

Supreme Court Case No.: S213468

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CITY OF PERRIS,
Plaintiff and Respondent,

v.

RICHARD C. STAMPER, et al.,
Defendants and Appellants.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH
APPELLATE DISTRICT, DIVISION TWO
CASE NO. E053395

ON APPEAL FROM SUPERIOR COURT OF RIVERSIDE
COUNTY, THE HONORABLE DALLAS HOLMES, JUDGE
CASE NO. RIC524291

**PLAINTIFF/RESPONDENT'S ANSWER TO THE AMICI CURIAE
BRIEF OF PACIFIC LEGAL FOUNDATION AND NFIB SMALL
BUSINESS LEGAL CENTER**

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I. INTRODUCTION AND SUMMARY OF RESPONSE

Cutting to the crux of Pacific Legal Foundation's and NFIB Small Business Legal Center's (collectively, "Amici") arguments, they essentially contend that the project effect doctrine applies here because a city should not "insulate" itself from paying "fair market value" for a property in an eminent domain proceeding by designating land in its general plan for street purposes and then acquiring the land sometime in the future at agricultural values. (*See* Amici Brief, pp. 4, 5, 11, 12, 14, and 15.)

The difficulty with this argument is that it is not a true "project effect" argument. Rather, the argument is a thinly veiled attempt to undo and challenge over 40 years of precedence and scores of published opinions on claimed dedication requirement cases in eminent domain under the *Porterville* doctrine. The project effect doctrine has no place here.

When portions of a property are designated for street purposes and subject to dedication at the time of development, established principles in eminent domain law under the *Porterville* line of cases dictate that the fair market value of those portions *is* agricultural. This is so because fair market value is defined as the highest and best price that a willing buyer, knowledgeable of all the uses and purposes for which a property is reasonably adaptable and available, would pay to a willing knowing seller for the property, on the date of valuation. (Code Civ. Proc. § 1263.320(a)¹.)

Logically then, when a portion of property being acquired is that which an owner would have to dedicate to a public agency for road purposes to secure necessary permits to develop the larger parcel to its highest and best use at the time of development, the value of that portion must be determined based on the permitted use because that portion can never be used for any purpose other than the road. (*City of Fresno v. Cloud*

¹ All section references are to the Code of Civil Procedure unless otherwise noted.

(1972) 26 Cal.App.3d 113, 123 (“*Fresno*”).) Otherwise, the price paid by the public agency for that portion would not be fair market value under eminent domain law -- it would *exceed* fair market value and be a windfall to the property owner.

For Amici to argue that Plaintiff/Petitioner City of Perris (the “City”) cannot use agricultural values as fair market value to acquire the Subject Interests that have been designated as Indian Avenue in the City’s general plan circulation element (“Circulation Element”) and subject to dedication at the time of development, Amici would have to prove that the City’s imposition of the dedication requirement is somehow illegal or an invalid exercise of its police powers. Here, even Defendants/Respondents Richard Stamper, Donald D. Robinson, LLC, and Donald Robinson (collectively, “Owners”) have not made such an argument because the record is undisputed that, as a valid exercise of its police powers and as a part of a comprehensive state-mandated circulation element update using detailed engineering studies of street plans, the City legitimately updated its Circulation Element in 2005 to place Indian Avenue in its current configuration.²

Even if Amici could prove the 2005 Circulation Element update was not a valid land use exercise and that Owners’ challenge was timely, Amici’s argument still is not a project effect argument, but instead a challenge to the City’s legislative action and use of police powers to lay its streets.

² Under Government Code Section 65009, Owners had 90 days to challenge the Indian Avenue realignment in its current configuration but failed to do so. The 90-day challenge period exists to provide certainty and finality to a public agency’s land use decision and to prevent property owners from doing exactly what Owners are doing here: challenging the configuration of a street years after it has already been designated and built. Owners have in essence waived their objection to the Indian Avenue alignment.

Second, the City agrees with Amici that a public agency cannot, for example, designate 90% of private property as right-of-way and then argue that because the right-of-way is subject to a dedication requirement, the City is only required to pay agricultural values. (Amici Brief, p. 12.) However, such a scenario is not subject to a project effect analysis either. Before a public agency can use agricultural values to pay for a property subject to dedication, the dedication must be determined to be valid; that is, it must be reasonably probable and constitutional (i.e., the dedication must substantially further a legitimate government objective and be roughly proportional to the impacts of development). If a project is not roughly proportional to the impacts of development, then the project is invalid and the public agency would not be able to pay agricultural values. The project effect doctrine is irrelevant to the analysis.

Here also, on remand (as the Court of Appeals directed with respect to evidentiary issues not on review before this Court), the City will be required to show that the Indian Avenue dedication is reasonably probable, would substantially further a legitimate government objective, and would be roughly proportional to the impacts of development. Such a showing is not a project effect analysis – it is the constitutionality analysis articulated in *State Route 4 Bypass Authority v. Sup. Ct.*, (2007) 153 Cal.App.4th 1546 (“*State Route 4*”) and the *Porterville* line of cases. No matter how Amici’s argument is cut, the project effect doctrine simply has no place in dedication requirement cases.

Third, even looking at this case in a very simplistic way and reviewing the plain language of Section 1263.330, “project effect” does not apply here. Citing to *City of San Diego v. Rancho Penasquitos Partnership*, (2003) 105 Cal.App.4th 1013 (“*Rancho Penasquitos*”), Amici agree that the purpose of the project effect doctrine is to exclude from valuation “changes in land use, to the extent that they [are] influenced by

the proposed improvement.” (Amici Brief, p. 5.) This case does not involve a change in land use influenced by a proposed improvement. There is not a shred of evidence in the record that the City placed Indian Avenue in its current configuration in 2005 to accommodate the construction of Indian Avenue years later.

Normally, circulation element amendments and updates are required by statute to revise a public agency’s street plans as a community grows and develops. (Gov. Code §§ 65302(b), 65358.) In this case, the project is the construction of Indian Avenue north of Ramona Expressway (“Project”). The Indian Avenue placement in its current configuration was done prior to the Project as part of state-mandated comprehensive Circulation Element update supported by unchallenged engineering and traffic studies.³ Again, at the time the City updated its Circulation Element in 2005, it did not even have any plans to construct Indian Avenue.

Unlike in *Rancho Penasquitos*, here (as with all claimed dedication cases), the need for construction of Indian Avenue, i.e., the Project, ***did not influence*** the City to update its Circulation Element as part of any regulation to decrease or depress property values; there simply is no shred of evidence in the record to the contrary.⁴ The factual record is undisputed

³ The 2005 Circulation Element update was supported by extensive traffic and engineering studies showing the right-of-way alignments, including Indian Avenue, are in the best configuration. (Respondent’s Appendix (“RA”) [volume:page] 1:0235-0265 [Tab 6]; Appellants’ Appendix (“AA”) [volume:page] 7:1589 [Tab 51]; Reporter’s Transcript (“RT”) [page:line] 139:7-141:16.)

⁴ In reiterating simply that the City had no plans to construct Indian Avenue at the time it adopted its 2005 Circulation Element update, the City is not conceding that if a public agency updates a circulation element while ***knowing*** it wants to condemn a portion of right-of-way, that such actions would somehow be a project effect. The project effect doctrine simply has no place in dedication requirement cases.

It cannot be that the State legislature and this Court will permit a public

that the dedication requirement ordinance adopted by the City was enacted decades ago and applies city-wide to *all* properties upon development of vacant land, not just Indian Avenue properties. As the Court of Appeals rightly pointed out, all claimed dedication requirements stem from a free-standing dedication requirement ordinance or regulation. (Court of Appeal's Slip Opinion dated August 9, 2013 ("Opinion"), p. 40.) Therefore, the claimed dedication requirement for Indian Avenue is simply not part of any project that affects value under Section 1263.330.

Application of the project effect doctrine to all claimed dedication requirements would reverse over 40 years of well-established case law holding that claimed dedication requirements must be considered during valuation if they are found to be reasonably probable and constitutional.

Recognizing the flaw in their argument, Amici attempt to address it by contending that the project effect doctrine does not apply to all dedication cases and only applies here because the Indian Avenue dedication requirement was done "solely" for the City's own purpose, while "normal" dedication requirements not subject to the project effect doctrine are those that serve the purpose of mitigating the impacts of intensified land use upon development of property. Amici's contention is a

agency to require dedication of property for *free* at the time of development (provided the dedication is valid), but require the public agency to then pay more than fair market value if it wants to acquire the property by eminent domain prior to any development of the property. Such a holding would give a property owner a windfall and be bad public policy.

Presumably, Amici and Owners would argue under such circumstances the City is condemning property for its own benefit rather than to mitigate the effects of any development of the property and therefore, the owner should get a windfall. Again, however, such an argument goes to the constitutionality of a dedication requirement, not whether the dedication is a project effect. If a property owner can show a dedication requirement has no benefit to the owner whatsoever, the dedication is unconstitutional and agricultural values cannot be used.

non-distinction: *all* claimed dedication requirement cases in eminent domain somehow have a public benefit or use because public agencies cannot take private property unless there is a public purpose for the taking. Under Amici's theory, a property owner can always argue that claimed dedication requirements are done only for a public agency's own purpose. By Amici's definition, "normal" dedication requirements are only those that are actually imposed at the time an owner seeks to develop his or her property through the development permit process and are never claimed dedication requirements in the context of eminent domain.

There simply is nothing in the record that the Indian Avenue dedication requirement was done *solely* for the City's benefit. In fact, the record is clear that Indian Avenue will benefit all property owners within north Perris, including Owners' Property,⁵ and Indian Avenue was configured to accommodate development in the area, including the development of Owners' Property.⁶

Notwithstanding the foregoing, Amici's argument that the Indian Avenue dedication requirement was done solely for the City's benefit essentially is an argument that the dedication is not constitutional, and project effect has no place in the analysis.

⁵ Indian Avenue will benefit Owners by providing frontage upon a major road, which the Property previously did not have. The frontage is highly desirable, for it will allow for successful commercial development in a zone which lacks any meaningful commercial development to support the area, and will bring higher values per square foot than industrial uses. (RT 143:23 – 144:2.)

⁶ Indian Avenue and other roads within north Perris were needed "to provide acceptable levels of service in conjunction with the planned development of the area. Eligible facilities are those which will provide a regional benefit ... by diverting a significant portion of the truck traffic away from some of the major thoroughfares within the City of Perris and [will] accommodate an acceptable level of service to support new development." (RA 2:0302, 0310 [Tab 11].)

Accordingly, this Court should affirm the Court of Appeals in holding that Section 1263.330 does not apply to exclude the Indian Avenue dedication requirement as a project effect.

II. UNDER WELL-ESTABLISHED EMINENT DOMAIN PRECEDENCE, THE PLAIN MEANING OF “FAIR MARKET VALUE” REQUIRES PUBLIC AGENCIES TO PAY AGRICULTURAL VALUES WHEN ACQUIRING PROPERTY DESIGNATED FOR STREET PURPOSES AND SUBJECT TO DEDICATION AT THE TIME OF DEVELOPMENT -- TO PAY MORE WOULD EXCEED FAIR MARKET VALUE AND BE A WINDFALL TO A PROPERTY OWNER.

When public agencies take private property for public use, the Fifth Amendment of the United States Constitution, Article I, Section 19 of the California Constitution, and Section 1230.010 *et seq.* of the Code of Civil Procedure require the payment of just compensation. Just compensation translates to the payment of fair market value for real property. (*New York v. Sage* (1915) 239 U.S. 57, 61.) Fair market value is defined as the highest and best price that a willing buyer, knowledgeable of all the uses and purposes for which a property is reasonably adaptable and available, would pay to a willing knowing seller for the property, on the date of valuation.⁷ (§ 1263.320(a).)

The State legislature therefore declared that fair market value necessarily requires considering the cost of preparing property for development to its highest and best use. (Evid. Code § 821; *Los Angeles v. Cole* (1946) 28 Cal.2d 509, 518.) As a result since 1972, California courts began valuing the portions of property conditioned on dedication of a road

⁷ The Real Estate Appraisal Institute defines the “highest and best use” of condemned property as a use that is: (1) physically possible, (2) legally permissible [e.g. in conformance with the general plan and zoning], (3) financially feasible and (4) maximally productive [i.e. giving the highest rate of return on investment]. (See the Dictionary of Real Estate Appraisal, Third Edition, Appraisal Institute, 1993.)

based on the existing use of the *undeveloped* property, not on its highest and best use, as developed. (*Fresno, supra*, 26 Cal.App.3d at 123; *City of Porterville v. Young* (1987) 195 Cal.App.3d 1260, 1269 (“*Porterville*”).) This is also known as the *Porterville* doctrine.⁸ “Where dedication of the take would be required as a condition of development, the take generally does not have the same value per square foot as the remainder of the parcel.” (*Contra Costa County Flood Control & Water Conserv. Dist. v. Lone Tree Invs.* (1992) 7 Cal.App.4th 930, 934 (“*Contra Costa*”).) The value of the take subject to dedication is usually much lower than the remainder of the property.

Since then, courts throughout California have always required a claimed dedication requirement to be considered rather than ignored in valuation. The “project” for which property is being acquired simply is not a relevant factor to determining the property’s value.

⁸ In *Porterville*, a portion of property was being acquired for a public roadway. (195 Cal.App.3d at 1262.) The city’s appraiser appraised the acquired portion based on its agricultural rather than commercial use, even though the property was zoned commercial. The court held:

Although the parcel was zoned for commercial purposes, it could not be adapted and developed for such purposes without a dedication of frontage to widen the east side of Prospect Street to its ultimate planned width. . . . The take is the very frontage owner would have had to dedicate to city to secure the building permits or conditional use permit needed to develop the parcel to its highest and best commercial use. The trial court should have determined the value of the take on the basis of its agricultural use, because it could never be used for any other purpose.

(*Id.* at 1269.)

The *Porterville* doctrine evolved further through the years after *Nollan v. California Coastal Comm'n*, (1987) 483 U.S. 825 (“*Nollan*”), and *Dolan v. City of Tigard*, (1994) 512 U.S. 374 (“*Dolan*”), when courts began requiring that claimed dedication requirements in eminent domain be both reasonably probable and constitutional. (*City of Hollister v. McCullough* (1994) 26 Cal.App.4th 289, 297 (“*Hollister*”) [“proof that a conditional dedication is a ‘reasonable probability’ requires a showing not only that plaintiff would probably have imposed the dedication condition if defendants had sought to develop the property, but also that the proposed dedication requirement would have been constitutionally permissible”]; *Contra Costa, supra*, 7 Cal.App.4th at 937.)

The most recent and clear seminal case regarding the *Porterville* doctrine is *State Route 4, supra*. *State Route 4* holds that for a claimed dedication requirement to be valid, such that it triggers a lower agricultural valuation, the dedication requirement must be both:

- (i) reasonably probable, and
- (ii) constitutional, that is:
 - a. the requirement must substantially further a legitimate government objective (the nexus standard under *Nollan*), and
 - b. be roughly proportional to the impacts of development (the rough proportionality standard under *Dolan*).

(153 Cal.App.4th at 1551.)

Nowhere in *State Route 4*, *Contra Costa*, *Porterville*, or any other eminent domain cases involving claimed dedication requirements do the courts look to the project or its effects to determine whether a dedication requirement should be excluded – and for good reason: determining fair market value of a property necessarily requires consideration of a dedication requirement as part of the highest and best use.

Amici boldly assert that the City cannot “insulate itself from [the requirement to pay just compensation] by designating land it wants to acquire in its general plan, because the law forbids government from reducing condemnation awards on account of the project for which it needs the land.” (Amici Brief, p. 4.) But the *Porterville* doctrine, promulgated by the courts themselves, permits exactly that – the reduction of compensation for property subject to a *valid*, i.e., a reasonably probable and constitutional, claimed dedication requirement.

Under *Porterville* and its progeny, courts are *required* to analyze whether a claimed dedication requirement is reasonably probable and constitutional. If a court determines the claimed dedication satisfies both thresholds, then the claimed dedication requirement *must* be considered at agricultural values during valuation and cannot be ignored. On the other hand, if a court determines the claimed dedication is either not reasonably probable or is unconstitutional, then the claimed dedication requirement *cannot* be considered during valuation.

The only way the Indian Avenue dedication requirement would not be considered during valuation, as Amici suggests, is for this Court to find that the dedication is an illegal or invalid exercise of police powers. Under Government Code Sections 7050 and 66475, the State legislature authorizes the use of dedication requirements, as a valid exercise of police power. This Court also has determined that a public agency may constitutionally require a dedication of land as a condition of development and such a dedication requirement is not viewed as an act of eminent domain. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638-640.) However, such dedication requirement must be reasonably related to the use of the property as viewed in light of its impact on the surrounding community (both in the present and the future) and its impact on the general welfare of the community. (*Id.*)

Here, the City updated its Circulation Element, as required by law under Government Code Sections 65302 and 65358, to account for increased development in the City. As part of the update, the City realigned roads, including Indian Avenue, and designated new ones. (RA 1:0152 [Tab 5] [existing major rights-of-way prior to update] and RA 1:0189 [Tab 5] [future major rights-of-way after update].) In doing so, the City conducted extensive traffic studies to determine the best location with least private injury. (RA 1:0235-0265 [Tab 6]; RT 139:7-141:16.) In addition, the Indian Avenue dedication requirement will be imposed upon development of the Property, which is currently vacant. Traffic studies showed the development of the Property would generate, on average, 8% to 13% of the Indian Avenue traffic within the area. (RT 139:13-14; 143:1-15; 183:2-28; RA 1:0235-0265.) Additionally, evidence showed that existing but non-permanently paved roads abutting the Property may be vacated in the future, making the Indian Avenue dedication requirement all the more important for ingress and egress on the Property. (RA 1:0138-0139 [Tab 4]; AA 2:0299-0302 [Tab 10].)

Public agencies such as the City have discretion in placing its streets in a way that would benefit the community. (*See* Gov. Code § 65009.) Regulation and control of the design, alignment, grades, widths, and improvements of streets is vested in local governments. (Gov. Code §§ 66411, 66418.) Therefore, placement of streets does not have to be related to development of a vacant, unentitled property.

There is no evidence that the City updated its Circulation Element and realigned Indian Avenue or imposed the Indian Avenue dedication requirement in violation of its police powers to do so. Hence, assuming the Indian Avenue dedication requirement is constitutional under well-established precedence, it must be considered in determining the fair market value of the Subject Interests. Ultimately, Amici are arguing that although

the City will be able to require Owners to dedicate the Subject Interests for Indian Avenue *for free* when the Property is developed, Owners should get *more* than fair market value and a *windfall* in this case simply because the City has decided to build Indian Avenue before Owners' development, in part to help facilitate the much-needed public infrastructure for meaningful future development of Owners' Property. The argument simply has no support in any case law and would make bad public policy.

Accordingly, analyzing whether the claimed dedication requirement is a project effect under Section 1263.330 has no place here, and if this Court holds otherwise, it will undo well-established principles and create confusion in determining the fair market value.

III. APPLYING THE PROJECT EFFECT DOCTRINE IN THIS CASE MEANS THAT ALL CLAIMED DEDICATION REQUIREMENTS WOULD BE EXCLUDED FROM VALUATION IN EMINENT DOMAIN CASES, AND AMICI'S ATTEMPT TO DISTINGUISH THIS CASE FROM OTHER DEDICATION CASES FAILS.

Although they try to somehow distinguish the Indian Avenue dedication requirement from all other dedication requirement cases, at the end of the day, Amici still argue that “[b]ut for the City’s Project [i.e., construction of Indian Avenue], the Owners would not be required to dedicate their property to the City as a condition of development... Hence, that dedication requirement must be ignored in determining the property’s fair market value.” (Amici Brief, p. 4). Yet, Amici fail to demonstrate how this case is different from any other garden variety dedication requirement case decided under *Porterville*. As briefed in detail in Section VIII(B) of the City’s Opening Brief (pp. 39-41), every time an eminent domain case involves a claimed dedication requirement, the dedication of the right-of-way is always pursuant to a general plan or circulation element update and the project is always construction of said right-of-way.

The facts of this case are no different from the seminal eminent domain cases dealing with dedication requirements. In *all* those seminal condemnation cases with dedication requirements, the projects were acquisition of property for right-of-way as part of the implementation of a general plan circulation element or specific plan:

1. In *Fresno*, to implement its *master plan for streets and highways* (the equivalent of a general plan circulation element), a city acquired strips of property abutting two streets that were subject to dedication requirements to build out those streets. (26 Cal.App.3d at 115-16; reviewed denied on Aug. 23, 1972.)

2. In *Porterville*, as part of its *general plan*, a city acquired a commercially zoned strip of property to widen a street to full width. (195 Cal.App.3d at 1263.)

3. In *Contra Costa*, a flood control district was building a flood control channel per its *specific plan* and acquired 5 acres of a 38-acre property. (7 Cal.App.4th at 932, 937, review denied by *Contra Costa County Flood Control & Water Conserv. Dist. v. Lone Tree Invs.* 1992 Cal. LEXIS 4917 (Sept. 30, 1992).)

4. In *Rohn v. Visalia*, (1989) 214 Cal.App.3d 1463, a city *amended* its *general plan* to connect a street at an intersection.

5. In *State Route 4*, a bypass authority constructed a highway as part of its transportation plan. (153 Cal.App.4th at 1553, review denied by *State Route 4 Bypass Authority v. Sup. Ct.* 2007 Cal. LEXIS 13075 (Nov. 14, 2007).)

Under Amici's logic, all these cases must be overturned. Yet, precedent clearly establishes that valid claimed dedication requirements in the context of eminent domain *must be considered* rather than ignored in valuation.

Amici also argue that the City's action of updating its Circulation Element to map out roadways it intends to acquire is a preliminary action related to the taking of property to be excluded under Section 1263.330(c), and that the gap in time between the amendment and the actual eminent domain action is insignificant because the amendment was made for the purpose of the Indian Avenue project. (Amici Brief, p. 11.) Under Amici's reasoning, *every* amendment to a public agency's circulation element that adds or realigns rights-of-way would be excluded under Section 1263.330 because every amendment to a circulation element could be argued to be a preliminary action done for the eventual purpose of acquiring a right-of-way by eminent domain or by dedication and construction thereof. This is so because the very purpose of having a circulation element is to show where rights-of-way will be located and eventually acquired, either through eminent domain or through required dedications.⁹

Amici presumably understand the importance of *Porterville* and at least are not directly urging this Court to overturn decades of precedence. In two places in their Brief, Amici make an attempt to distinguish this case from other dedication cases by contending that the project effect doctrine "serves to ferret out dedication requirements imposed solely to benefit the government's project, from those required as mitigation for the impacts of private development" (Amici Brief, p. 16): They plead "[t]he Court need

⁹ An absurd consequence of such a flawed line of reasoning is that only rights-of-way that are originally shown and initially adopted on a circulation element when a public agency first comes into existence would be valued at agricultural values when a public agency seeks to acquire it. For all other rights-of-way that are subsequently created or realigned through an amendment of a circulation element, the public agency would be forced to pay higher values because the amendment would be considered a preliminary action related to the taking of property to be excluded under Section 1263.330. This cannot be so, and Amici fail to explain how their logic could yield a less absurd result.

not decide whether all dedication requirements are always subject to the project-effect rule. Rather, where, as here, a dedication requirement stems solely from government's anticipated need for the property, rather than from mitigation for the effect of private development, is an effect 'attributable to the project for which the property is [being] taken' that must be excluded." (Amici Brief, p. 10.)

Amici's argument is a non-distinction because every time a public agency condemns a property subject to dedication prior to the development of an owner's property, then arguably the owner can argue that the dedication is being imposed for the benefit of the government's project (e.g., the construction of the public infrastructure) whatever it may be (Indian Avenue in this case), and hence the change in value is a "project effect." Under Amici's theory, public agencies can only use dedication requirements through the development permit process and never in the context of taking the initiative as a public agency to enhance public infrastructure by developing roads. Such a rule will cripple development, particularly in underdeveloped cities such as Perris. If the public agency must pay industrial or commercial values, which is beyond the fair market value for a portion of property designated as a right-of-way, when initiating an infrastructure project but can get the same portion of property for free when a developer applies for a development permit, then public agencies will simply wait for private development and will not start public infrastructure projects.

To the extent Amici want to argue somehow the take does not have a nexus to the future use of Owners' Property or the size of the take here is unproportional to the Property, they will have that opportunity on remand under the *Nollan/Dolan* standards of the constitutionality analysis. In other words, the project effect doctrine is unnecessary because the *Porterville* doctrine and constitutionality analysis serve to ensure any claimed

dedication requirement is validly exercised before being applied in eminent domain.

Accordingly, the project effect doctrine does not have a place in *any* claimed dedication requirement cases and Amici's attempt to distinguish this case fails.

IV. *RANCHO PENASQUITOS AND BARRATT AMERICAN ARE NOT APPLICABLE BECAUSE THIS CASE (OR ANY OTHER DEDICATION CASE FOR THAT MATTER) DOES NOT INVOLVE A CHANGE IN LAND USE INFLUENCED BY THE PROPOSED IMPROVEMENT OR AN ACTION DONE SOLELY TO DEPRESS THE ACQUISITION VALUE.*

Amici argue that the purpose of the project effect doctrine is that "changes in land use, to the extent that they were influenced by the proposed improvement" should be excluded in evaluating the property taken. (Amici Brief, p. 8.) That is not the case here or, in general, in any dedication cases.

As previously stated, changes to a circulation element are normally in response to updating a growing community's traffic, safety, and developmental needs, as required by state law. (Gov. Code § 65302, 65358.) The updates typically are made as a result of extensive traffic and engineering studies. The City's case is no different: after extensive traffic studies were conducted, the City aligned its roads, including Indian Avenue, to determine the best location with the least private injury. (RA 1:0235-65 [Tab 6]; RT 139:17-141:16.) At the time the City updated its Circulation Element, the City had no plans to begin the Indian Avenue construction project. The Project did not influence any change in value of property or prompt the City to enact any regulation to depress property values.

Also, Amici's argument in distinguishing this case as a case where the "dedication requirement [is] imposed solely to benefit the government's

project” is disingenuous and misstates the record. Amici cite to *Rancho Penasquitos*, *supra*, 105 Cal.App.4th 1013, and *City of San Diego v. Barratt American* (2005), 128 Cal.App.4th 917 as the seminal authorities to exclude the Indian Avenue dedication requirement from valuation, but those cases do not involve dedication requirements and are factually distinguishable from the case at hand. In both *Rancho Penasquitos* and *Barratt American*, zoning restrictions were *solely* enacted by the City of San Diego as part of the highway construction project to specifically restrict development and depress property values in areas where the city knew it would later acquire property for the proposed highway project. (*Rancho Penasquitos*, *supra*, 105 Cal.App.4th at 1038-39; *Barratt American*, *supra*, 128 Cal.App.4th at 937-38.) The same cannot be said about the Indian Avenue dedication requirement or the Indian Avenue realignment.

The Indian Avenue dedication requirement is a valid exercise of the City’s land use powers and part of a city-wide dedication requirement ordinance that requires all vacant, unimproved properties abutting unimproved or uncompleted rights-of-way to dedicate portions of property designated as rights-of-way as a condition of developing the properties into their highest and best uses. The dedication requirement ordinance applies to development of *all* properties within the City, not just properties abutting Indian Avenue. The dedication requirement ordinance also applies to *all* rights-of-way, not just Indian Avenue. The City presented undisputed testimony that dedication requirements are conditions of approval commonly imposed on *all* development projects throughout the City, not just along Indian Avenue. (RT 95:9-96:24, 138:19-139:3.) The evidence in the record completely contradicts Amici’s assertions that the Indian Avenue dedication requirement was implemented *solely* for the purpose of depressing property values of the Subject Interests.

Prior to 1999, the location of Indian Avenue near the Property and *north* of Ramona Expressway was a paper street (i.e., it existed on the Circulation Element as a street but was not physically constructed). (RA 1:0152 [Tab 5].) In 1999 the City amended its Circulation Element and realigned Indian Avenue *south* of Ramona Expressway. (AA 7:1566-1569 [Tab 51].) The amendment in the Circulation Element allowed for “the accommodation of regional transportation goals” and “developed” a system of city streets, excluding freeway, that is capable of serving existing traffic and expected future increases in traffic.” (RA 1:0099 [Tab 4].) The realignment served a public purpose and would be beneficial to all surrounding areas. (*Id.*) Moreover, at the time in 1999, the City did not even contemplate realigning Indian Avenue *north* of Ramona Expressway, yet alone constructing Indian Ave. There is no evidence that the City envisioned or had any plans to start the Indian Avenue construction project in 1999.

In 2005 the City updated its Circulation Element, to create new roads and realign other roads, including Indian Avenue. The 2005 Circulation Element update affected the *entire* City, not just Indian Avenue. (RA 1:0142-0234 [Tab 5].) Again, at the time the City updated its Circulation Element, the City did not have any plans whatsoever of constructing Indian Avenue.

In 2008, the City needed “more public rights-of-ways to increase access to surrounding properties, improve traffic flow, and ease congestion” to make economically sound developments in North Perris, including Owners’ Property. (RA 2:0429 [Tab 14].) There is no evidence to support Amici’s contention that the construction of Indian Avenue, or even the realignment of Indian Avenue either north or south of Ramona Expressway, was done for the sole purpose of, or for the purpose of influencing, a decrease in property values so the City could acquire it for

eminent domain at agricultural values.¹⁰ Rather, the record is replete with facts that the City realigned Indian Avenue to respond to the existing and future needs of private development and to mitigate their effects on public health, safety, and welfare, as stated above.

Furthermore, the out-of-state cases cited by Amici are not only inapplicable to California law, but are also wholly inapposite to the facts here. In *San Antonio River Authority v. Garret Bros.* (Tex. App. 1975) 528 S.W. 266, 269, the plaintiff property owner sought and obtained approval for development of its property and began construction on the development. It was not until after the project was approved and construction had begun that a city and river authority began to take steps to condemn the plaintiff's land. The evidence showed a planned, concerted effort by the agencies to depress the value of the land, where city officials halted development by discontinuing utility installation and refusing to issue permits for additional improvements. (*Id.* at 269-70.) The developer successfully sued the city and authority for damages suffered as a result of the interruption of the development. (*Id.* at 270.)

¹⁰ The legislative history of Section 1263.330 clarifies that its purpose is to exclude any increase or decrease in the value of property caused by *the* project for which the property is being taken, not *related* projects. (Recommendation Relating to the Creation of Eminent Domain Law (Dec. 1974) 12 Cal. Law Revision Com. Rep. (1980) p. 1833.) Section 1263.330 is not intended to apply to changes in value beyond the scope of the "project". "Where changes in value are caused by a project other than the one for which the property is taken, *even though the two projects may be related, the property owner may enjoy the benefit or suffer the detriment caused by the other project.*" (The Eminent Domain Law with Conforming Changes in Codified Sections and Official Comments (Dec. 1975) 13 Cal. Law Revision Com. Rep. (1975) p. 1214 [emphasis added]; *see also, e.g., People v. Cramer* (1971) 14 Cal.App.3d 513.)

Here, the "construction of Indian Avenue" for which there is a claimed dedication requirement on Owner's Property is an entirely different project from the realignment of Indian Avenue both *north* and *south* of Ramona Expressway.

The Texas appellate court affirmed the verdict in part, holding that the city was not immune from liability for the actions of its officials. (*Id.* at 274.) In analyzing the city's defenses on appeal, the court explained that the city could not exercise its regulatory authority to "rig" the market in its favor, *as the record clearly showed the city had done in halting the development.* (*Id.*; See also, *Joint Ventures, Inc. v. Department of Transportation* (Fla. S.C. 1990) 563 So.2d 622 [Only after petitioner property owner contracted to sell its land contingent on the buyer's ability to obtain development permits, did governmental agency record a map of reservation precluding the issuance of development permits. Such recordation occurred in accordance with a state statutory scheme which did not require compensation for the reserved land. Accordingly, the Florida Supreme Court held the statutory scheme was unconstitutional].)

Here, despite Amici's conjectures, Amici have failed to cite to *any* evidence in the record of pre-condemnation efforts to depress property values, nor can they allege that the City is unwilling to compensate the Owners for the Subject Interests for fair market value.

Because the Indian Avenue construction project was not done for the sole purpose of depressing property values or for influencing a change in land use, this Court should affirm the Opinion and hold that the claimed dedication requirement should not be excluded under Section 1263.330.

V. AMICI IMPROPERLY CONFLATE THE CONSTITUTIONALITY ANALYSIS OF THE PORTERVILLE DOCTRINE WITH THE PROJECT EFFECT DOCTRINE.

Throughout their Brief, Amici contend the Indian Avenue dedication requirement (1) was done "solely from the [City's] anticipated need for the property" (Amici Brief, p. 10); and (2) would not "mitigate for the impacts of intensified land use were the [Owners] to develop the Property" (Amici Brief, p. 18), and that therefore, the dedication is a project effect under

Section 1263.330. Amici's analysis, however, is not a project effect analysis. Rather, it is the constitutionality analysis under the *Nollan* nexus standard and the *Dolan* rough proportionality standard articulated in eminent domain case law for claimed dedication requirements.

Mitigation of impacts simply is not the test under Section 1263.330. The *Nollan/Dolan* standards have no place in the project effect doctrine, and no court has ever decided that such an analysis belongs under Section 1263.330. (See, e.g., *Rancho Penasquitos*, *supra*, 105 Cal.App.4th 1013.)

Amici wrongly allege that the City realigned Indian Avenue to bisect the Property to ensure the City would not have to pay fair market value for the Subject Interests. Amici go even further and brazenly assert that if Section 1263.330 did not apply, then the City:

...can depress the value of any land it wants to acquire – and simultaneously insulate itself from the project effect rule – merely by amending its general plan. There would be nothing to stop [the City], for example, from designating 90 percent of a privately-owned, vacant parcel as a roadway. Later in an eminent domain action, [the City] could claim that it need only pay for the land according to its current use.

(Amici Brief, p. 13.)

Amici are wrong again. There *is* something that would prevent such an abuse of authority: the *Nollan/Dolan* standards under the constitutionality analysis.

The *Porterville* doctrine, as articulated by *State Route 4*, ensures that public agencies act within the confines of the US and California Constitutions through the *Nollan* nexus standard and *Dolan* rough proportionality standard. In particular, the City would not be able to designate 90 percent of commercially-zoned private property as a roadway and pay only agricultural values for it unless a court finds the 90 percent dedication requirement substantially furthers a legitimate government

interest under *Nollan* and is roughly proportional to the impacts of the property's proposed development under *Dolan*. In the unlikely event the court finds the dedication meets the *Nollan/Dolan* standards, the dedication would be valid and the City would be able to use agricultural values. If, most likely, the court finds the dedication fails to meet the *Nollan/Dolan* standards, then the dedication is invalid and the City would be required to use commercial values for the 90% take. Thus, the concerns Amici raise in the Amici Brief are adequately addressed under the constitutional analysis. The additional step of applying Section 1263.330 to the Indian Avenue dedication requirement is unnecessary and inappropriate.

Amici and Owners are, in essence, re-litigating the *Nollan/Dolan* standards before this Court and disguising it as a project effect analysis under Section 1263.330. Amici later drop the guise altogether and directly argue the merits of the constitutionality analysis. (Amici Brief, pp. 23-25.) For example, Amici state the City failed to satisfy its burden of showing that any proposed development of the Property would create impacts on public infrastructure justifying a 20 percent dedication requirement. (Amici Brief, p. 24.) Amici's statements are misdirecting this Court and completely ignore the evidence in the record that the City did conduct extensive traffic studies analyzing the impacts of proposed developments of the Property to justify the required dedication. (RT 139:13-14; 143:1-15; 183:2-28; RA 1:0235-0265.)

Amici also cite to *Hollister*, *supra*, 26 Cal.App.4th 289, in support of their proposition that the key to distinguishing dedication requirements that may be considered in valuing property and those that must be excluded under Section 1263.330 is the mitigation of the impacts of intensified land use. (Amici Brief, p. 18.) *Hollister* serves to prove the City's point, however, that Amici and Owners in essence are arguing the facts and the law under a constitutional analysis, because the *Hollister* case is when the

court first began requiring a constitutional analysis for determining the valuation of claimed dedication requirements. *Hollister* speaks nothing of Section 1263.330 and the project effect doctrine.

Amici's line of argument is wholly improper at this point because this Court has limited the issues on review to (i) whether the constitutionality of an otherwise reasonably probable dedication requirement is a question that must be resolved by a jury, and (ii) whether the Indian Avenue dedication requirement is a project effect that must be ignored under Section 1263.330. Although the Court could have also reviewed the merits of whether the Indian Avenue dedication requirement meets the *Nollan/Dolan* standards, this Court chose not to do so. Therefore, Amici's argument on the merits of the constitutionality of the Indian Avenue dedication requirement is wholly improper and should be stricken from its Brief.

The constitutionality analysis is not a matter before this Court. What is before this Court is the determination of whether the Indian Avenue requirement is a project effect under Section 1263.330. Owners will be able to make the same mitigation arguments related to the dedication requirement and their Property when this matter is on remand before the trial court, where the constitutionality analysis will be revisited, as directed by the Court of Appeals (Opinion, pp. 35-36), but such an analysis would be duplicative and wholly unnecessary in determining whether Section 1263.330 requires the Indian Avenue dedication requirement to be excluded from valuation.

VI. THE CONSTITUTIONAL AVOIDANCE CANON IS INAPPLICABLE.

Amici contend that this Court should determine the valuation of the claimed dedication requirement using the project effect doctrine under Section 1263.330, which will obviate the need for a constitutional analysis

under the *Porterville* doctrine, according to the constitutional avoidance canon. The contention wrongly assumes that Section 1263.330 is applicable to the claimed dedication requirement, which, as stated in Sections II and III of this Brief, it is not. Therefore, the constitutional avoidance canon is inapplicable.

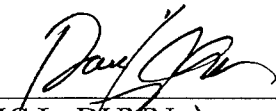
Amici also assert that this Court's adoption of the City's interpretation of Section 1263.330 would require this Court to reach an unnecessary constitutional issue and raise serious concerns. (Amici Brief, p. 21.) However, as established in well-settled case law over the past 40 years, eminent domain jurisprudence requires this court to evaluate the constitutionality of a claimed dedication requirement under the *Porterville* doctrine and its progeny. Failure to do otherwise would be overturning well-settled case law. The requirement to evaluate the constitutionality of a claimed dedication requirement under the *Porterville* doctrine and its progeny will also ensure that a public agency is not overreaching in its authority to regulate private property. Hence, the constitutional avoidance canon is inapplicable in this case.

VII. CONCLUSION

For the foregoing reasons, this Court should *affirm* the Court of Appeal's ruling that Section 1263.330 regarding project effect is not applicable in this case.

Dated: May 28, 2014

ALESHIRE & WYNDER, LLP


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CERTIFICATE OF WORD COUNT

I certify that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the attached PLAINTIFF/RESPONDENT'S ANSWER TO THE AMICI CURIAE BRIEF OF PACIFIC LEGAL FOUNDATION AND NFIB SMALL BUSINESS LEGAL CENTER was produced on a computer and contains 7,325 words, as counted by the Microsoft Word 2010 word-processing program used to generate Plaintiff's/Respondent's Answer to the Amici Curiae Brief.

Dated: May 28, 2014

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By: 
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PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 18881 Von Karman Avenue, Suite 1700, Irvine, CA 92612.

On **May 28, 2014**, I served the within document(s) described as:


**PLAINTIFF/RESPONDENT'S ANSWER TO THE AMICI CURIAE BRIEF OF
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- ☐ **(BY MAIL)** By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United States Postal Service on that same day, with postage thereon fully prepaid at Irvine, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.
- ☒ **(BY OVERNIGHT DELIVERY)** I deposited in a box or other facility regularly maintained by NORCO Overnight Delivery, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in a sealed envelope or package designated by the express service carrier, addressed as set forth on the attached mailing list, with fees for overnight delivery paid or provided for.
- ☐ **(BY PERSONAL SERVICE)** I caused to be delivered a true copy of the foregoing document(s) in a sealed envelope by hand to the offices of the above addressee(s).

Executed on **May 28, 2014**, at Irvine, California. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Carla Durkee

(Type or print name)



(Signature)

Richard C. Stamper, et al. v. City of Perris
 California Court of Appeal, Fourth Appellate District, Division Two – Case No. E053395;
 Supreme Court Case No.: S213468
City of Perris v. Richard C. Stamper, et al.
 Riverside Superior Court, Central District – Case No. RIC524291

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