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FOOTHILL COMMUNITIES COALITION

8
9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 FOR THE COUNTY OF ORANGE – COMPLEX CIVIL COURTROOM

11 FOOTHILL COMMUNITIES
12 COALITION, an unincorporated
association

13 Petitioner,

14 v.

15 COUNTY OF ORANGE, ORANGE
16 COUNTY BOARD OF SUPERVISORS,
DOES 1 through 10, inclusive,

17 Respondents,
18

19 ROMAN CATHOLIC DIOCESE OF
20 ORANGE, KISCO SENIOR LIVING,
LLC, and DOES 11 through 25, inclusive,

21 Real Parties in Interest.
22

**Case No. 30-2011-00467132-
CU-WM-CXC**

Reassigned to the Honorable
Judge Gail A. Andler

**PETITIONER’S REPLY BRIEF
IN SUPPORT OF PETITION FOR
WRIT OF MANDATE**

Date: January 23, 2012
Time: 9:00 a.m.
Dept: CX101

[ACTION FILED: April 14, 2011]

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TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY OF REPLY.....	1
II. RESPONDENTS’ MISREPRESENTATION OF THE PZL STANDARD OF REVIEW CORRUPTS THEIR ANALYSIS OF PETITIONER’S PZL CLAIMS ...	2
A. Respondents Cannot Hide Behind Government Code Sections 65010 and 65945.7.....	2
B. Respondents Ignore the “Rigorous” Judicial Standard of Review for Spot Zoning.	4
C. Respondents Have the Spot Zoning Burden of Proof Backwards.....	6
D. Spot Zoning Goes Both Ways.	7
E. The Court Can See for Itself that Respondents Spot Zoned RCDO’s Property.	10
F. No Reason Exists for RCDO’s Property to Be Uniquely Zoned SRH.	10
G. Respondents Cannot Unring Their Own Bell.	11
H. This Lawsuit Didn’t Have to Happen.	13
IV. CONCLUSION.....	14

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES:

Arcadia Development Co. v. City of Morgan Hill
(2011) 197 Cal.App.4th 1526. 4

Avenida San Juan Partnership v. City of San Clemente
(Dec. 14, 2011) ___ Cal.Rptr.3d ___, 2011 WL6188451. 4-7, 9-11, 13

Ciani v. City of San Diego Trust and Savings Bank
(1991) 223 Cal.App.3d 1604. 2

Consul v. City of San Diego
(1992) 6 Cal.App.4th 1781. 8

Committee to Save Hollywoodland Specific Plan v. City of Los Angeles
(2008) 161 Cal.App.4th 1168. 11

County of Inyo v. City of Los Angeles
(1976) 61 Cal.App.3d 91. 11

Ehrlich v. City of Culver City
(1996) 12 Cal.4th 854. 5,6

Environmental Defense Project of Sierra County v. County of Sierra
(2008) 158 Cal.App.4th 877. 2,3

Hamer v. Town of Ross
(1963) 59 Cal.2d 776. 5

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(1985) 172 Cal.App.3d 837. 11

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(1890) 83 Cal.. 521. 11

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(1982) 131 Cal.App.3d 656. 11

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(1985) 165 Cal.App.3d 1185. 12

Rubin v. Board of Directors of City of Pasadena
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(1992) 11 Cal.App.4th 1255. 3

Topanga Assn. For a Scenic Community v. County of Los Angeles
(1974) 11 Cal.3d 506. 13

1 **STATUTES:**

2 Government Code § 65010. 2

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5 Government Code § 65906. 9

6 Government Code § 65945.7. 2

7

8 **LAW REVIEWS:**

9 J. Peter Byrne; Due Process Land Use Claims After *Lingle*; 34 Ecology Law Quarterly
(2007) at pp. 486. 8

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I.

INTRODUCTION AND SUMMARY OF REPLY

“[T]here was a society of men among us, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid. To this society all the rest of the people are slaves.” (*Gulliver’s Travels.*)

Taking a Swiftian approach to lawyering, real parties in interest Roman Catholic Diocese of Orange (“RCDO”) and Kisco Senior Living, LLC (“Kisco”) (collectively, “RPI”) begin their opposition brief by assuring the Court that “[d]espite overwhelming community support for The Springs at Bethsaida development (the “Project”), a small and discrete (but very vocal) group of residents comprising Petitioner Foothill Communities Coalition (“Petitioner”) is not in the best interests of their enclave.” The Administrative Record (“AR”) amply proves the statement patently false;^{1/} however, it does presage the credibility of the remainder their brief.

The opposition brief (“ROB”) of Respondents the County of Orange (“County”) and Orange County Board of Supervisors (“BoS”) (collectively, “Respondents”) passes on such outrageous bluff and focuses entirely on Petitioner’s claims brought under the California Planning and Zoning Law (Gov. Code §§ 65000 *et seq.*: “PZL”). However, and as shown below, Respondents founder primarily because they fail to understand that “spot zoning” is a type of land use discrimination that can either *burden or benefit* a single property. As a result, they fail to see that their discrimination *in favor of* RCDO’s property and in a manner totally out of sync with the North Tustin Specific Plan (“NTSP”) epitomizes classic spot zoning. Moreover, they fail to appreciate that, in situations where spot zoning has occurred, courts owe *no* deference to the legislative body’s land use determinations. By simple resort to an area map a judge can use her own common sense to determine if spot zoning has occurred, and if it has then the burden of proving a valid legal basis for that action falls squarely on the public agency.

¹ Over a thousand pages of AR materials reveal the magnitude of the community’s opposition to the Project, including over 2,500 signed petitions from a community of no more than 1,537 dwellings. (AR G/4012-5164 & 6028; H/9081-9082.)

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II.
RESPONDENTS’ MISREPRESENTATION OF THE
PZL STANDARD OF REVIEW CORRUPTS THEIR
ANALYSIS OF PETITIONER’S PZL CLAIMS

A. Respondent Cannot Hide Behind Government Code Sections 65010 and 65945.7

Respondents try (ROB pp. 2-3) to defend their failure to comply with state law noticing requirements by citing to two “savings” statutes in the PZL: Government Code sections 65010 and 65945.7. However, neither statute gets them off the hook. According to the Fourth District Court of Appeal, Government Code section 65945.7 does *not* apply here because that statute only applies in narrow instances where there is a defect in the notice given to a project applicant. (*Ciani v. City of San Diego Trust and Savings Bank* (1991) 223 Cal.App.3d 1604, 1620, fn. 6 [“this statement of an administrative harmless error doctrine is specifically applicable only to notices and action required to be taken by sections 65945, 65945.3, or 65945.5.”])

Despite Respondents’ best efforts to distinguish *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, Respondents’ reliance on Government Code section 65010 is similarly misplaced because it neither applies nor compels Petitioner to prove prejudice and injury. The *Environmental Defense* court’s holding makes it clear that Government Code section 65090 mandates that the notice’s “general explanation” “must include the planning commission’s recommendation as part of the “general explanation of the matter to be considered”.” (*Environmental Defense*, at 893.) Respondents try to parse this by claiming that *Environmental Defense* involved a declaratory relief action, and that Government Code section 65010(b) still applies in mandate actions. This dodge won’t work. First, Respondents overlook the fact that Petitioner’s Second Cause of Action in its *Verified Petition for Writ of Mandate* was, in fact, for **declaratory relief** and that the Second Cause of Action incorporated by reference the allegations set out in the First Cause of Action, including the following:

“B. VIOLATIONS OF THE PZL

52. Respondents are, and at all times relevant herein have been, charged by law with the performance of all duties arising

1 under the PZL, including (but not limited to) giving legally
2 adequate notices to the public, maintaining a valid and internally
3 consistent General Plan and specific plans, and not creating
4 conflicts and inconsistencies between and within those plans.

5 53. Under Government Code section 65090, Respondents
6 were required to publish, in a newspaper of general circulation, a
7 notice of the public hearing at which the Council considered and
8 approved the Project. By law such notice must disclose the
9 planning commission's recommendation as to the Project.
10 (*Environmental Defense Project of Sierra County v. County of*
11 *Sierra* (2008) 158 Cal.App.4th 877.)

12 54. The notice of the public hearing at which the Board
13 approved the Project did not (among other things) include the
14 County Planning Commission's recommendation to the Board. The
15 notice was therefore legally defective.

16 55. Respondents' approval of the Project based on a
17 defective notice of public hearing constitutes a violation of
18 Government Code section 65090.

19 56. Petitioner, its members, and other members of the
20 public have been harmed as a result of Respondents' violation of
21 Government Code section 65090 because they have been denied the
22 benefits and protections provided by compliance with this statute."

23 Consequently, as even Respondents admit, Government Code section 65010(b) does not apply
24 to Petitioner's Second Cause of Action.

25 Second, Respondents ignore the fact that Government Code section 65010(b) does not
26 apply to Petitioner's First Cause of Action in mandamus either. In *Sounhein v. City of*
27 *San Dimas* (1992) 11 Cal.App.4th 1255, 1260-1261, the Second District Court of Appeal found
28 that:

1 “. . . the failure of the city to provide the requisite notice and
2 hearing procedures [under PZL sections 65854-65857] cannot be
3 deemed harmless or nonprejudicial. (See § 65010, subd. (b).) The
4 failure to provide notice and public hearings was not a mere minor
5 technical defect . . . The Sounheins were notified of the city
6 council's proposed action and afforded an opportunity to be heard.
7 However, the other residents of the city affected by the ordinance
8 were not given notice and an opportunity to be heard and to have
9 their concerns, needs and welfare considered by both the planning
10 commission and the city council at public hearings, thus amounting
11 to more than a mere technical, procedural omission and reflecting
12 a total deprivation of basic zoning procedural safeguards for the
13 community.”

14 That is precisely what Petitioner alleged in paragraphs 9, 11, and 56 of its *Verified Petition*: that
15 it brought this action not only on behalf of its own members but on behalf of all those in the
16 community who were misinformed by Respondents’ legally deficient notice.

17 **B. Respondents Ignore the “Rigorous” Judicial Standard of Review for Spot Zoning**

18 After conceding that specific plans must be internally consistent, Respondents ignore the
19 “rigorous” critical judicial standard of review applicable to spot zoning. (ROB pp. 3-5.) Instead,
20 they assure the Court that Petitioner’s assertion “that the standard of review differs from the
21 deferential abuse of discretion standard in cases such as this one challenging "spot zoning" ...
22 is incorrect” and trot out the deferential standard of review applicable in the majority of
23 situations where spot zoning is *not* involved. (*Id.*) Later, they try to bolster this argument by
24 claiming that, “since California land use law was modified in the early 1970s ... "spot zoning"
25 has largely become an anachronistic concept.” (ROB p. 13.)

26 To the contrary, two recently published decisions confirm that Respondents are wrong
27 on both points. Last August’s *Arcadia Development Co. v. City of Morgan Hill* (2011) 197
28 Cal.App.4th 1526 (“*Arcadia*”), and *last week’s Avenida San Juan Partnership v. City of*

1 *San Clemente* (Dec. 14, 2011) ___ Cal.Rptr.3d ___, 2011 WL 6188451 (“*Avenida San Juan*”),^{2/}
2 both show that “spot zoning” is hardly “an anachronistic concept” in California land use law.
3 Moreover, *Avenida San Juan* (p. 13) serendipitously comes from our own Court of Appeal and
4 shows that this Court is *not* beholden to the PZL’s usual deferential standard of review in spot
5 zoning cases but can substitute its own judgment for that of the public agency: “Justice Mosk
6 observed in a case otherwise devoted to development exactions that because spot zoning
7 implicates discriminatory treatment, it entails a “more rigorous form of judicial review.” (*Ehrlich*
8 *v. City of Culver City* (1996) 12 Cal.4th 854, 900 (conc. opn. of Mosk, J.) (*Ehrlich*).)”

9 In *Avenida San Juan*, the City of San Clemente reduced the density on an undeveloped
10 2.85 acre parcel in the middle of a residential tract to one dwelling per 20 acres. By contrast, the
11 surrounding tract was zoned to allow four dwellings per acre. After initially filing suit in federal
12 court claiming (among other things) inverse condemnation based on spot zoning, the parcel
13 owners refiled the action in state court, and that action was bifurcated so the court could first
14 consider the owners’ request for mandamus relief.

15 Judge Stock heard the first phase and, after rejecting all of the city’s excuses for creating
16 “an isolated area that has become an island of minimum lot size zoning in a residential ocean of
17 substantially less restrictive zoning,” issued a writ of mandate striking down the city’s refusal
18 to give the owners the same housing density as the surrounding tract. As our Court of Appeal
19 noted, Judge Stock’s foregoing quote “plus her citation to *Hamer v. Town of Ross* (1963) 59
20 Cal.2d 776 (*Hamer*), a spot zoning case, leave little doubt as to the basis of her decision to grant
21 the writ of mandate.”

22 In the second phase of the trial regarding the owners’ request for inverse condemnation
23 damages, Judge McEachen likewise “specifically rejected the City’s various reasons for zoning
24 the property RVL,” finding bad faith on the part of the city, and “substantively found spot
25 zoning.” After concluding that a taking of the owners’ property had occurred, Judge McEachen
26 awarded the owners \$1.3 million in just compensation.

27 ² For the Court’s convenience, Petitioner has attached a copy of *Avenida San Juan*
28 *Partnership v. City of San Clemente* to this brief.

1 **C. Respondents Have the Spot Zoning Burden of Proof Backwards**

2 *Avenida San Juan* makes salient *three* points that are unprecedented in traditional land
3 use planning law. The first point is that, “because spot zoning implicates discriminatory
4 treatment,” courts show *no* deference to the legislative decision makers. As both Petitioner and
5 Respondents agree, in most land use situations the reviewing court defers to the judgment of the
6 legislative decision makers.^{3/} However, when the issue of spot zoning is raised, the court shows
7 *no* deference to the findings of the legislative decision makers^{4/} and can decide for itself if spot
8 zoning has occurred ***by looking at a map of the controverted property and its surroundings:***

9 “In the present case, there is no need to rest the [spot zoning]
10 determination on either Judge McEachen’s finding of bad faith on
11 the part of the City or the more rigorous form of review advocated
12 by Justice Mosk in his concurrence in *Ehrlich*. *Here, there is no*
13 *question that the owners’ parcel is a one-house-per-20-acre island*
14 *in a two-to-six house-per-acre sea. Zoning maps in the record*
15 ***readily provide substantial evidence of spot zoning.*** Exhibit 6 is a
16 color photo that shows higher density development on Avenida San
17 Juan encircling the subject property.

18 (*Avenida San Juan* p. 14; emphasis added.)

19 The second point is that once the court looks at the map and sees spot zoning, then *the*
20 *burden of justifying the spot zoning shifts to the public agency* to support its rationale for
21 “*discriminatory treatment.*” (*Id.*, p. 15; italics in original.) As can be seen in the *Avenida San*
22 *Juan* opinion, the burden of justifying the discrimination inherent in spot zoning falls entirely
23 on the public agency. For example, Judge Stock concluded that the procedural record revealed
24 “no findings or support at any level in the general plan amendment process for tying the RVL

25 _____
26 ³ In other words, if the legislative body “finds” that a cow is a horse, then the court
27 (while perhaps rolling its eyes) defers to that finding.

28 ⁴ In other words, the court exercises its own judgment and common sense to reject
calling a cow a horse.

1 designation to the subject property.” (*Id.*, p. 6.) In other words, although Judge Stock did not
2 dispute the wisdom of the city creating the RVL zoning designation, the city failed to prove *why*
3 it was necessary *for this one particular property* to come under the ambit of RVL zoning.
4 Similarly, Judge McEachen considered and “specifically rejected the City’s various reasons for
5 zoning the property RVL.” (*Id.*, p. 7.) Although the city raised a host of justifications to
6 “assert[] its discriminatory downzoning and refusal to meaningfully consider the owners’ 2006
7 development application was justified,” both judges concluded that the city failed in its burden
8 of proving why “[*t*]his parcel, in *this* neighborhood, was being singled out for discriminatory
9 treatment independent of the reason for RVL zoning in the first place.” (*Id.*, pp. 15-16; italics
10 in original.)

11 Third, and perhaps most relevant to this action, *Avenida San Juan* shows that, when it
12 comes to spot zoning, the public agency cannot unring the bell as to past determinations it and
13 its staff have made regarding the spot zoned property. For example, the inconvenient fact for
14 the City of San Clemente in *Avenida San Juan* was that, in the early 1980's “[*t*]he City approved
15 plans to subdivide the property allowing for four single family lots,” and “specifically found that
16 there were no geological obstacles to developing the property with four residences. A city
17 resolution at the time stated that ““all competent evidence before the City Council indicates that
18 the site is developable without danger to adjacent properties.”” (*Id.*, p. 3.) It was only after
19 opposition to that development arose in the surrounding neighborhood that the city reversed
20 course and spot zoned the owners’ property from “six houses per acre” to what was essentially
21 open space. (*Id.*, pp. 3-4.)

22 **D. Spot Zoning Goes Both Ways**

23 Petitioner’s *Opening Brief*(p. 4, fn. 1) listed several definitions of “spot zoning” showing
24 that it usually involves discriminating *in favor of* a single property owner and against the
25 surrounding property owners. This is how it is typically understood throughout the USA:

26 “State courts have developed distinct doctrines that help
27 specify when the local political process might be suspect. Zoning
28 actions that fall within these doctrines typically are not condemned

1 categorically as violations of due process. Rather, they present
2 circumstances in which a reviewing court exercises greater scrutiny
3 of whether the measures advance the public interest. All involve
4 some heightened concern about systematic unfairness in the local
5 political process. *For example, "spot zoning," the practice of*
6 *amending a local zoning classification of a small parcel of*
7 *property at the behest of the owner, comes under far more*
8 *searching scrutiny than typical of other due process claims. The*
9 *concern in these cases is a familiar public choice danger that a*
10 *small class of owners may lobby intensely for the gain that can*
11 *come from "upzoning" their land, thereby increasing its*
12 *development value, but that diffuse neighbors, each of whom is*
13 *injured only slightly, may be not assert their views. The judicial*
14 *remedy that has evolved is a somewhat more demanding search for*
15 *general public benefits from the amendment weighed against harm*
16 *to the neighbors. However unsatisfactory anyone of these decisions*
17 *may seem, the availability of such a claim in court likely deters*
18 *egregious special favor actions that could occur without check in*
19 *the absence of due process review."*

20 (J. Peter Byrne; Due Process Land Use Claims After *Lingle*; 34 Ecology Law Quarterly (2007)
21 at pp. 486-487; emphasis added.)

22 However, spot zoning also occurs in the *reverse* context where a single property is
23 discriminated against to the benefit of surrounding properties, and by happenstance California
24 decisions have usually addressed spot zoning in the reverse context. Respondents (ROB pp. 13-
25 14) try to capitalize on this oddity by citing *Consul v. City of San Diego* (1992) 6 Cal.App.4th
26 1781, and claiming that only the reverse context constitutes spot zoning. *Consul* does not
27 support Respondents' because "[t]he owner's spot zoning argument in *Consul* was an obvious
28 afterthought," and moreover the maps in *Consul* showed that the appellants' property was "*not*

1 being arbitrarily singled out for special treatment” as an “island” but instead was being given
2 “the same right as similarly situated property owners.” (*Avenida San Juan* p. 17; italics in
3 original.) That the “acknowledged evils” of spot zoning are *not* restricted to the reverse context
4 as Respondents claim is shown by the California Supreme Court’s discussion of the origin of
5 variances in *Rubin v. Board of Directors of City of Pasadena* (1940) 16 Cal.2d 119, 124:

6 “A zoning ordinance places limitations upon the use of land
7 within certain areas in accordance with a general policy which has
8 been adopted. But because compliance with the ordinance may
9 present unusual difficulties as to certain property, almost every
10 zoning ordinance includes provisions under which an owner may
11 apply to an administrative board for permission to put his land to a
12 non-conforming use. ***This procedure has been devised in order to***
13 ***minimize the acknowledged evils of ‘spot zoning’ by amendment***
14 ***of the zoning ordinance.*** *It provides the opportunity for*
15 *amelioration of unnecessary hardships* which, owing to special
16 conditions, would result from literal enforcement of the restrictive
17 features of the ordinance’. . . .

18 Unlike the ‘spot zoning’ obtained by amendment of the
19 general zoning ordinance, a variance or exception sanctions a
20 deviation from the standard under the dispensing power vested in
21 the administrative body. [citation omitted]”

22 (Emphasis added.) In other words, variances arose in land use as a way to offer a “a grant of
23 dispensation as a matter of grace” to benefit a single property as an alternative to engaging in
24 “the acknowledged evils of ‘spot zoning’ by amendment of the zoning ordinance.” However,
25 this dispensation of grace is not unfettered. Government Code section 65906 expressly limits
26 the granting of a variance to situations where “special circumstances” unique to a specific
27 property would result in “the strict application of the zoning ordinance deprives such property
28 of privileges enjoyed by other property in the vicinity” that is similarly zoned.

1 **E. The Court Can See for Itself that Respondents Spot Zoned RCDO’s Property**

2 As noted above, our Court of Appeal affirmed Judge Stock’s and Judge McEachen’s
3 rejection of the City of San Clemente’s claim that it had not spot zoned the appellants’ property
4 and endorsed both judges “I-know-it-when-I-see-it” conclusion that the city had spot zoned the
5 property by looking at maps showing the property was an “island” of one dwelling per 20 acre
6 zoning surrounded by an “ocean” of four dwellings per acre zoning. In this action the Court has
7 something even better than maps: satellite photos of the property and its surroundings.

8 In a PowerPoint the Foothill Communities Association presented to the North Tustin
9 Advisory Committee, the first slide, titled “Spot Zoning” and humorously captioned, “What
10 doesn’t belong in this picture?” shows a close-up satellite photo of RCDO’s property with a
11 mock-up of the proposed project entirely surrounded by detached single-family homes. (AR
12 G/6026.) A few slides later is a satellite photo of the broader community confirming that the
13 Project site is indeed an “island” entirely surrounded by an “ocean” of single-family homes.

14 With the Court allowed to use its own eyeballs to confirm spot zoning, *Avenida San Juan*
15 instructs that the Court’s next inquiry is (1) whether “[t]his parcel, in *this* neighborhood, was
16 being singled out for discriminatory treatment independent of the reason for [SRH] zoning in
17 the first place,” and (2) whether Respondents can successfully unring the bell as to its past
18 findings regarding the NTSP in general and RCDO’s property in particular. (*Id.*, pp. 15-16;
19 italics in original.) As will be shown, Respondents cannot prevail on either count.

20 **F. No Reason Exists for RCDO’s Property to be Uniquely Zoned SRH**

21 Respondents make no bones about the fact that the County abandoned its initial plan of
22 rezoning RCDO’s property to multi-family and instead created an entirely new zoning category
23 – SRH – conveniently sized to fit RCDO’s property, even admitting that, at this point *it has no*
24 *plans to ever designate any other property in the entire County SRH*. Respondents rationalize
25 their decision for doing so by claiming that this utterly unique zoning designation “is reasonably
26 related to the public welfare goal of providing senior housing opportunities.” (ROB p. 16:26-
27 17:1.) However, as *Avenida San Juan* shows is required, this “finding” fails to explain the need
28 for the County to create a new zoning designation and apply it to RCDO’s property.

1 Tellingly, Respondents ignore *Markley v. City Council* (1982) 131 Cal.App.3d 656, 668,
2 and *Committee to Save Hollywoodland Specific Plan v. City of Los Angeles* (2008) 161
3 Cal.App.4th 1168, 1183, cited in Petitioner’s *Opening Brief*. As those cases show, when a
4 specific plan exists for an area then the relevant “consistency” inquiry for a project within that
5 area is to the more detailed specific plan and not the more generic general plan, and an exception
6 to that specific plan must have, like a variance, a *property-specific* basis. Here, Respondents
7 have provided no reason for creating a unique zoning category and applying it to RCDO’s
8 property other than the obvious reasons that: (1) RCDO was bequeathed a potentially valuable
9 undeveloped piece of low-density residential property upon which to build a church and school;
10 (2) RCDO no longer desires to build a church and school on the property; and (3) RCDO would
11 like to achieve a higher economic value out of its property than developing it in accordance with
12 the low density single-family NTSP zoning applicable to it. While those reason are no doubt
13 important to RPI, they carry no weight in proving *why* spot zoning this single property bears any
14 relationship to the public welfare of the entire County.

15 As the our Supreme Court said more than a century ago, “a court of equity will never lend
16 its aid to accomplish by indirect means what the law, or its clearly-defined policy, forbids to be
17 done directly.” (*Jackson v. Torrence* (1890) 83 Cal. 521, 537.) This is a writ of mandate action,
18 and “[m]andate proceedings, although not of equitable origin, are governed by equitable
19 principles.” (*County of Inyo v. City of Los Angeles* (1976) 61 Cal.App.3d 91, 96; see also
20 *Henneberque v. City of Culver City* (1985)172 Cal.App.3d 837, 843 [“while mandate is
21 ordinarily classed as a legal remedy it has the effect of an equitable interference supplementing
22 the deficiencies of the common law ... largely controlled by equitable principles”].) Thus, this
23 Court will be acting within its traditional equitable powers in rejecting the “indirect means” the
24 County employed to give RCDO and Kisco what they wanted to the detriment of the surrounding
25 community.

26 **G. Respondents Cannot Unring Their Own Bell**

27 In *Avenida San Juan*, the City of San Clemente was stymied by its own past admissions
28 that the appellants’ property was suitable for development at up to six dwellings per acre. Like-

1 wise here, Respondents have *repeatedly* gone on record that low density single-family residential
2 development of properties in the NSTP north of 17th Street is appropriate. When the County
3 crafted the NTSP in the early 1980's, it concluded that it was appropriate for RCDO's property
4 in "Design Review Parcel 2" to retain its existing detached single-family (RSF) zoning of 2-3.5
5 dwelling units per acre. (AR H/9019, 9021, 9023, 9026, 9038-9040, 9045-9046, 9077, 9082-
6 9083, 9085, 9174-9176.) A few years later, when the owner of "Detailed Review Parcel 1" filed
7 an action challenging the NTSP, the Court of Appeal upheld the NTSP, in the process expressly
8 noting County staff's statement that the area north of 17th Street was "considered well suited to
9 remain medium/low density" and assurance that "more intense uses will not migrate further
10 north [from the intersection of 17 and Newport] since the uses are established."^{5/} (AR H/9039-
11 9043; *Mitchell v. County of Orange* (1985) 165 Cal.App.3d 1185, 1188.) In the late 1990s,
12 when the owner of the 6-acre "Detailed Review Parcel 3" property at the northwest corner of 17th
13 Street and Newport Avenue tried to spot zone it for commercial development the community
14 used the NTSP to successfully thwart that effort. (AR F/3824:12-15; H/9046-9047.)

15 As the Foothill Communities Association repeatedly asked – but received no answer –
16 "What has changed since 1982" to make it necessary for the County to impose what is essentially
17 a multi-family commercial development on the "established community" of low-density single-
18 family homes north of 17th Street? (AR G/6028, 6033, 6038, 6051.) It goes without saying that
19 Respondents face a huge challenge trying to explain *why*, given what the County and its staff
20 have said and done in the past, spot zoning RCDO's property by the creation of an entirely new
21 zoning category was anything other than arbitrary and capricious. While Respondents and RPI
22 both object to Petitioner likening the NTSP to a "contract" Respondents have broken with the
23 community, their beef on this point is more properly with the Supreme Court:

24 *"A zoning scheme, after all, is similar in some respects to a*
25 *contract; each party foregoes rights to use its land as it wishes in*
26 *return for the assurance that the use of neighboring property will*

27
28 ⁵ Satellite photos show that those single-family uses are indeed well established.

1 *be similarly restricted*, the rationale being that such mutual
2 restriction can enhance total community welfare. [Citations.] If the
3 interest of these parties in preventing unjustified variance awards
4 for neighboring land is not sufficiently protected, the consequence
5 will be subversion of the critical reciprocity upon which zoning
6 regulation rests.”

7 (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506,
8 517-518; emphasis added.) As *Avenida San Juan* shows, the burden is on Respondents to
9 provide valid reasons for breaching the NTSP “contract” by rejecting the County’s past
10 determinations as to the appropriate use of properties north of 17th Street.

11 **H. This Lawsuit Didn’t Have to Happen**

12 Petitioner would be remiss if it failed to conclude with a final pragmatic point for the
13 Court’s consideration: this lawsuit could have been completely avoided had RCDO and RPI been
14 willing to compromise *just a little* with the North Tustin community.

15 As the AR shows, Petitioner’s constituents were actually willing to *overlook and live with*
16 the discriminatory spot zoning of RCDO’s property and accept the development of a high-
17 density senior facility on it if RCDO and Kisco would simply refrain from making density pigs
18 of themselves and reduce the project height to single-story: “We just have asked that the project
19 height be brought down. I believe the project is now 35-feet high, a single-story facility would
20 be acceptable to FCA.” (AR F/3813:27-28.) FCA’s counsel noted both precedent for RPI to do
21 so and that doing so could still result in the development of a viable senior facility:

22 “The Sunrise Facility asks for 2-stories and the county said no. And
23 Sunrise still operates as a successful one-story facility. So FCA
24 would like to see this project as a one-story project. It commends
25 the Diocese and the applicant for bringing forth a project. It just
26 feels that the heights and the massing and the scale and the multi-
27 family new designation isn't right for the location because it's
28 surrounded by single-family residential on all four sides.”

1 (AR F/3814:2-6.) Notably, even Kisco’s representative acknowledged to the BoS how close RPI
2 had come to achieving peace with the North Tustin community:

3 “Over the last several years, we have had very detailed interactive
4 discussions with countless of neighbors *and we have literally come*
5 *within inches today to having the Foothill Community Association*
6 *stand beside us in support of this project.* Unfortunately we could
7 not get everyone to agree, so we have agreed to respectfully
8 disagree at least for now.”

9 (AR F/3791:26-3792:1; emphasis added.) It is truly astonishing that RPI declined to accept this
10 remarkable and generous olive branch from the community.

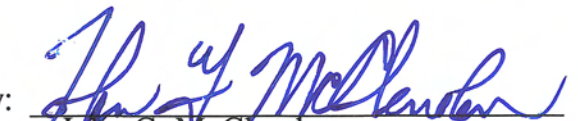
11 **III.**
12 **CONCLUSION**

13 For all of the reasons set forth in the *Opening Brief* and this *Reply Brief*, Petitioner
14 respectfully requests this Court to issue a writ of mandate commanding Respondents to set aside
15 the Project’s approvals, including certification of the EIR prepared in connection therewith, and
16 ordering Respondents and RPI to take no further steps toward approving or otherwise
17 implementing the Project unless and until Respondents fully comply with the PZL, the SMA,
18 CEQA and the CEQA Guidelines.

19
20 Dated: December 21, 2011

LEIBOLD McCLENDON & MANN, P.C.

21
22
23 By:


John G. McClendon
Attorneys for Petitioner
FOOTHILL COMMUNITIES COALITION

1 **PROOF OF SERVICE**

2 1013A (3) CCP Revised 5/1/88

3 STATE OF CALIFORNIA)
4 COUNTY OF ORANGE) ss.

5 I am employed in the County of Orange, State of California. I am over the age of 18 and
6 not a party to the within action. My business address is 23422 Mill Creek Drive, Suite 105,
7 Laguna Hills, California 92653.

8 On December 21, 2011, I served, in the manner indicated below, the foregoing document
9 described as "PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF
10 MANDATE" on interested parties in this action by placing the true original thereof enclosed in
11 a sealed envelope addressed as follows:

12 **SEE ATTACHED SERVICE LIST**

13 _____ (By Overnite Express) I caused such envelope(s) to be placed in the OVERNITE
14 EXPRESS drop box located in Laguna Hills, California, for overnight delivery to the above
15 addressee.

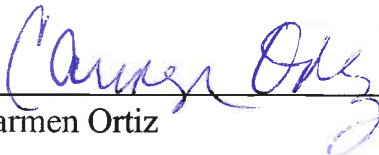
16 _____ (By Fax) I caused such document(s) to be transmitted to the number(s) shown on the
17 attached service list. A transmission report was properly issued by the fax machine and the
18 transmission was reported as complete and without error to the number(s) listed thereon.

19 XXX (By Mail) I caused such envelope(s) with postage thereon fully prepaid to be placed in
20 the United States mail at Laguna Hills, California. I am "readily familiar" with the firm's
21 practice of processing correspondence for mailing. Under that practice it would be deposited
22 with the U.S. postal service on that same day with postage thereon fully prepaid at Laguna Hills,
23 California in the ordinary course of business. I am aware that on motion of the party served,
24 service is presumed invalid if postal cancellation date or postage meter date is more than one day
25 after date of deposit for mailing in affidavit.

26 _____ (By Email per stipulation of the parties)

27 Executed on December 21, 2011, in Laguna Hills, California.

28 I declare under penalty under the laws of the State of California that the foregoing is true
and correct.


Carmen Ortiz

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A PROFESSIONAL CORPORATION

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SERVICE LIST

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CERTIFIED FOR PUBLICATION
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

AVENIDA SAN JUAN PARTNERSHIP,

Plaintiff and Appellant,

v.

CITY OF SAN CLEMENTE et al.,

Defendants and Appellants.

G043479 (consol. with G043534)

(Super. Ct. No. 30-2008-00101411)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, David T. McEachen, Judge. Motions to strike portions of the opening and reply briefs. Motions denied. Judgment affirmed in part and reversed and remanded in part.

Rutan & Tucker and Jeffrey S. Oderman for Defendants and Appellants.

Everett L. Skillman for Plaintiff and Respondent.

The City of San Clemente (City) appeals from a conditional judgment in favor of Avenida San Juan Partnership (the owners). The City imposed an “RVL” or “residential, very low” set of land use restrictions on an undeveloped 2.85 acre parcel in the middle of a residential tract otherwise zoned “Residential, Low (RL) Density Zone.” The RVL designation limits parcels to one dwelling per 20 acres. RL, by contrast, allows at least four dwellings per acre. There were two phases of trial. In phase one, the trial court concluded the restrictions constituted spot zoning. It issued a writ of mandate declaring the resolution denying the owners’ application to develop four houses on the property null and void and ordered the City to adopt a new resolution vacating the resolution denying the owners’ application.

The City asked for a stay of the writ. The stay was granted. In phase two, there was a trial on the owners’ request for damages. The court found a compensable taking, using the “*Penn Central* factors” test. (See *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104 (*Penn Central*)). The court entered a conditional judgment. The judgment gave the City the choice of either complying with the writ of mandate or paying \$1.3 million in damages for the value of the property taken by the RVL restrictions.

We affirm the judgment so far as the trial court gave the City the choice of either complying with the writ of mandate or paying inverse condemnation damages. The City’s refusal to lift the imposition of the RVL restriction on this particular parcel was arbitrary and capricious. As the trial court also found, applying the factors enumerated by *Penn Central*, that refusal to lift the RVL restrictions imposed specifically on this parcel constituted a taking. Further, this litigation was timely. This action is in substance an “as applied” challenge to the City’s denial of requested changes to the City’s land use scheme which otherwise works a peculiar hardship on the particular parcel at issue here, not a general attack on RVL zoning as such. However, we reverse

the judgment to afford the trial court the opportunity to reconsider the fair market value of the property.

FACTS

1. Background

The subject parcel consists of an undeveloped 2.85 acres on a slope that fronts Avenida San Juan. When the owners bought it in 1980, the zoning allowed six dwellings per acre.

In the early 1980's the owners wanted to develop four houses on the property. Their plans were well within the existing land use restrictions. The City approved plans to subdivide the property allowing for four single family lots. These lots would be connected to the street by a cul-de-sac road. Construction of the road required considerable grading, but the City specifically found that there were no geological obstacles to developing the property with four residences. A city resolution at the time stated that “all competent evidence before the City Council indicates that the site is developable without danger to adjacent properties.”

Opposition arose in the neighborhood. In 1983 a landslide occurred in the Verde Canyon area, which is generally located to the southwest of the subject parcel and lies behind the homes which front the southern side of Avenida San Juan. The landslide did not involve the subject parcel. Even so, a group of neighbors petitioned the City to make the subject parcel open space. The City attorney at the time, however, opined that rezoning the parcel as open space would be a compensable taking. The City engineer said there was no reason to reconsider the tentative parcel map approval already given. The property remained zoned six houses per acre. However, the owners did not develop it at the time.

2. The 1993 and 1996 RVL Restrictions

In 1993, the City amended its general plan to create the RVL zoning and impose it on several properties, including the subject property. All parcels surrounding the subject property, however, were zoned RL. RVL zoning in San Clemente allows only one residence for every 20 acres. RL zoning allows four dwellings per acre.

The City did not get around to formally rezoning the property from “R-1-B-1” to the one-dwelling-per-20 acres RVL until 1996. In mid-February of that year the City approved changing the zoning for a variety of properties to correspond to the 1993 amended general plan.

The general plan states that the purpose of RVL zoning is to preserve open space in canyons. RVL zoning, under the terms of the City’s ordinance, is intended to apply to cases of “significant acreage.” The subject parcel is 2.85 acres. It is not a canyon. It is a slope. The ordinance says nothing about slopes.

The ordinance specifically recites that the purpose of RVL zoning is to “preserve currently undeveloped canyons which are either geologically unstable, or aesthetic open-space, or biological resources.” There is no dispute that the parcel does not contain “any sensitive biological resources.”

3. The 2006 Variance Application and 2007 Denial

None of the partners in the partnership actually found out about the downzoning from R-1-B-1 to RVL until 2004. That year they hired a civil engineer to help them once again try to develop the property.

In early September 2006 the owners submitted a development application to build four dwellings on the 2.85 acres. Specifically, the application sought a general plan amendment, zoning amendment, tentative parcel map, site plan permit, conditional use permit, and variance.

Some five months later, in February 2007, the city planning commission recommended denial of the application. The owners sought review by the city council. At a meeting of the city council on July 24, 2007, a resolution was approved denying the application.

4. The Ensuing Litigation

a. trial level

i. writ of mandate

Within 40 days, on August 29, 2007, the owners filed suit in federal court. They alleged, among other claims, inverse condemnation based on the spot zoning of the property. A number of city officials were added as nominal defendants. The federal court granted a motion to dismiss, but with leave to amend. After the owners amended their complaint in federal court, they filed this action in state court and dismissed the federal action.

There is no argument on appeal that the dismissal with leave to amend by the federal court has any sort of preclusive effect. The City accepts that the August 29, 2007 filing date in federal court is the one on which the litigation commenced for purposes of the statute of limitations. (See 28 U.S.C. § 1367(d).)

The parties agreed to an order bifurcating the trial. The trial court was first to consider the owners' request for administrative mandate. Remaining issues were to be decided in a second phase.

The writ of mandate phase was heard by Judge Stock. Her statement of decision reached three major conclusions:

(1) The City did not give adequate notice of the downzoning of the property via the imposition of the 1993 and 1996 RVL restrictions to the owners. What notice was given to the general public was either in the San Clemente Sun Post, or posted at City Hall. Judge Stock found it was practically impossible for the owners to discover

“anything that had to do with the prospective down-zoning of their property.” The City never circulated any map showing that downzoning “prior to the adoption of the amendments.” A review of a 32,000-page administrative record showed that no “draft general plan map had ever been published” as part of the City’s activity “leading up to the approval” of the general plan amendments “so as to allow even a casual observer to notice that the Avenida San Juan property was going to be zoned as RVL.” In fact, Judge Stock “manually searched through over 500 pages of that general plan draft with the marked-up version, and found no reference therein to the RVL designation.” Citing *Harris v. County of Riverside* (9th Cir. 1990) 904 F.2d 497, much of Judge Stock’s statement of decision was devoted to explaining that the lack of notice in fact constituted a due process violation.

(2) The RVL restrictions were arbitrary and capricious as applied to the property. The restrictions created “an isolated area that has become an island of minimum lot size zoning in a residential ocean of substantially less restrictive zoning.” An examination of the administrative record reveals “no findings or support at any level in the general plan amendment process for tying the RVL designation to the subject property.” In practical effect, the property had been rezoned from low density residential allowing four houses to an Open Space-4 designation, i.e., one house on 20 acres. Judge Stock also wrote that the “small number of homes contemplated on the parcel would add a mere four houses’ worth of traffic,” but “there are no issues of buffer zones or any other unique facts that call for this parcel to remain a residentially-landlocked island.” Moreover, the amount of grading and retaining walls required were insufficient “to overcome the constitutional deficiencies inherent in the adoption of the General Plan Amendment which led to the mandatory adoption of the zoning Ordinance in 1996.” Judge Stock in fact noted that one of the senior staff for the City had observed that the original title of RVL was Open Space-4, but the staffer thought the designation was too obvious since it may send “the wrong message.”

(3) The owners' suit was timely under the applicable statute of limitations. Following *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757 (*Travis*), Judge Stock held that the appropriate statute of limitations was the 90-day period established by Government Code section 65009, subdivision (c)(1)(E). (All further undesignated statutory references are to that Code.) The owners filed suit within 90 days of the City's July 24, 2007 decision.

The ensuing writ of mandate filed September 10, 2009, (1) declared the City's resolution denying the owner's land use application null and void; (2) ordered the City to adopt a new resolution vacating the earlier resolution denying the owners' application; and (3) ordered the City to file a return to the writ within 60 days showing the City complied with the writ's terms. The City took the position that it was going to contest the writ in an appeal. The trial court stayed the writ in early December.

ii. inverse condemnation trial

Phase two commenced in mid-December. Trial included a site visit by Judge McEachen, testimony from 13 witnesses, and numerous exhibits. On February 1, 2010, Judge McEachen issued a statement of decision and judgment finding that the City had deprived the owners of all economically viable use of the parcel.

Judge McEachen specifically rejected the City's various reasons for zoning the property RVL, finding the parcel is not a canyon, as the City claimed, and there was no evidence of "negative geotechnical data." In fact the court noted that the land's "stability" was shown by a nearby cliff that faces the street without a retaining wall, and there was nothing unusual about the parcel's topography. The vegetation was the same chaparral and brush that is typical of all of Southern California. The trial court found the real reason for the RVL zoning was the City's desire to keep the property as open space.

Judge McEachen also specifically found "bad faith" in the City's handling of the owners' 2006 development application. He wrote: "Even though Plaintiff asked

for a general plan amendment and a zoning amendment, the denials were all illogically ‘based’ on the fact that the application did not comply with the general plan and zoning ordinances.” In essence, the City never gave any serious consideration to the owners’ application. Under the heading “City’s Bad Faith Handling of Plaintiff’s 2006 Development Application,” he wrote: “With the September 1, 2006 application, Plaintiff submitted a proposed tentative parcel map which is substantially similar to Tentative Parcel Map 82-832 [the one conditionally approved back in 1983]. However, the application was rejected first by Mr. Nicholas [an associate City planner], then by the City’s Planning Commission, then by the City Council. Even though Plaintiff asked for a general plan amendment and a zoning amendment, *the denials were all illogically ‘based’ on the fact that the application did not comply with the general plan and zoning ordinances.* Also, Mr. Nicholas wrote in at least two reports that since his recommendation to deny the application was based on its nonconformity to the general plan and zoning ordinances, ‘staff did not complete any further review,’ meaning no real investigation occurred. Therefore, City had zero evidence for a finding that the proposed development was somehow physically unsuitable.” (Italics added.) Judge McEachen further found that the City’s land use officials had ignored the City’s own ordinances which seek to promote cooperation with local landowners so as to come to a balanced accommodation of interests.

The judge elaborated on the City’s underlying purpose to keep the property open space: “City targeted the Property for the stated purpose of ‘protecting open space,’ thus forcing Plaintiff to bear a public burden which should be borne by the public as a whole. Although City retained the authority to further amend the general plan and zoning ordinances, it held fast to its RVL zoning decision, instead of correcting this injustice.”

Not surprisingly, Judge McEachen found a regulatory taking of the parcel by the City. He used what is often called the *Penn Central* factors approach. Judge McEachen enumerated no less than nine factors all pointing in the direction of a taking:

(1) The major loss of use of the property as the result of the government action, (2) the loss of investment backed expectations from what they had been at the time of acquisition, (3) the arbitrariness of the rezoning, (4) the unequal treatment of the subject parcel in comparison with the surrounding properties, (5) the fact that the City's action was prompted by the desire of the neighbors to keep the subject parcel as complete open space, (6) the City's core motivation for the downzoning was to keep the subject parcel as open space, (7) the City's attitude of being substantively against any development of the property, (8) the absence of any action by the City to mitigate the financial burdens imposed by the downzoning, and finally, (9) the fact that the downzoning had clearly prevented the "best use" of the land (which would be four lots, not one).

Judge McEachen then calculated the amount of just compensation. There was evidence its fair market value was \$2.8 million if developable with four lots. From that \$2.8 million he deducted the cost of the cul-de-sac road. The judge took the cost estimate for the road from the City's cost expert at about \$1.5 million. Subtracting the latter from the former yielded the \$1.3 million award.

b. posttrial and appellate matters

The award resulted in a judgment filed February 1, 2010 for the \$1.3 million (\$1,316,967 to be exact). A notice of entry of judgment was filed on February 9, 2010. On February 24 the City filed an intention to move for new trial. The hearing on the new trial motion was scheduled for April 6, 2010. Among the grounds proffered for the new trial motion was that the City had the right, under *Hensler v. City of Glendale* (1994) 8 Cal.4th 1 (*Hensler*) "to rescind the RVL standard as an alternative to paying inverse condemnation damages." The City also made the related argument that by "granting a Writ" and requiring the City to pay damages for a "complete and permanent taking of the Property, the Decision erroneously authorizes a double recovery."

On March 29, prior to the hearing on the new trial motion, the City filed its first notice of appeal, creating docket number G043479. The notice of appeal was from “the final judgment in this matter on February 1, 2010 and all orders that are separately appealable.”

About a week later, on April 6, the trial court denied the new trial motion. However, the trial court was obviously concerned with the impact of *Hensler*. “[R]ather than granting a new trial,” wrote Judge McEachen, *Hensler* required giving the City the choice of paying damages or rescinding its RVL land use restriction. This “would only require a modification of the judgment pursuant to CCP 662.” Accordingly, the minute order directed that the language of the February 1 judgment would now read: “Defendant City of San Clemente shall have thirty (30) days to comply with the Order Granting and Issuing Writ of Administrative Mandamus filed on 9-10-09, and thereby avoid having to pay compensation for a permanent taking. But if defendant City of San Clemente does not comply with the Order Issuing and Granting Writ of Administrative Mandate within 30 days, on the third cause of action for inverse condemnation in Plaintiff’s complaint, Judgment for Plaintiff and against City for \$1,316,967.00 plus interest at the Surplus Money Investment Fund rate as set forth at C.C.P. 1268.350 from July 24, 2007 plus reasonable attorney’s fees and expert fees and costs of suit herein.”

About a week later, on April 13, the City filed its second notice of appeal in this case, creating docket number G043534. However, it was not until April 19, about a week afterwards, that a formal, signed “modified judgment” was filed.

The terms of the modified judgment provide: The stay on the writ of mandate was lifted. The City would have 30 days (until May 6, 2010) to comply with it. If the City did not comply by then, the owners would recover \$1,673,530.52 from the City. The \$1,673,530.52 consisted of: (1) the \$1,316,967 inverse condemnation damages for the taking of the property; (2) \$105,769.22 in prejudgment interest; (3) recoverable costs of \$23,644.30; and (4) \$227,150 in attorney fees.

DISCUSSION

1. Appellate Jurisdiction

Generally, the filing of a notice of appeal “divests the trial court of further jurisdiction in the cause.” (*In re Estate of Waters* (1919) 181 Cal. 584, 585; see generally *Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180 (*Varian*) [explicating section 916 of Code of Civil Procedure].) There are, however, a number of exceptions to the rule. (See *Varian, supra*, 35 Cal.4th at p. 191 [noting collateral matter exception, including new trials and proceedings to expunge a lis pendens].)

Section 662 of the Code of Civil Procedure affords trial judges the option of modifying judgments on new trial motions without actually having to grant a new trial. (See *Spier v. Lang* (1935) 4 Cal.2d 711, 714 [rejecting “contention that the language of the section does not give the court the power to change the findings and modify its judgment so as to make a new or different judgment unless a new trial be granted”].) The option to modify in the course of deciding a new trial motion, can, of course, create the anomaly of a trial court retroactively modifying a judgment already appealed. Under several of the various tests articulated by the high court in *Varian* (see *Varian, supra*, 35 Cal.4th at pp. 189-190 [direct or indirect modification of the appealed judgment, interference with appellate court’s ability to conduct appeal, and irreconcilability of original and modified judgment]), the postappeal modification of an already appealed order would appear to impact the effectiveness of the appeal.

The anomaly was solved more than 50 years ago in *Neff v. Ernst* (1957) 48 Cal.2d 628 (*Neff*). Like the present case, *Neff* involved the trial court modifying a judgment already the subject of an appeal while the trial court was in the process of denying a new trial motion. Further, as in the present case, in *Neff* there was a second appeal after the modification of the original judgment. (*Id.* at pp. 632-633.)

The *Neff* court solved the anomaly by recognizing the obvious. “The question is: which appeal is properly before the court. Obviously it is one or the other

and cannot be both.” (*Neff, supra*, 48 Cal.2d at p. 633.) The logic of section 662 dictated, then, that the modified judgment becomes “the final judgment.” (*Id.* at p. 634.) The “appeal from the prior judgment becomes ineffective,” or “nonoperative.” (*Ibid.*) The *Neff* court then went on to consider the merits of the modified judgment.

We now follow suit. In the present case we now have only one “operative” appeal, namely the appeal from the modified judgment filed on April 19. In fact, the relevant notice of appeal, filed April 13, 2010 after the announced modification on April 6 was, in fact, premature. Even so, it is nevertheless effective. (See Cal. Rules of Court, rule 8.104(d).)

The essence of the modified judgment is that the City’s RVL land use restrictions constitute a taking, but the City has the choice of either rescinding its denial of the owners’ application to change those restrictions, as the writ of mandate requires, or paying inverse condemnation damages.

2. *The Writ of Mandate*

Since the modified judgment gives the City the choice of complying with the earlier writ of mandate issued by Judge Stock we review the core conclusion of that writ, namely that the downzoning of the subject property, and later refusal to change that zoning, was arbitrary and capricious.

The “rezoning of property, even a single parcel, is generally considered to be a quasi-legislative act” thus “subject to review under ordinary mandamus.” The standard for review of a quasi-legislative act is whether the action was “arbitrary or capricious or totally lacking in evidentiary support.” (*City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 238-239; see *Arnel Development Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 521; *Consaul v. City of San Diego* (1992) 6 Cal.App.4th 1781, 1791 (*Consaul*).)

Here, the trial court (in the writ of mandate phase presided over by Judge Stock) found the downzoning, embodied in the both the 1993 general plan amendment and the 1996 zoning ordinance, and the City's 2007 refusal to consider rezoning the property, to be arbitrary and capricious. We agree.

In her statement of decision Judge Stock found a "suggestion of spot-zoning here." Nevertheless, her reference to the subject parcel being "an isolated area" that had "become an island" of "minimum lot size zoning in a residential ocean of substantially less restrictive zoning," plus her citation to *Hamer v. Town of Ross* (1963) 59 Cal.2d 776 (*Hamer*), a spot zoning case, leave little doubt as to the basis of her decision to grant the writ of mandate.

The essence of spot zoning is irrational discrimination.

Arcadia Development Co. v. City of Morgan Hill (2011) 197 Cal.App.4th 1526, 1536 (*Arcadia Development*) described spot zoning: "Spot zoning occurs where a small parcel is restricted and given lesser rights than the surrounding property, as where a lot in the center of a business or commercial district is limited to uses for residential purposes thereby creating an 'island' in the middle of a larger area devoted to other uses. . . . Usually spot zoning involves a small parcel of land, the larger the property the more difficult it is to sustain an allegation of spot zoning. . . . Likewise, where the 'spot' is not an island but is connected on some sides to a like zone the allegation of spot zoning is more difficult to establish since lines must be drawn at some point. . . . Even where a small island is created in the midst of less restrictive zoning, the zoning may be upheld where rational reason in the public benefit exists for such a classification." (Internal quotation marks omitted.)

Justice Mosk observed in a case otherwise devoted to development exactions that because spot zoning implicates discriminatory treatment, it entails a "more rigorous form of judicial review." (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 900 (conc. opn. of Mosk, J.) (*Ehrlich*).)

In the present case, there is no need to rest the determination on either Judge McEachen's finding of bad faith on the part of the City or the more rigorous form of review advocated by Justice Mosk in his concurrence in *Ehrlich*. Here, there is no question that the owners' parcel is a one-house-per-20-acre island in a two-to-six house-per-acre sea. Zoning maps in the record readily provide substantial evidence of spot zoning. Exhibit 6 is a color photo that shows higher density development on Avenida San Juan encircling the subject property. Even more telling is the City's own general plan map showing the applicable zoning. The subject parcel is a small RVL spot surrounded by denser land uses. Moreover, Judge McEachen personally visited the site and found that, "There is nothing unusual about the Property's topography."

Both *Hamer, supra*, and this court's decision in *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954 (*Ross*) found a city guilty of spot zoning when it denied a property owner's request to rezone the owner's property to a designation consistent with surrounding properties so the owner could proceed with a development plan. In *Hamer*, the Supreme Court struck down a minimum one-acre lot size requirement on a 2.2 acre parcel as arbitrary and discriminatory, given the existence of denser construction to the east, north, and west of the property. (See *Hamer, supra*, 59 Cal.2d at pp. 790-791.) Justice Tobriner emphasized the disparity in *size* restrictions between the subject property and the more dense surrounding properties: "[Z]oning ordinances which impose a one-acre lot restriction cannot properly apply to property which is virtually surrounded by parcels of lesser size" (*Id.* at p. 778; see also p. 781.)

To the same effect is *Ross*. There a one-acre restriction on a 1.117 acre plot prevented the construction of a second dwelling on the property, which, if the property had been zoned as the surrounding properties, would have been allowed. (See *Ross, supra*, 1 Cal.App.4th at p. 961.)

Indeed, *Ross* applies directly, if not a fortiori to the case before us. In *Ross*, this court said: "Even after the proposed division" the development would still be less

dense than “many” in the area. (*Ross, supra*, 1 Cal.App.4th at p. 961.) Here, the proposed development would be less dense than *everything* that surrounds it.

In its reply brief, the City asserts its discriminatory downzoning and refusal to meaningfully consider the owners’ 2006 development application was justified because the property is on a slope. Therefore the project requires high retaining walls and what the City characterizes as a “tunnel-like” access road.

The topography, or “slope,” argument fails for several reasons. First and most basically, the topography rationale in this case does not support *discriminatory* treatment. Much of the City of San Clemente reflects the same topography, with many houses already built on slopes in the area. Judge Stock’s statement of decision specifically found there were no “unique facts” calling for the parcel to remain a land-locked island. The City’s community development director testified that almost all of San Clemente is on hilly terrain. As Exhibit 6 shows, Avenida San Juan itself was carved out of a sloping terrain. The City obviously has no problem with *slopes* as distinct from *canyons*. Its own RVL zoning ordinance makes no mention of slopes in regard to RVL zoning.

Second, topography by itself was not a reason to deny the owners’ various applications that would have allowed the City to make an exception to the imposition of RVL (one-house per *twenty* acres) on the subject parcel. The record is full of pictures of houses in San Clemente with high retaining walls. Any disruption from grading would necessarily be temporary and subject to reasonable restrictions to ameliorate any disruption to the neighbors. As Judge McEachen observed, the matter of retaining walls and excavation necessary for the cul-de-sac road were matters that might have been ironed out to “cure” those “specific concerns.” Judge McEachen found that the City ignored its own ordinance requiring the City planning department to *cooperate* with local landowners so as to achieve a balanced accommodation of interests. And as the City itself recognizes in its opening brief, the specifics of the owners’ application received “no

detailed review.” The arbitrariness of the City’s denial is shown by its refusal to consider measures to “cure” the impact of grading or retaining walls.

Even under the City’s 1993 general plan amendments, there were only two points of concern (called “opportunities and constraints” in the text) under the heading of “topography.” The first was the “potential of increased susceptibility of erosion on steep slopes that have been *improperly graded*.” (Italics added.) The second was the simple preservation of “the appearance of the natural hillsides and vegetation.” Both of these “constraints,” of course, could be addressed by reasonable mitigation measures.

Likewise, language in a 1996 general plan amendment concerning the “[m]aintenance and restoration of significant natural systems and resources” including “steep slopes,” is susceptible to address by reasonable mitigation measures. The 1996 language was framed in the context of *allowing* development compatible with the preservation of steep slopes, but requiring it to “comply with the Aesthetic Resources Element” including such “[m]aintenance.”

Most fundamental, though, is the contradiction between the basic purpose of RVL zoning under the City’s general plan and zoning laws, which is to preserve *canyons*, and this property, which, like much of the rest of the City, is on a slope. By its very terms, the rationale for the City’s RVL zoning -- protection of *canyons* -- does not apply to the parcel here. *This* parcel, in *this* neighborhood, was being singled out for discriminatory treatment independent of the reason for RVL zoning in the first place.

The City has cited us to no case where some aspect of a small parcel susceptible to mitigation has been used to justify what would otherwise be blatant spot zoning. The case the City primarily relies on to say this case is not an instance of spot zoning, *Consaul, supra*, 6 Cal.App.4th 1781, is distinguishable. *Consaul* involved the downzoning of part of a property (an undeveloped lower 1.06 acres of a larger 1.5-acre property, with the upper part already having a single-family residence and two apartments on it) from multifamily to single-family, dashing the hopes of the owners to

put in a 26-unit condominium project on the lower 1.06 acres. (See *id.* at 1786.) *Most* of the opinion has nothing to do with spot zoning, but deals with whether the 26-unit project constituted a vested right at the time of the downzoning. (See *id.* at pp. 1785, 1793-1801; cf. *id.* at pp. 1811-1813 (dis. opn. of Nares, J.).)

The owners' spot zoning argument in *Consaul* was an obvious afterthought. The spot zoning portion of *Consaul* occupies only three paragraphs of discussion, and the opinion, without going into much detail at all, simply affirms the trial court's "evaluation on these factual issues concerning the existence of a valid basis for the city's action" in light of the "topographical and usage characteristics of the land and the surrounding area." (*Consaul, supra*, 6 Cal.App.4th at p. 1802.) While the *Consaul* majority observed that "lines in zoning must be drawn at some point" (*ibid.*), that general observation does not mean that any time a local government invokes the word "topography" it can treat a given parcel differently from the surrounding property.

The clincher is the rezoning map in the appendix to the *Consaul* opinion. (*Consaul, supra*, 6 Cal.App.4th at p. 1814.) Just as the maps in this case clearly show spot zoning, the map in the appendix to the *Consaul* opinion does not. The property in *Consaul* was *not* being arbitrarily singled out for special treatment. One can easily see that there were no "islands." Moreover, the opinion also noted that in the bottom of the canyon where the property was located there were already a number of single-family homes (*id.* at p. 1786). The owners in *Consaul* could hardly argue "spot zoning" when the downzoning merely gave them the same right as similarly situated property owners.

The trial court's conclusion in granting the writ of mandate that the subject parcel was arbitrarily and capriciously downzoned must therefore be affirmed.

3. *The Inverse Condemnation Award*

Like Judge Stock before him in phase 1, Judge McEachen substantively found spot zoning in phase 2. As noted, he specifically noted after his site visit that the

subject parcel's topography was not usual, and he went so far as to find affirmative bad faith on the City's part. But even without either finding, his conclusion that the City committed a taking was sound.

The City argues that there is no compensatory regulatory taking unless the regulation denies all economically viable use of the property. (Cf. *Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003 (*Lucas*) [taking where all use was denied].) Of course when a regulating authority goes so far as to deprive owners of "all economically beneficial or productive use of land" there is a complete taking under *Lucas*. (*Id.* at p. 1015.)

The City's model, however, is too limited. There are compensable takings that do not involve the deprivation of *all* economically viable use of land. The United States Supreme Court has declared that a compensable regulatory taking can occur when a regulation goes "too far," but stops short of denying all economically viable use. (*Palazzolo, v. Rhode Island* (2001) 533 U.S. 606 (*Palazzolo*), quoting *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, 415.)

Whether a regulation goes "too far" is tested under what has been called the "Penn Central factors" approach. Our own Supreme Court has noted that there are three core factors: (1) the economic effect on the landowner; (2) the extent of the regulation's interference with investment-backed regulations; and (3) the character of the governmental action. (*Kavanau v. Santa Monica Rent Control Bd.* (1997) 16 Cal.4th 761, 775.)

Although Judge McEachen found a complete taking, he also made findings regarding the *Penn Central* factors establishing a less than complete taking. We do not agree the City committed a complete taking because substantial evidence does not support Judge McEachen's findings that (1) the City would not approve any development on the property and (2) development of one home on the property at street level was not

financially feasible. We, however, agree that the *Penn Central* factors establish a partial taking in this case.

The three core *Penn Central* factors readily apply here: First, the economic effect was dramatic. This was illustrated by the trial court's \$1.3 million difference between the property valued if four houses could be built as per the 1983 City approvals and the zero value the trial judge found under RVL (zoning).

Second, the regulation wholly undermined the investment-backed expectations of the owners. The owners purchased their property in 1980 when it was zoned the same as the surrounding properties are currently zoned. As if to emphasize those original expectations, the City itself, in 1983, approved a four-house development along the lines of the one it turned down in July 2007.

Third, the character of the governmental action appears to have been largely motivated to keep the subject parcel open space. The old label for RVL zoning was "OS [open space] 4." The RVL designation is a virtually impossible one for a residential area, allowing only one house for every 20 acres. Application of RVL to this parcel in the "sea" of RL zoning that allows four houses per acre suggests, as Judge Stock noted, an irrational discrimination.

So-called "minor" *Penn Central* factors also point to a taking. The subject parcel was singled out for unequal treatment, particularly in light of the land use scheme that governed it in 1980. There was evidence that the neighbors and City simply wanted to keep the parcel as nearby open space. The City did not seriously consider mitigation measures in turning down the application. The best use of the land is consistent with the density of the surrounding neighborhood.

The City makes no meaningful attempt in this appeal to argue that the *Penn Central* factors were misapplied by the trial court. All its arguments are based on the premise that there must be a total taking -- a "*Lucas* taking" -- before there can be any compensable taking.

Preliminarily we reject the City's assumption that the parcel has a \$825,000 value even with the RVL zoning, because one house could still be built at curbside, and therefore no taking occurred. The \$825,000 figure was proffered by the City's own appraiser. Judge McEachen impliedly rejected it. He found the parcel had no value with RVL zoning.

In any event, the City's argument is incompatible with *Penn Central*, as well as the Supreme Court's relatively recent application in *Palazzolo*. There the federal Supreme Court held that there was a compensable taking even where an uplands section of the coastal property at issue was valued as high as "\$200,000 if developed." (*Palazzolo, supra*, 533 U.S. at p. 621.)

The City also argues that there was no physical invasion or appropriation of the property, ergo there was no taking. That argument contravenes the whole idea of a *Penn Central* regulatory taking in the first place. A regulation that goes "too far," even without a physical invasion, may constitute a taking.

Finally, the City also relies on a delay case, *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006 (*Landgate*). But *Landgate* merely stands for the proposition that a *reasonable delay* in the processing of a permit is not a compensable taking. The landowner in *Landgate* did indeed obtain a permit to build a proposed mansion, but only after a two-year delay occasioned by a good faith dispute over whether the Coastal Commission had jurisdiction over a certain lot line adjustment. (*Id.* at pp. 1014-1015.) A divided Supreme Court held that the developer could not recover damages for the lost two years because the "regulatory process" necessarily involves the "imposition of certain procedural conditions and substantive requirements on development." (*Id.* at p. 1027.)

This is not a delay case, and there is no claim that the time required by the permit process itself constituted a taking. Therefore *Landgate* has no application here.

4. Statute of Limitations

The City argues that the applicable statute of limitations is section 65009, subdivision (c)(1)(B), which provides for a 90-day statute of limitations from direct attacks on newly enacted land use ordinances. It further argues that under section 65009, subdivision (c)(1)(B), the statute of limitations began to run either (a) in 1993, when the general plan was amended, or (b) in 1996, when the zoning ordinances pursuant to the 1993 general plan amendments were adopted, or at the very latest (c) in 2004, when the owners actually discovered the imposition of the RVL restriction on the subject parcel. The theory is that the owners were required to bring their challenge to the general plan and zoning imposition of RVL land use restrictions at the very time of those enactments. We disagree. The applicable statutes of limitations are section 66499.37 and section 65009, subdivision (c)(1)(E), and both began to run from the City's final administrative adjudication in denying the owners' application in 2007. (See *County of Sonoma v. Superior Court* (2010) 190 Cal.App.4th 1312, 1324 (*County of Sonoma*) [to "pinpoint" when the statute of limitations begins to run on a claim against a land use restriction, one must "determine what specific governmental act or acts" are challenged].)

First, there can be no question that insofar as the lawsuit seeks relief from the City's denial of the owners' application for a tentative parcel map, the appropriate statute of limitations is section 66499.37. (See *Hensler, supra*, 8 Cal.4th at pp. 24-26; *Friends of Riverside's Hills v. City of Riverside* (2008) 168 Cal.App.4th 743, 751 ["Even our state's Supreme Court has emphasized, in *Hensler* . . . that the 90-day statute of limitation under section 66499.37 applies to any type of action seeking review of a legislative or advisory body's subdivision-related decision under" the Subdivision Map Act].)

Second, as to the challenge to the remainder of the City's denials, it is section 65009, subdivision (c)(1)(E), which governs challenges to final administrative adjudications, that applies, not section 65009 subdivision (c)(1)(B). (All references to

“(c)(1)(B)” or to “(c)(1)(E)” are to section 65009.) Cases applying (c)(1)(B) have involved direct attacks on ordinances. They have not involved challenges to a final administrative adjudication based on the application of the ordinance to a given case. (*County of Sonoma, supra*, 190 Cal.App.4th at pp. 1324-1325 [applying (c)(1)(B) to challenge by marijuana dispensary that asserted it did not need even to seek permit as required under local ordinance]; *Arcadia Development, supra*, 169 Cal.App.4th at p. 261 [applying (c)(1)(B) to facial challenge to extension of temporary density restriction ordinance]; *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 283 [noting previous opinion, now law of the case, had applied (c)(1)(B) to attack on recent ordinance upping “safety factor” requirement]; *Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 438-439 [applying (c)(1)(B) to direct attack on conditional use permit aspect of cybercafe regulation]; *Save Our NTC, Inc. v. City of San Diego* (2003) 105 Cal.App.4th 285, 310-312 [applying (c)(1)(B) to attack on recent zoning ordinances allowing greater height limits than those contained in initiative enacted about 30 years previously]; *Buena Park Motel Assn. v. City of Buena Park* (2003) 109 Cal.App.4th 302, 307-309 [applying (c)(1)(B) to direct attack on city ordinance restricting stays in motels]; *Howard Jarvis Taxpayers Assn. v. City of Los Angeles* (2000) 79 Cal.App.4th 242, 247-249 [applying (c)(1)(B) where suit sought to void ordinance imposing city home occupations tax].)

By contrast, cases applying (c)(1)(E) have involved challenges to final administrative decisions, such as the case at bar. (*Trinity Park L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, 1029-1030, 1044-1046 [applying (c)(1)(E), as well as section 66499.37, to challenge to below market housing requirement imposed on developer as a condition of subdivision approval]; *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 527-528 [applying (c)(1)(E) to appellant’s attack on variance obtained by neighbor]; *Royalty Carpet Mills, Inc. v. City of Irvine* (2005) 125 Cal.App.4th 1110, 1121-1124 [harmonizing (c)(1)(E) with Public Resources Code

section 21167.6, and applying (c)(1)(E) to carpet manufacturer's challenge to conditional use permit issued to builder of proposed apartments near carpet manufacturer's plant in industrial section of city].)

The case that is most illustrative of the distinction between direct, facial challenges to ordinances and challenges to the application of those ordinances in final administrative decisions is *Travis, supra*, 33 Cal.4th 757. *Travis* directly rejected the application of (c)(1)(B) in favor of (c)(1)(E).

Because it is dispositive of the City's argument here, we examine *Travis* in detail. The enactment of the relevant county ordinance had occurred years previously, in 1981. The ordinance was good news and bad news for property owners. On the one hand, it specifically allowed "'affordable'" second dwelling units to be constructed by residential property owners. On the other hand, the ordinance set controls on both the kinds of people to whom the owners could rent their second dwellings, and on the amount of rents that might be charged. (*Travis, supra*, 33 Cal.4th at p. 763.) The last substantive amendment of the ordinance was in 1997. (*Id.* at p. 765.)

In 1999, more than 17 years after the 1981 original enactment of the ordinance and about two years after its last substantive amendment, two separate owners each applied for permits to construct a second dwelling unit on their property.

The first owner was granted a permit, but that permit was subject to the restrictive occupancy and rent control rules placed on the property by the 1981 ordinance. He then filed an administrative appeal against those conditions; that appeal was denied in June 1999. The second owner was also granted a permit subject to the same occupancy and rent controls, but did not pursue an administrative appeal. (*Travis, supra*, 33 Cal.4th at p. 764.)

Both owners filed a petition for writ of mandate in early September 1999, attacking the occupancy and rent restrictions as preempted by certain later-enacted state statutes, and also as contrary to various state and federal laws, including the takings

clause of the Fifth Amendment. (See *Travis, supra*, 33 Cal.4th at p. 764.) For the first owner, the early September action was certainly within 90 days of the denial of his administrative appeal challenging the restrictions. Both sets of owners made “as applied” challenges. (*Id.* at p. 765.) The trial court ruled that the first owner’s “as applied” regulatory taking claim was timely, but nonmeritorious. The trial court held the second owners’ as applied claim was untimely because the owners did not bring an action within 90 days of the “final decision” on the permit application. The intermediate appellate court, however, said that both sets of owners were subject to the 90-day statute of limitations in (c)(1)(B), and therefore even the first owner’s suit was untimely. (*Ibid.*)

The California Supreme Court then *disagreed* with the appellate court’s determination that the first owner’s suit was precluded under (c)(1)(B) on the theory that the statute began running with the 1981 enactment of the land use law. The California Supreme Court pointed out that the owners were making an “as applied” challenge because they challenged the imposition of the conditions on their permits in addition to the original enactment of the ordinance requiring the conditions. (*Travis, supra*, 33 Cal.4th at p. 767.) The court held that a claim does not fall outside (c)(1)(E) “merely because the plaintiff claims the permit or condition was imposed under a facially unconstitutional or preempted law.” (*Id.* at p. 768.)

Next, the *Travis* court addressed the running of the statute of limitations in the previous *Hensler* decision. The *Travis* court said that *Hensler* was different, because in *Hensler* there was no doubt that the landowner’s inverse condemnation action was untimely. It was untimely because the action was brought “several years after the city *had applied* the ordinance to the plaintiff’s property.” (*Travis, supra*, 33 Cal.4th at p. 768, italics added.) Hence, said *Travis*, the action in *Hensler* was untimely “whether considered as an attack on the ordinance itself *or* on the city’s *application* of the ordinance.” (33 Cal.4th at p. 768, italics added.)

We conclude that the present action is not a “facial challenge” but an “as applied” challenge. A facial challenge considers only the text of the challenged law. An as applied challenge considers the application of that law to the particular circumstances of the case. (See *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084 (*Tobe*); see also *NJD, Ltd. v. City of San Dimas* (2003) 110 Cal.App.4th 1428, 1439.) An “as applied” challenge may even seek relief from a facially valid statute. (*Tobe, supra*, 9 Cal.4th at p. 1084.) Here, the owners have sought relief from the first time the 1993 general plan amendment and the 1996 zoning ordinance were ever actually *applied* to the subject property, which was when the City denied their application to build four houses on the subject parcel in 2007. The owners do not challenge the entire 1993 general plan amendment or the entire 1996 zoning ordinance. Likewise they do not challenge the RVL zoning designation in general nor do they seek relief regarding any parcel other than their own. Instead, the owners challenge only the City’s refusal to even consider changing the RVL restrictions as they apply to their specific property and its particular circumstances.

The case the City mainly relies on, *Traverso v. Department of Transportation* (2001) 87 Cal.App.4th 1142 (*Traverso*), is not a (c)(1)(B) case and in any event is distinguishable. *Traverso* was an attempt to “revive permits for billboards which were canceled over a quarter-century ago.” (*Traverso, supra*, 87 Cal.App.4th at p. 1143.) The plaintiff’s theory, in a complaint filed no earlier than 1997, was that the original cancellation of those permits in the period 1973-1975 was invalid. There had been a request for “renewal” of one of the permits in November 1997, but the request had come in the wake of a new statute that provided that any permits not renewed after January 1 were “deemed revoked.” (*Id.* at p. 1144.) The *Traverso* court’s point was that, substantively, the suit sought to set “aside permit revocations that occurred over 25 years ago” in a context where the plaintiff *could not* obtain “new permits.” (*Id.* at pp. 1145-1146.) The court said that the plaintiff had no cause of action for *denial* of the permits

because state law precluded new permits. The claim for improper original cancellation back in 1975 was untimely a quarter-century later.

Because we conclude that owners' claim is from the 2007 denial of their application to develop the property and not from the 1993 or 1996 enactments, we need not deal with the ramifications, if any, of the trial court's finding that the City acted in bad faith by effectively hiding the 1993 and 1996 enactments from the owners. Nor is there any need to discuss the "future generations" passages in both *Palazzo* and *Travis* that arguably indicate that state statute of limitations laws should not be interpreted to unreasonably preclude the opportunity to present federal law takings claims. (See *Palazzolo, supra*, 533 U.S. at p. 627; *Travis, supra*, 33 Cal.4th at pp. 770-771.)

5. Ripeness

In direct contrast to its statute of limitations argument (too late), the City argues that any inverse condemnation claim is unripe (too early), because the owners did not apply for the one thing that they might have under the RVL zoning, a single dwelling on their 2.85 acres.

Ripeness, as explained in *Palazzolo*, is a matter of final administrative adjudication. The idea of ripeness arises precisely because local authorities should have the chance to change their minds when a local restriction otherwise results in a compensable taking. When they do make up their mind, the case is ripe. *Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281 perfectly illustrates the rule. There the court held that the landowner's regulatory takings claims were ripe for adjudication because the local authority, there a county, had decided it lacked any discretion to allow the subdivision of the property, leaving, as in *Palazzolo* and the case at hand, the residual possibility of developing a single-family residence.

Judging by the final administrative adjudication standard in *Palazzolo*, the City's denial of the owners' four-dwelling plan here was clearly "final." In *Palazzolo*,

the fact that the landowner had not applied to build the one house he was otherwise allowed *anyway* did not make the case unripe. It is the same here.

6. *Damages*

In its appeal, and in a cross-appeal, both the City and the owners challenge the amount of the \$1.3 million inverse condemnation award. The City argues it is too high because the figure does not account for the value of the property with at least one house on it, even one built curbside, without the ocean view that would be otherwise available. The owners claim it is too small because the trial court candidly admitted that it “low-balled” the \$1.3 million valuation claim. We agree with both parties and remand the case for a recalculation of damages.

a. the City’s appeal

Judge McEachen ruled the City committed a complete taking based on his finding the City would not allow any development on the property and that developing of the one home the RVL zoning permitted was not economically feasible. Judge McEachen therefore did not deduct the value of the property with one home from the value of the value of the property with four homes when he awarded the owners inverse condemnation damages.

We find no substantial evidence in the record that the City would not at least permit one house, built at curbside without an ocean view. Moreover, the City assured this court in this appeal that it will approve such a dwelling. The City will be judicially estopped in the future to change that position. (See *People v. Castillo* (2010) 49 Cal.4th 145, 155 [judicial estoppel prevents a ““““party from gaining an advantage by taking one position, and then seeking a second advantage by taking an incompatible position.””””].)

Similarly, we find no substantial evidence to support the finding that developing of the property with one home was not economically feasible. It is simply inconceivable that absolutely no one would be willing to pay at least some money to own these 2.85 acres with the chance to put a house on it. The arguments that the property has no economically viable use even with one curbside house are not availing. The City indeed could, consistent with the RVL zoning in place, allow construction of one house, even under state open space laws. And the fact that neighbors might sue to prevent the construction of even the one curbside house only goes to the residual value of the property *with* the curbside house, not the absolute preclusion of that house.

A very large taking is not a total taking. Under the *Penn Central* factors test a total taking is not necessary for compensation. The trial court erred in failing to account for the property's value with the one house the RVL zoning allows.

b. the owners' cross-appeal

Like eminent domain, the basic measure of damages in inverse condemnation actions is market value. (*City of Ripon v. Sweetin* (2002) 100 Cal.App.4th 887, 897; *Housley v. City of Poway* (1993) 20 Cal.App.4th 801, 807 (*Housley*)). Fair market value is determined based on the “highest and most profitable use to which the property might be put in the reasonably near future.” (*City of San Diego v. Neumann* (1993) 6 Cal.4th 738, 744.) When an incorrect measure of damages is used, the trial court's award should be reversed and the case remanded for a retrial on the damages issue. (See *Housley, supra*, 20 Cal.App.4th at pp. 810, 814.)

As explained in its statement of decision, the trial court calculated the damage award by accepting the lowest valuation of the property when zoned for four single-family houses, then deducted the highest cost estimate regarding the construction of the cul-de-sac needed to develop four homes on the property. The trial court did not deduct the property's value when zoned for one single-family home. At the hearing on

the City's motion for new trial, however, the trial court explained that in calculating the damage award the court took into consideration the value of the property zoned for one single-family home even though it did not rely on any evidence regarding that value. In doing so, Judge McEachen was plain that he guesstimated damages by taking the lower expert opinion for the property's value zoned for four single-family homes, then deducted the highest cost estimate for constructing the cul-de-sac: "I didn't maybe factor that [i.e., the property's value when zoned for one single-family home] in . . . my statement of decision; but I did factor it in my thought process that I went through to get to that number. [¶] I didn't state how much a house would be, but I did low-ball what I thought was a big piece of property. I put a lower number in there than I would have normally had they not had some opportunity to build. [¶] But quite frankly, the only opportunity that they would have to build was this little area fronting the street of Avenida San Juan which would be financially disastrous for the people to develop property like that. [¶] So I actually low-balled a number to factor that in. While I didn't put it in writing, I did take that into account. . . . And I took the plaintiff's lower number and deducted the highest cost of the road. And so that was my factor in terms of coming up with a value. And I was looking for the fairest value I could, using my powers of equity to determine the value."

We must remember that the court calculated the \$1.3 million figure while it was under an erroneous impression of law, namely that it was going to enter a judgment directly obligating the City to pay \$1.3 million. The court was disabused of that erroneous impression by the City in its new trial motion, when it realized that *Hensler* requires that the City have a choice of paying inverse condemnation damages *or* rescinding the land use restriction giving rise to the inverse condemnation damages. In light of the trial court's candid recognition that it "low-balled" the damages award at a time when it did not realize *Hensler* required the City have a choice to pay or rescind, we cannot say that in ascertaining damages the trial court was really focused, as the law

requires, on fair market value. Under the circumstances, remand for recalculation in light of this opinion is appropriate. (Cf. *Perko's Enterprises, Inc. v. RRNS Enterprises* (1992) 4 Cal.App.4th 238, 245 ["We will, therefore, remand the issue of costs in order to allow the trial court to determine the reasonableness of the filing fee and to exercise its discretion in accordance with this opinion."].)

On remand, the trial court will have the opportunity to calculate the true market value of the subject parcel, taking into account the fact it must still have some value even if the current land use restrictions remain in place.

A related but minor issue is prejudgment interest. The City makes no argument that prejudgment interest is, all else being equal, inappropriate. It simply says that if the current ascertainment of damages is overturned, the prejudgment interest award must be overturned too. The City is right, at least insofar as the exact figure is concerned. Prejudgment interest will need to be recalculated on remand so the City will know the precise figure it must pay if it elects not to comply with the writ of mandate.

7. *Attorney Fees*

a. the city's appeal

The City's attack on the attorney fee award is limited. It only argues that in the event of reversal, the fee award to the owners must be reversed. While we do reverse the judgment for a recalculation of damages, by no means does that determination affect the substance of who is the prevailing party. The owners still win. The City's clear objective in this litigation has been to claim there has been no spot zoning, no regulatory taking and no viable lawsuit. And on those major points the City has failed.

b. the owners' cross-appeal

There are two parts to the owners' challenge to the attorney fee award as legally insufficient. The first part is the trial court's decision not to award any fees at all

for legal work done by one of the owners, Patrick O’Keefe, himself an attorney. The second part is the trial court’s perception that it was precluded from applying what it thought was an appropriate 20 percent multiplier for the fees of the owners’ attorney Everett Skillman.

Both issues are settled by the words “actually incurred” used in the governing statute, section 1036 of the Code of Civil Procedure. The statute, in its entirety, provides: “In any inverse condemnation proceeding, the court rendering judgment for the plaintiff by awarding compensation, or the attorney representing the public entity who effects a settlement of that proceeding, shall determine and award or allow to the plaintiff, as a part of that judgment or settlement, a sum that will, in the opinion of the court, reimburse the plaintiff’s reasonable costs, disbursements, and expenses, including reasonable attorney, appraisal, and engineering fees, *actually incurred because of that proceeding in the trial court or in any appellate proceeding in which the plaintiff prevails on any issue in that proceeding.*” (Italics added.)

Here, there was no written fee agreement or any evidence that the partnership was billed for O’Keefe’s services. The owners never “actually incurred” fees for his work. And, as to the multiplier, the words “actually incurred” simply preclude application of a multiplier. While the owners argue that a reading of “actually incurred” which precludes a multiplier might mean cash-poor landowners would have trouble finding counsel in inverse condemnation actions, the answer to that is to convince the Legislature to rewrite the statute to make “reasonable fees” recoverable, as distinct from fees “actually incurred.”

Cases relied on by the owners for the possibility of a multiplier are distinguishable. *City of Oakland v. Oakland Raiders* (1988) 203 Cal.App.3d 78, was not an inverse condemnation action, but an eminent domain case. *Salton Bay Marina, Inc. v. Imperial Irrigation Dist.* (1985) 172 Cal.App.3d 914, was a tour de force on the question of what constitutes reasonable fees in inverse condemnation actions where there is a

contingency agreement. (In any event the case reiterated the “actually incurred” standard. (See *id.* at page 954.)) And *Parker v. City of Los Angeles* (1974) 44 Cal.App.3d 556, was likewise a contingent fee case.

DISPOSITION

We deny the owners’ motions to strike portions of the opening brief and the reply brief.

We affirm the judgment to the extent that it incorporates the provisions of the writ of mandate requiring the City to vacate the resolution denying the owners’ development application. We recognize the *conditional* nature of the inverse condemnation judgment. If the City complies with the writ of mandate it need not pay the recalculated judgment on remand.

Obviously there is a question of timing. The writ of mandate should remain stayed until after this court’s judgment is final and the trial court has the opportunity to recalculate the fair market value of the property, taking into account the fact that the City has committed in this appeal to allow one house built at curbside. Prejudgment interest should be recalculated. Upon such time as the conditional judgment becomes final, the City will have 30 days to comply with the writ of mandate, i.e., decide, under *Hensler*, whether to change its mind or not.

Assuming that the City chooses not to change its mind and comply with the writ of mandate, the conditional judgment shall be triggered at the expiration of the those 30 days. That should give the City the opportunity the *Hensler* decision demands.

Assuming the City does change its mind and complies with the writ of mandate, it obviously may impose *reasonable* conditions on the construction process to ameliorate the “noise” and “disruption” of any necessary grading. (See *Landgate, supra*, 17 Cal.4th at p. 1027; but cf. *id.* at p. 1029 [“a government agency may not evade the

takings clause by . . . arbitrarily imposing conditions on development in order to delay or discourage that development”].)

We also affirm the judgment to the extent that it awards attorney fees and costs to Avenida San Juan Partnership. The owners remain the prevailing party.

Avenida San Juan Partnership shall recover its costs and attorney fees on appeal. The trial court shall determine the amount of attorney fees incurred by the partnership on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

MOORE, J.

ARONSON, J.