordinance are still underway and the next public draft of the ordinance is anticipated to be released this month. The County Regional Planning Commission is expected to consider the draft ordinance at a public hearing on April 23, 2014.

[2] The protections under the federal and State takings clauses are similar for present purposes and thus, this letter will collectively refer to these provisions as the "Takings Clause."

The provisions in the draft ordinance you cite as being potentially subject to challenge are: (a) the requirement that applicants for a conditional use permit ("CUP") in an HMA dedicate part of their land as open space; (b) the development restrictions on the non-HMA portions of parcels partially located in an HMA; and (c) the extension of the HMA requirements beyond those already covered in the existing HMA ordinance to include low-density developments.[3] You also question the County's purported policy shift reflected in the draft HMA ordinance, which you claim shows a policy movement from preventing environmental degradation to providing community amenities in HMAs.

In short, we do not believe the challenged provisions in the draft ordinance that you cite would violate the Takings Clause, nor do we believe that the draft ordinance reflects a policy shift regarding HMAs.

As background, the draft ordinance, as you note, expands the HMA requirements in the existing ordinance to include low-density projects, and also eliminates the distinction between urban and non-urban HMAs for purposes of triggering the ordinance's requirements. It further expands the HMA exemptions for small projects that do not require substantial grading. The provisions in the draft ordinance that you question relating to dedicating open space and restricting development on non-HMA portions of HMA parcels are already requirements in the County's existing ordinance.

Taken together, the changes to the existing HMA ordinance, as reflected in the draft ordinance, are intended to more closely link HMA requirements to a project's specific impacts rather than be tied to a density calculation or an urban/non-urban designation. They do not, in our view, raise a *Nollan/Dolan* inquiry.

A *Nollan/Dolan* inquiry is triggered when the government acts in a quasi-adjudicative capacity on an individual permit application and demands that a property owner dedicate a property right as a condition of obtaining a development permit. "The 'sine qua non' for application of *Nollan/Dolan* scrutiny is . . . the discretionary deployment of the police power in the imposition of land use conditions in individual cases." *San Remo Hotel, L.P.*, 27 Cal.4th 643, 670, citing *Ehrlich v. City of Culver City*, 12 Cal.4th 854, 869 (1996); see also

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[3] The County's existing HMA ordinance is found in section 22.56.215 of the Los Angeles County Code.

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 546-548 (2005); *Building Industry Association of Central California v. County of Stanislaus, et al.*, 190 Cal.App.4th 582, 589-591 (2010).

The draft ordinance, on the other hand, is a prospective land use regulation of general applicability. If the County adopts the draft ordinance, it will be acting in its legislative capacity and the challenged provisions would apply to all affected property owners in the same manner. In implementing the draft ordinance, the County will not be exercising discretion on an individual permit basis as to the applicability of these provisions.

For this type of regulation, the case law shows that the *Nollan/Dolan* analysis does not apply. Instead, the test under the Takings Clause is whether the regulation is a legitimate exercise of the government's police power and whether it deprives a property owner of all economically viable use of his/her property. *Id.*; *Agins v. City of Tiburon,* 447 U.S. 255 (1980); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124 (1978). As for economic viability, courts will give consideration to whether the regulation materially interferes with a property owner's investment-backed expectations related to the property. *Id.,* at p. 124. The draft ordinance passes constitutional muster under these tests.

The County's purpose in adopting the draft ordinance would be to preserve the physical integrity and scenic value of these areas. This is plainly a legitimate government purpose. See, California Public Resources Code section 21000 (government shall regulate its land to prevent environmental damage). Requiring CUP applicants to dedicate part of their land as open space, restricting development on the non-HMA portions of HMA parcels, and extending HMA protections to low-density developments, are legitimate means to further this purpose.

Further, the draft ordinance does not regulate properties to such an extent that all economically viable use of these properties is prohibited. Development of HMA properties is contemplated in the draft ordinance, but the development is to occur with a sensitive design, taking into account the physical constraints of the property and the environmental impacts of the development.

Finally, the investment-backed expectations of impacted property owners should not be materially affected by the draft ordinance. These property owners are already on notice that HMA properties have a special set of practical and environmental challenges and are subject to regulation. As discussed above, two

of the ordinance provisions you challenge, the required dedication of land to open space and the restriction on development in non-HMAs, already are requirements in the County's existing HMA ordinance.

Regarding your claim that the draft ordinance reflects a policy shift by the County, we respectfully disagree. The draft ordinance explains that its purpose is to preserve the physical integrity and scenic value of HMAs in the County. This is essentially a refinement of the stated purpose in the existing HMA ordinance, which is to prevent environmental degradation of these areas. The fundamental purpose of both the existing and draft HMA ordinance is the same, namely to preserve the integrity and scenic beauty of HMAs.

If you have any questions or concerns, please contact the undersigned at (213) 974-1927.

Very truly yours,

JOHN F. KRATTLI
County Counsel

By
JILL M. JONES
Deputy County Counsel
Property Division

JMJ:gl

Enclosure

PACIFIC LEGAL FOUNDATION

November 21, 2013

Board of Supervisors
County of Los Angeles
Kenneth Hahn Hall of Administration
500 West Temple Street, Suite 383
Los Angeles, CA 90012

Re: General Plan 2035 (October 2013 Hillside Management Area (HMA) Ordinance)

To the Honorable Members of the Los Angeles County Board of Supervisors:

We are writing in regard to the Los Angeles County's proposed Hillside Management Area Ordinance that is being considered as a component of the county's General Plan 2035. After reviewing the proposed ordinance, we discovered a number of policies that could threaten property rights and wanted to be sure that you were aware of these potential problems. Last week we submitted the enclosed letter, which describes these issues, to the Department of Regional Planning. As you prepare to review these proposals we hope that you will consider our comments.

Sincerely,

Paul J. Beard II
Attorney

Enclosure

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PACIFIC LEGAL FOUNDATION

November 15, 2013

Ms. Brianna Menke
County of Los Angeles
Department of Regional Planning
320 West Temple Street, Room 1354
Los Angeles, CA 90012

VIA EMAIL: bmeenke@planning.lacounty.gov

Re: Comments on General Plan Update (October 2013 Hillside Management Area (HMA) Ordinance)

Dear Ms. Menke:

This letter addresses proposed policies contained in the October 2013 Draft Hillside Management Area (HMA) Ordinance, for the County's consideration as it updates the General Plan.

Introduction

Pacific Legal Foundation (PFL) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of monitoring and litigating matters affecting the public interest. For more than forty years, PLF has been litigating in support of property rights. *See, e.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Costal Comm'n*, 483 U.S. 825 (1987). Because of its history and experience with regard to issues affecting private property, PLF believes that its perspective may provide you with some valuable insight as you update the County's HMA. We do not advocate any particular policy or law. Instead, our aim is to identify some of the legal implications of certain draft policies contained in the draft ordinance, should they be adopted.

Summary of Law

Our comments primarily concern the potential for some of the proposed policies to infringe constitutionally protected private property rights. The Fifth Amendment to the United States Constitution provides, in relevant part, that private property will not "be taken for

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public use without just compensation." U.S. Const. amend. V; *see also* Cal. Const. art. I, § 19 (private property may be taken only for a "public use" and "only when just compensation" has been paid). The United States Supreme Court has explained that the Takings Clause was designed to ensure fundamental fairness—i.e., "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

To ensure fairness and protect private property rights, the Takings Clause strictly guards against extortionate conditions, that the government might be inclined to force a property owner seeking a permit to develop or use his/her land to accept. In *Nollan*, 483 U.S. at 837—one of the cases that PLF litigated—the Supreme Court determined that an "essential nexus" must exist between any permit condition and the public purpose allegedly requiring the condition. In *Nollan*, the Coastal Commission required the property owner of beach-front property to dedicate a strip of beach as a condition of obtaining a permit to rebuild his house. *Id.* at 827-28. The United States Supreme Court held that there must be a nexus between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner's property. *Id.* at 837. Without such a connection, a permit condition is an illegal regulatory taking—i.e., "not a valid regulation of land use but 'an out-and-out plan of extortion.'" *Id.* (citations omitted).

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court defined how close a "fit" is required between the permit condition and the alleged impact of the proposed development. Even when a nexus exists, there still must be a "degree of connection between the exactions and the projected impact of the proposed development." *Id.* at 386. There must be rough proportionality—i.e., "some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development." *Id.* at 391 (emphasis added). Otherwise, the condition will be held unconstitutional as an unlawful taking.

With these basic principles in mind, we urge you to consider the legal implications of some of your proposed policies, as outlined below.

Comments Re: Proposed Issue Summary on Hillside Management Area (HMA)

1. Requirement To Dedicate Land To Open Space

This proposed policy requires applicants for conditional use permits to dedicate part of their land to open space. In Rural Land Use Designation areas the requirement is 70% of

the gross area of a development site. Draft HMA Ordinance § 22.56.215(F)(1). In other areas, the requirement is 25%. Draft HMA Ordinance § 22.56.215(F)(2)(a). In the case of a subdivision, the open space must be given to another entity or the development rights must be permanently extinguished—effectively creating a conservation easement. Draft HMA Ordinance § 22.56.215(F)(5).

This policy raises serious Takings Clause concerns. The policy would condition certain permits on the relinquishment of a right to use the property regardless of the proposal's impact. Under the proposed rule, there is no requirement that the County make an individualized determination that the impact of the project sought to be permitted constitutionally *justifies* such a substantial concession on the part of permit applicants. Absent an individualized showing of an essential nexus and rough proportionality between a project's impact and the need to provide open space and enhance community character, the condition may violate the Takings Clause under *Nollan* and *Dolan*.

If the County wants a property owner to dedicate property, it must first demonstrate that the impact of the proposed project *justifies* the forced dedication. If there is no connection between the project's impact and the dedication requirement then the County must either forgo the requirement or it must pay for the land it takes. U.S. Const. amend. V (prohibiting a taking of private property without "just compensation").

Without such a connection the ownership and management transfer is nothing more than "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837. The Takings Clause prohibits the County from forcing landowners to bear burdens benefitting the public which, "in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

2. Restrictions on Development in Non-HMA Areas

The current proposal applies to land if it is part of a development that includes an HMA. Draft HMA Ordinance § 22.08.080. This means that property that is primarily flat may be taken from landowners as an open space dedication merely because elsewhere in the development something is built on the HMA. This provision does not show a clear connection between the impact of the proposed development and the regulation imposed by the county. Although an exception exists for development that maintains or restores all HMAs in a natural state, the policy still broadly controls many non-HMA areas.

Because the regulation is designed to protect HMAs—and not flatter areas, it is difficult to see the nexus between the harm done in these areas and the required dedication. The policy may violate the Takings Clause, under *Nollan* and *Dolan*. The County has the

burden of establishing how each project that comes before it justifies the uncompensated taking of interests in private property. Specifically, the County must demonstrate, for each project, how the project is *causing* the alleged need for an open space dedication. Here there is no indication that the County will make such a finding. The County's policy of imposing an easement on non-HMA portions of a development—without regard to *Nollan* and *Dolan*—may violate private property rights.

3. Extending the Regulation To Cover Areas Developed at a Low Density

The draft regulation extends the Hillside Management regulations to proposals to develop areas at low densities. Under the current regulations, conditional use permits are only required if the property is developed at a high density. L.A. Cnty. Mun. Code § 22.56.215(A)(2). However, the new proposal removes this distinction and subjects all areas with 25% slopes to the same treatment. Draft HMA Ordinance § 22.08.080.

Similar to the requirements discussed above, the County's proposal risks violating the Takings Clause. This policy raises a concern that the County is not carrying its burden of demonstrating a causal connection between the County's alleged need for hillside preservation and regulation of areas that are developed at a low density. It is not clear that low density development in these areas threatens the HMAs such that an open space dedication is needed.

4. Policy Shift from Preventing Environmental Degradation To Preserving Scenery

Under the draft proposal, the purpose of the ordinance shifts from the prevention of environmental degradation to the provision of community amenities. The old ordinance required conditional use permits if the development was going to cause environmental degradation or the destruction of life and property. L.A. Cnty. Mun. Code § 22.56.215(B)(1). The purpose of the permit was to ensure that development, to the extent possible, maintained existing resources. L.A. Cnty. Mun. Code § 22.56.215(B)(1). The new ordinance shifts away from this responsive focus and instead requires development to "provide[s] open space, and enhance[s] community character." Draft HMA Ordinance § 22.56.215(A)(1).

Further, the regulation requires the applicant to show that the proposal preserves the scenic value of the HMAs to the best extent feasible. Draft HMA Ordinance § 22.56.216(H)(2). Previously the regulation only required applicants to show that a proposal was safe, compatible with natural resources, accessible to services, and creatively designed. L.A. Cnty. Mun. Code § 22.56.215(F)(1). This shift raises concerns that the new regulation is

not designed to ameliorate the effects of development, but instead to take property from the landowner to provide benefits to existing constituents.

Because the plan will not be approved unless it meets these requirements, the proposal may prevent any development or land use in HMAs. This policy threatens to be a taking of property rights and in fact, may extinguish most development in these areas. To the extent the policy would either deny all economically viable use of private property—or result even in a substantial economic impact—the policy could effect a taking requiring just compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Penn Central Transp. Corp. v. New York City*, 438 U.S. 104, 124 (1978)

We appreciate your consideration of our comments.

Sincerely,

PAUL J. BEARD II
Principal Attorney