NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

JULIET ERICKSON et al., Plaintiffs and Appellants, v. COUNTY OF NEVADA, Defendant and Respondent.	C082927 (Super. Ct. No. CU13079389) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT] (Filed Dec. 18, 2020)

THE COURT:

It is ordered that the opinion filed herein on November 30, 2020, be modified as follows:

1. On page 12, the third sentence of the first full paragraph that begins with "Indeed, *Dollan*, *Nolan*, and *Koontz* all involved. . . ." is to be replaced with the following sentence:

Indeed, *Dolan*, *Nollan*, and *Koontz* all involved government demands that the landowner convey a specific property interest to the public.

2. The following footnote is added to the end of the last sentence on page 12:

In a petition for rehearing, appellants contend the County's conditions "would have required [them] to spend considerable sums of money over an extended period of time" to maintain the vegetation on their property, even if the conditions would not have required them to convey any part of their land. For that reason, appellants argue, their claim is comparable to that in *Koontz*. But because appellants raise this factual claim for the first time in their petition for rehearing, we will not consider it. (*People ex rel. Dept. of Public Works v. Mascotti* (1962) 206 Cal.App.2d 772, 779 ["'points not previously argued will not be considered where raised for the first time on petition for rehearing'"].)

This modification does not change the judgment.

BY THE COURT:

/s/
BLEASE, Acting P.J.

/s/
HULL, J.

/s/
MAURO, J.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

JULIET ERICKSON et al., Plaintiffs and Appellants, v. COUNTY OF NEVADA, Defendant and Respondent.	C082927 (Super. Ct. No. CU13079389) (Filed Nov. 30, 2020)

The United States Supreme Court has identified several limitations on the government's ability to require a landowner to convey property as a condition of obtaining a land use permit. The court has held conditions of this sort, known as "land-use exactions," violate the takings clause of the Fifth Amendment unless

there is a "nexus" and "rough proportionality" between the government's condition and the effects of the proposed land use.

In this case, appellants Juliet Erickson and Peter Lockyer allege Nevada County (the County) violated these principles when they sought a permit to build a house and garage. The County granted their requested permit but only on the condition that appellants maintain the trees and vegetation on part of their property indefinitely. Contending this condition was an unconstitutional exaction, appellants filed suit and sought compensation and a permit without this condition.

The court below agreed with appellants in part. It agreed the County needed to issue appellants their permit without the contested condition, though not because of the takings clause. It instead did so because it believed the County required the condition based on its mistaken reading of a County ordinance. The court also agreed the County's condition was an "exaction" that lacked the required "nexus" and "proportionality." But although finding an improper exaction, the court nonetheless rejected appellants' request for compensation. In the court's view, appellants would be entitled to compensation only if the County's conduct caused extraordinary delay or was based on some illegitimate motive. But the court found neither, explaining appellants suffered only ordinary delay in the permitting process.

On appeal, appellants contend the trial court—in requiring them to prove extraordinary delay or

illegitimate motive—demanded more than is necessary under the United States Supreme Court's exaction cases. Regardless of whether the trial court erred in this regard, however, we find the court's ultimate conclusion sound: Appellants were not entitled to compensation. Appellants' takings claim was solely premised on their exaction theory, but, unlike the trial court, we find the County never imposed an "exaction." As the California Supreme Court has noted, "[i]t is the governmental requirement that the property owner *convey* some identifiable property interest that constitutes a so-called 'exaction' under the takings clause. . . ." (*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 460-461 (*California Building*), italics added.) But although the County certainly sought to restrict appellants' use of their property, it never asked them to convey anything. We thus find no exaction that would give rise to a takings claim and affirm on that basis.

BACKGROUND

In March of 2011, appellants applied to the County for a permit to build a house and garage.

The following month, the County provided several comments to appellants' application. Among other things, the County noted that the proposed buildings would impact a "visually important ridgeline" within the meaning of the County's Visually Important Ridgeline ordinance (Ridgeline Ordinance)—one of the County's ordinances intended "to guide the design,

location, and development of new land uses and the alteration of existing uses." (Nev. County Ord., § L-II 4.1.1.) According to the Ridgeline Ordinance, applicants must submit a management plan for projects the County determines may impact "a visually important ridgeline," and this plan must "delineate specific protective measures and impact controls necessary to minimize visual impact to the maximum extent possible." (Nev. County Ord., § L-II 4.3.16.) Based on these requirements, the County directed appellants to submit a management plan minimizing the potential visual impacts of their proposed house and garage.

In response to the County's request, appellants submitted a management plan discussing three mitigation measures that, in appellants' view, addressed the negative visual impact on the ridgeline. The plan noted (1) the garage, the only structure having a potential negative visual impact, was "designed and oriented such that the height of various portions of the building and roof slope match the existing slope of the hillside," (2) "[e]xisting mature and healthy trees located directly south of the building will remain to help screen the building and establish the visual profile of the ridgeline," and (3) appellants planted native cedar "to provide further screening as they mature."

The County, however, disagreed that these measures would be sufficient to address the project's visual impact. To protect "the visual quality" of the ridgeline, the County approved appellants' management plan subject to the following conditions: (1) the house and garage could not exceed certain specified height limits;

(2) the property owner must agree, in a recorded deed restriction, (a) to replace dead or dying trees that are removed from a designated part of the property and (b) not to remove or thin trees in this designated area unless a biologist concludes the tree is dead or dying or a fire district finds removal or thinning necessary for fire safety purposes; and (3) the "existing native vegetation located south of the proposed structures shall remain standing on the property," "[v]egetation removal shall not expose the structures as viewed from" a certain nearby road, and "[a]ll trees proposed for removal to accommodate the construction of the residence and garage shall be indicated on the construction site plans and evaluated by the architect." The County imposed these conditions over appellants' objections.

After unsuccessfully appealing the second and third conditions to the County's board of supervisors, appellants filed a complaint and petition for writ of mandate in Nevada County Superior Court. According to appellants, the County's conditions prohibiting them "from removing trees or vegetation growing on" parts of their property constituted an unlawful "exaction" in violation of the Fifth Amendment of the United States Constitution. Appellants asked the court to strike the County's tree maintenance conditions and award it compensatory damages and other costs of suit.

In its initial decision, the trial court agreed the County erred in imposing these conditions. The court found the County failed to establish that appellants' proposed home and garage would lie on a visually important ridgeline, and even if it did, the County failed

to establish that the proposed house and garage would impact the ridgeline. Even if these flaws were set aside, the court continued, the County went too far in imposing the condition requiring a negative deed restriction. That condition, the court found, went beyond what was necessary to address the project's potential impacts and thus constituted an unconstitutional taking of property. The court added that this negative easement condition was also unconstitutionally vague. The court remanded the matter back to the County and informed the parties that it would set the trial on the compensation issue at a later date.

On remand, the County reconsidered and reapproved appellants' application, subject to three conditions that in many respects mirrored the previous imposed conditions. As conditions of approval, the County wrote, (1) the house and garage could not exceed certain specified height limits; (2) the property owner must agree, in a recorded deed restriction, (a) to replace dead, downed, or dying trees that are removed from a designated part of the property and (b) not to remove or thin trees in this designated area unless a biologist or arborist concludes the tree is dead or dying or a fire district finds removal or thinning necessary for fire safety purposes; and (3) the "existing native vegetation located south of the proposed structures shall remain standing on the property," "[v]egetation removal shall not expose the structures as viewed from" any public roads or parks, and "[a]ll trees proposed for removal to accommodate the construction of the residence and garage shall be indicated on the

construction site plans and evaluated by the architect." The County's second condition, although using language largely identical to that used in its earlier conditional approval, now covered an area that was about a third smaller from the previous restricted area. The County also, in its reapproval, made several findings in support of its conclusion that appellants' proposed project would impact a "visually important ridgeline."

After unsuccessfully appealing the new conditions to the County's board of supervisors, appellants filed a supplemental complaint with the trial court. In their supplemental complaint, appellants claimed the County's conditional reapproval suffered from the same flaws the court found in the County's previous conditional approval.

The court agreed the County's conditions remained flawed, though for reasons other than the ones appellants raised. Although finding the County had "remedied substantially all of the defects found present in the initial writ hearing," the court now found an additional flaw in one of the County's conditions for approval. The court concluded the County's second condition, the deed restriction, was inconsistent with Civil Code section 815.3. Under section 815.3, the court noted, counties may obtain conservation easements that are voluntarily conveyed, but they may not demand conservation easements as a condition to issuing a land use approval. Because, in the court's view, the County's deed restriction condition was in effect a conservation easement, the court found the County's attempt to impose this condition violated section 815.3.

It thus directed the County to issue the building permit without this condition.

After further briefing from the parties, the court modified its reasoning and expanded its ruling to cover both the County's second and third conditions. Setting aside its finding based on Civil Code section 815.3, the court now focused on the County's Ridgeline Ordinance. The County purported to impose its three conditions based on the Ridgeline Ordinance, but, the court found, that ordinance did not apply to individual building permits like that here. Because the County thus had no authority to impose these three conditions, the court found all the conditions improper. The court thus struck the two conditions appellants challenged—that is, conditions two and three. The court also briefly addressed whether the County's attempt to impose these conditions violated the takings clause. Although the court earlier wrote the County's actions resulted in a taking, the court now explained no final judgment had been issued on that topic and none would be issued until after the inverse condemnation trial.

Following the inverse condemnation trial, the court issued its final statement of decision on appellants' petition and complaint. Agreeing with appellants, the court found the County's tree maintenance conditions "operate[d] as an exaction" and lacked the required "nexus" and "rough proportionality" to the effects of appellants' proposed land use. Although the court suggested these requirements of "nexus" and "rough proportionality" would have been satisfied had the Ridgeline Ordinance been applicable, it found

neither requirement could be satisfied when, as here, the County acted without authority.

But although finding an improper exaction, the court ultimately found no unconstitutional taking of property had occurred. The County's conditions did not result in a permanent taking, the court wrote, because the court eliminated those two conditions in the writ proceedings. Nor, the court found, did the County's conditions result in a compensable temporary taking considering *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006. The California Supreme Court there considered "whether a legally erroneous decision of a government agency during the development approval process resulting in delay constitutes a temporary taking of property." (*Id.* at p. 1018.) It ultimately concluded it did not because a normal delay, by itself, does not constitute a temporary taking (*id.* at p. 1021), unless the government's conduct was "so objectively unreasonable as to give rise to the inference that it was adopting that position solely for purposes of delay or some other illegitimate reason" (*id.* at p. 1025). Applying *Landgate, Inc.*'s reasoning, the trial court rejected appellants' takings claim because they had not shown that the County's conduct either caused "something more than mere delay in the permit process" or was based on some illegitimate motive.

Appellants timely appealed.

DISCUSSION

I

A

The takings clause of the Fifth Amendment, made applicable to the states by the Fourteenth Amendment, "provides that private property shall not 'be taken for public use, without just compensation.'" (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 536 (*Lingle*).)

The United States Supreme Court has identified two general categories of takings: "physical takings" and "regulatory takings." (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (2002) 535 U.S. 302, 321.) A physical taking, the classic type of taking, is based on the government's "'"direct appropriation" of property, or the functional equivalent of a "practical ouster of [the owner's] possession."' [Citations.]" (*Lingle*, *supra*, 544 U.S. at p. 537.) Government conduct that matches this description (e.g., when the government seizes property under its condemnation power) will generally be deemed a taking based on "the straightforward application of *per se* rules." (*Tahoe-Sierra Preservation Council, Inc.*, at p. 322.) A regulatory taking, in turn, is based on government regulation that, generally stated, goes "'too far'" in restricting a landowner's use of his or her property. (*Lingle*, at p. 537.) To determine whether a regulation has gone "too far," courts usually—rather than apply *per se* rules—consider "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with

reasonable investment-backed expectations, and the character of the government action." (*Palazzolo v. Rhode Island* (2001) 533 U.S. 606, 617.)

Apart from these two general categories of takings, the Supreme Court has also identified a "special" category of takings claims for "land-use exactions." (*Lingle*, *supra*, 544 U.S. at p. 538.) A land use exaction occurs when the government demands property from a land use permit applicant in exchange for permit approval. (See *Koontz v. St. Johns River Water Management Dist.* (2013) 570 U.S. 595, 599 (*Koontz*).) The leading examples of "exactions" come from the Supreme Court's decisions in *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 (*Nollan*), *Dolan v. City of Tigard* (1994) 512 U.S. 374 (*Dolan*), and *Koontz*. In *Nollan*, the California Coastal Commission had conditioned its grant of a permit to landowners who sought to rebuild their house on their agreeing to transfer to the public an easement across their property. (*Nollan*, at p. 827.) In *Dolan*, a city had conditioned its grant of a permit to a property owner who sought to increase the size of her existing retail business on her agreeing to dedicate a portion of her property to the city for use for a bike path and for flood control purposes. (*Dolan*, at p. 377.) And in *Koontz*, a water district had conditioned its grant of a permit to a landowner who sought to develop 3.7 acres of an undeveloped property on his agreeing to spend money to improve certain lands the water district owned. (*Koontz*, at pp. 599-602, 614.)

To determine whether these types of demands are impermissible, courts apply a "special application of

the 'doctrine of "unconstitutional conditions."'" (*Lingle*, *supra*, 544 U.S. at p. 547.) Under that doctrine, the government may not ask a person to give up a constitutional right (e.g., the right to receive just compensation when property is taken for a public use) "in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." (*Dolan*, *supra*, 512 U.S. at p. 385.) Applying that doctrine in the context of land use exactions, the Supreme Court has placed two requirements on governmental entities when they demand property from applicants in the land use permitting process. The government must show (1) a "nexus" between the government's legitimate regulatory interest and the property demanded (*id.* at p. 386), and (2) "'rough proportionality'" between the property demanded and "the impact of the proposed development" (*id.* at p. 391).

Unlike most takings claims, exaction claims are not necessarily premised on the taking of any property. As the Supreme Court explained in *Koontz*, the principles undergirding the court's exaction cases "do not change depending on whether the government *approves* a permit on the condition that the applicant turn over property or *denies* a permit because the applicant refuses to do so." (*Koontz*, *supra*, 570 U.S. at p. 606.) In both circumstances, the court found, the condition is improper if it lacks the requisite nexus and rough proportionality. (*Ibid.*; see also *id.* at p. 607 ["Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not

because they take property but because they impermissibly burden the right not to have property taken without just compensation."].) But, the court emphasized, "[t]hat is not to say . . . that there is *no* relevant difference between a consummated taking and the denial of a permit based on an unconstitutionally extortionate demand. Where the permit is denied and the condition is never imposed, nothing has been taken. While the unconstitutional conditions doctrine recognizes that this *burdens* a constitutional right, the Fifth Amendment mandates a particular *remedy*—just compensation—only for takings. In cases where there is an excessive demand but no taking, whether money damages are available is not a question of federal constitutional law but of the cause of action—whether state or federal—on which the landowner relies." (*Id.* at pp. 608-609.)

B

Appellants' principal contention on appeal concerns the trial court's finding that they were not entitled to compensation. As they note, the court found the County's conditions "operate[d] as an exaction" and lacked a "nexus" and "rough proportionality" to the effects of appellants' proposed land use. And as they further note, the court nonetheless declined to rule in their favor because they had failed to show, in addition to the lack of "nexus" and "rough proportionality," that the County's conduct either caused extraordinary delay or was based on some illegitimate motive. According to appellants, the court erred in imposing this third

requirement on top of the nexus and proportionality requirements.

In evaluating appellants' claim, we consider first whether the County's conditions could be characterized as an "exaction" subject to the "nexus" and "proportionality" requirements. Because we conclude they could not, and because appellants' takings claim was solely premised on their exaction theory, we find the trial court appropriately declined to rule in appellants' favor on their takings claim.

The California Supreme Court's reasoning in *California Building*, *supra*, 61 Cal.4th 435 is particularly instructive to our analysis. The court there considered what qualifies as an "exaction" within the meaning of *Nollan*, *Dolan*, and *Koontz*—the United States Supreme Court's lead exaction cases. Reviewing these three cases, the court found nothing in these cases suggested "the unconstitutional conditions doctrine . . . would apply where the government simply restricts the use of property without demanding the conveyance of some identifiable protected property interest (a dedication of property or the payment of money) as a condition of approval." (*California Building*, at p. 460.) Rather, the court explained, "[i]t is the governmental requirement that the property owner convey some identifiable property interest that constitutes a so-called 'exaction' under the takings clause and that brings the unconstitutional conditions doctrine into play." (*Id.* at pp. 460-461.)

Based on this reading of *Nollan*, *Dolan*, and *Koontz*, the court upheld a residential inclusionary zoning ordinance that required developers of residential properties of 20 or more units to set aside 15 percent of units for sale at an affordable price. Although a building association contended the ordinance was an unconstitutional exaction under the state and federal takings clauses, the court found the ordinance could not be characterized as an exaction because it did not require developers to convey any property interest. (*California Building*, *supra*, 61 Cal.4th at p. 461.) "Rather than being an exaction," the court explained, the ordinance falls within "municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large." (*Ibid.*)

Other courts have found similarly on facts more comparable to our own. The Federal Circuit's decision in *Norman v. United States* (Fed.Cir. 2005) 429 F.3d 1081 is a notable example. The appellants there were real estate developers who sought to develop commercial buildings on lands previously used for ranching and agricultural activities. (*Id.* at p. 1085.) During the development process, the Army Corps of Engineers identified several acres of wetlands that would be impacted by the proposed project. (*Ibid.*) To mitigate for the loss of those wetlands, the Army Corps of Engineers issued a permit requiring the appellants to record deed restrictions to protect certain other wetlands they owned as "'wetland preserves and wildlife habitat in perpetuity.'" (*Id.* at p. 1087.) The appellants

afterward filed suit alleging, among other things, that the permit effected an unconstitutional exaction under the logic of *Nollan*. (*Norman*, at p. 1089.) But the Federal Circuit disagreed. *Nollan*, the court explained, "involved the use of a permit process to exact from a landowner an easement allowing public access across his land"—a type of physical intrusion. (*Norman*, at p. 1089.) But "[n]o such physical intrusion" resulted from the permit's requirement that the appellants protect certain wetlands on their property. (*Ibid.*) And given the absence of any physical intrusion or loss of exclusive possession, the court found the permit did not "'exact' possession of the land." (*Ibid.*)

We likewise find the County's conditions here cannot be characterized as an "exaction" under the *Nollan*, *Dolan*, and *Koontz* framework. As the *California Building* court explained, "[i]t is the governmental requirement that the property owner *convey* some identifiable property interest that constitutes a so-called 'exaction' under the takings clause and that brings the unconstitutional conditions doctrine into play." (*California Building*, *supra*, 61 Cal.4th at pp. 460-461, italics added.) Indeed, *Dollan*, *Nolan*, and *Koontz* all involved government demands that the landowner convey a specific property interest to the public. (See *Koontz*, *supra*, 570 U.S. at pp. 599, 614 [demand for monetary expenditure]; *Dolan*, *supra*, 512 U.S. at p. 377 [demand for land for bike path and flood control purposes]; *Nollan*, *supra*, 483 U.S. at p. 827 [demand for easement across property].) They all involved, in other words, government demands that if carried out

outside of the permitting process would have involved "*per se* physical takings" of property from the landowner. (*Lingle*, *supra*, 544 U.S. at pp. 546-547; see also *Koontz*, at p. 614 [noting petitioner's claim rested not on "*regulatory* taking" principles but on a "'*per se* [takings] approach'"].)

But not so here. The County's permit conditions, reduced to their essence, required appellants to maintain a tree screen to prevent the neighboring public from seeing their garage. To achieve this end, the County directed appellants to maintain the trees and vegetation located in a certain area of their property. None of the County's conditions interfered with appellants' right to exclusive possession of their property. Nor did any of the County's conditions require appellants to convey any part of their property. The County instead sought to restrict appellants' use of a portion of their property to maintain the existing tree screen. And under the reasoning of *California Building*, a government condition that "restricts the use of property without demanding the conveyance of some identifiable protected property interest" is not an "exaction." (*California Building*, *supra*, 61 Cal.4th at p. 460.)

Appellants never contend otherwise in their briefing. They instead argue the County forfeited this issue by failing to file a cross-appeal challenging the court's finding that the permit operated as an exaction. In support, appellants rely on *Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560 (*Preserve Poway*) and *Estate of Powell* (2000) 83 Cal.App.4th 1434 (*Estate of Powell*)—two cases where the respondent, who

filed no cross-appeal, sought "*reversal* of the judgment and entry of a new judgment more favorable to him." (*Estate of Powell*, at p. 1439; see also *Preserve Poway*, at p. 587.)

But the County does not seek "*reversal* of the judgment and entry of a new judgment more favorable to" it. It instead seeks affirmance of the judgment on a different ground. And as both of appellants' cited cases explain, that is perfectly permissible. The court in *Estate of Powell*, for example, explained that Code of Civil Procedure section 906 allows a respondent who has not filed a cross-appeal " 'to assert a legal theory which may result in affirmance of the judgment.' [Citation.]" (*Estate of Powell*, *supra*, 83 Cal.App.4th at p. 1439.) The *Preserve Poway* court likewise noted that Code of Civil Procedure section 906 "is intended to permit a respondent to assert a legal theory that will result in affirmance of the judgment notwithstanding an appellant's contentions." (*Preserve Poway*, *supra*, 245 Cal.App.4th at p. 586.)

II

Finally, appellants contend the trial court should have struck all the County's permit conditions rather than only the second and third conditions. But appellants fail to show they sought this relief in the trial court proceedings, and we find the claim forfeited as a result.

In their pleadings, appellants asked the trial court to strike only those "restrictions described in the

complaint"—namely, the conditions prohibiting them "from removing trees or vegetation growing on" parts of their property. The County's second and third conditions fit this description, but the first condition—which imposed a height restriction—did not. The court below thus described appellants' challenge in the writ proceedings this way: "Petitioners challenge Condition #2 and Condition #3 of the Management Plan required by the County in connection with the issuance of their building permit." And the court ultimately granted the very relief appellants requested by striking these two conditions.

Yet now appellants claim the court's ruling should have offered broader relief than they requested in their pleadings. Because they failed to demonstrate they sought this relief below, however, we find the claim forfeited on appeal. (See *Dietz v. Meisenheimer & Herron* (2009) 177 Cal.App.4th 771, 798 [party forfeited claims "by failing to demonstrate either that it preserved these arguments in the trial court, or that it may properly raise such arguments for the first time on appeal"].)

DISPOSITION

The judgment is affirmed. The County is entitled to recover its costs on appeal. (Cal. Rules of Court, rule 8.278(a).)

/s/
BLEASE, Acting P.J.

We concur:

/s/
HULL, J.

/s/
MAURO, J.

S. PAONE
FILED
AUG 17 2016
Superior Court of the
State of California
County of Nevada

IN THE SUPERIOR COURT OF
THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF NEVADA

JULIET ERICKSON and PETER LOCKYER,

Petitioners/Plaintiffs,

vs.

County of Nevada,

Respondent/Defendant,

CASE NO.: CU13-079389

STATEMENT OF DECISION

This matter involving joined claims of administrative mandamus and inverse condemnation came on for hearing and trial to the Court without a jury on three separate occasions. On motion by the respondent and defendant County of Nevada ("respondent", "defendant", or "County"), and over the objection of plaintiffs and petitioners Erickson and Lockyer ("plaintiffs", "petitioners", "the Lockyers", or [in citing arguments] "Erickson") the proceedings in mandamus were bifurcated from the proceedings in inverse condemnation, and the former were heard first. Plaintiffs and petitioners throughout have been represented by Haley & Bilheimer, of Nevada City (Allan S. Haley and John G.

Bilheimer, Esqq.), and Montague & Viglione, of Sacramento (John D. Montague and Dennis Viglione, Esqq.). Defendant and respondent was represented throughout by the Office of County Counsel (Alison Barratt-Green, Amanda Uhrhammer and Scott A. McLeran, Esqq.) and also by Colantuono, Highsmith & Whatley, of Grass Valley and Los Angeles (Michael G. Colantuono, Jennifer L. Pancake and Ryan Thomas Dunn, Esqq.).

Notices were given as required by law. At each stage of the proceedings, the Court considered the evidence and arguments of counsel.

The action generally involves Erickson's efforts to secure a building permit for the construction of a residence, garage/office on property situated along a ridge top above Lake Wildwood, Nevada County California. The Nevada Irrigation District owns adjoining property on which there are located two large highly visible brown water storage tanks. Additionally, there is located on the NID property a camouflaged cell communications tower, the construction of which was opposed by Erickson and which was the subject of a separate proceeding that is now final following appeal. The approval and construction of the communications tower happened largely concurrent with Erickson['s] permit application and during the pendency of this action. Other structures are also visible on the ridge top.

PHASE ONE: INITIAL DETERMINATION OF PETITIONERS' WRIT

(In its Tentative Decision, the Court relied upon and incorporated its prior findings in the Writ phases. One or both parties requested that these findings be set forth in full in this Statement of Decision.)

The Petition for Writ of Mandate initially was granted. Further, the Court found Condition #2 [] constituted a taking.[1] The matter was remanded for further administrative proceedings to correct the problems found by the Court.

The Phase One Writ was decided on the following basis:

A) Factual Background

Petitioners applied for a building permit. County, citing its Visually Important Ridgeline (VIR) ordinance[2], required a Management Plan for trees along the ridge line stating that a VIR was implicated by Petitioners' proposed project. Petitioners, through their architects, submitted a proposed Management Plan dated June 1, 2011 to address the County's concerns. (AR 008-009) On August 12, 2011, after reviewing the plan and the County's contour maps, County provided

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[1] This finding was subsequently clarified as "prospective and contingent" prior to the Eminent Domain Phase of the proceedings in the Court's Pretrial Rulings and Order filed 8/25/2015.

[2] Nevada County Land Use Code Section L-II 4.3.16, quoted in full, below.

an initial conditional approval requiring, among other things, 1) a maximum height limitation for Petitioners buildings, 2) the recordation of a deed restriction concerning maintenance, removal and replacement of trees within a designated area, and 3) a restriction on removal of native vegetation to the south of the proposed structures, review of the same during construction and site planning processes and a prohibition of removal that would expose the structures as viewed from Pleasant Valley Road. However, in issuing its conditional approval, the County expanded the proposed areas of protective tree cover, ultimately making it quite a bit bigger[3] than the architect's proposal. (AR 109)

Petitioners objected to the second and third conditions and to the scope of the restricted area. After hiring SCO Engineering to prepare and submit line of s[ight] analysis, Petitioners objected to the larger restricted area and submitted a proposed modified restricted area.

Following meetings attended by County Counsel and the Petitioners' attorney, County staff made a site visit and made further changes to the restricted area. These changes were rejected by Petitioners, which resulted in an impasse (AR 491-492), and a revised Management Plan Condition Approval was issued on July 12, 2012.

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[3] Hereafter, the Court may refer to the area proposed to be covered by the restrictive deed, in whatever configuration, as the "restricted area".

About the same time, the County approved the construction of a cell phone tower on the property adjacent to that of the Petitioners. Petitioners contended that the tree protection on their property was really intended to provide backdrop for the cell tower, not for their proposed structures.

Petitioners appealed Conditions #2 and #3 to the Board of Supervisors. County staff presented its case with respect to each of the line of sight survey lines identified by SCO in defining the restricted area, superimposed on the Counties GIS mapping system. For the purposes of this proceeding, as identified in the BOS appeal, they are:

Profile #I: Green line

Profile #2: Red line

Profile #3: Blue line

Profile #4: Yellow line

These designations are made with respect to the administrative record AR 0211-0217, AR 0112-0114. The profiles largely dictated the configuration of the restricted area to the south and east. To the west, an additional area of restriction was imposed to block views from an existing residence (seen on the right in AR0217), which said area was included, per staff, because "that was an area that the appellants' attorney had originally proposed". (AR 0113)

Staff concluded that its restricted area configuration was justified by the Petitioners' SCO Survey data[:]

> So the conditions and the restrictions with regard to the argument that these restrictions go far beyond what is required to screen the rooftop, I think in that last analysis it indicates that the polygon that we ultimately came up with was essentially justified by the GSO (sic) surveys and the appellants state that these surveys prove that the building be at the point of survey but the area behind that point of origin makes that sight invisible and to that we disagree because of the topography and the elevation would change the profile line of sight. (AR 0113-0114)

This "justification" is anything but clear.[4] However, it appears what staff was arguing was that, based on topography alone, the project would be visible within line of sight Profiles # 1, 2, and 4 (assuming no vegetation), but not visible within Profile #3. As explained by staff:

> The standards set forth in, again, 4.3.16 C.1 requires that in no case shall the roof line or any portion of the structure extend above the visually important ridge line. And to this I want to state that if – in the prior appeal, if we use the argument that the ridge line is the ground line, then we have a 20 foot conflict. But we have consistently used the vegetation. So as long as the vegetation screens the home and the proposed structure, staff was okay with that. The only thing that the

[4] Petitioners contend that County staff simply were unable to properly read the line of sight surveys.

> management plan is intended to do is to protect those areas.[5]

Because of this conclusion, vegetation screening was required within the polygonal shaped restricted area. (AR 0114) Staff concluded:

> Therefore, staff concludes approval of this management plan is only focused on the standards set forth in Section 4.3.16, which are intended to protect the visually important ridge lines, and that the management plan approval essentially incorporates those three recommendations of the appellants' own architect on their June 7th management submittal as well as the line of sight profiles submitted by SCO Engineering. And therefore staff is recommending that you adopt the attached resolution to today's staff report and deny this appeal. [ ] (AR 0115)

Thereafter, the BOS denied the appeal in BOS Resolution 12-481. Petitioners filed their writ petition and complaint for inverse condemnation. This ruling addresses the Petition for Writ of Mandate.

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[5] This explanation was made in reference to the Petitioners' appeal of the cell tower on the adjoining NID land in which Petitioners argued that the cell tower constructed above grade should be subject to the same visual standards as the Petitioners' project. The BOS determined that the disguised cell tower within the tree canopy did not visually impact the subject ridgeline. That appeal was decided by the BOS as the agenda item immediately prior to the Petitioners BOS appeal herein.

B) Standard of Review

Pursuant to Code of Civil Procedure § 1094.5 (b), the inquiry in an administrative writ proceeding shall extend to whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. To prevail on grounds of abuse of discretion, plaintiff must establish that the County did not proceed in the manner required by law, its decision is not supported by the findings, or the findings are not supported by the evidence.

Where it is claimed that an agency's decision is not supported by findings, the inquiry is whether the agency rendering the adjudicatory decision set forth findings that enable a reviewing court to trace and examine the agency's mode of analysis and bridge the analytical gap between raw evidence and the decision or order. Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 515.

Petitioner has the burden of proof in an administrative mandamus proceeding in establishing that an agency's decision should be set aside. Arwine v. Board of Med. Examiners (1907) I 51 Cal. 499, 503; Evidence Code §664. In reviewing the evidence, all conflicts must be resolved in favor of the prevailing party. Western States Petroleum Assoc. v. Superior Court (1995) 9 Cal.4th 559, 571.

C) The VIR Ordinance:

Section L-II 4.3.16 Visually Important Ridgelines and Viewsheds

A. Purpose. To protect the natural appearance and aesthetic quality of visually prominent ridgelines and large-scale viewsheds.

B. Definitions.

1. Visually Important Ridgelines And Viewsheds – Visibly prominent ridgelines, and large-scale viewsheds considered to be of high natural scenic quality and are highly visible from public roadways, parks and other public places.

C. Standards.

1. In no case shall the roofline or any portion of a structure extend above a visually important ridgeline.

2. Site grading shall not alter the existing silhouette of visually important ridgelines.

3. When the County determines that a project may impact a visually important ridgeline or viewshed, a Management Plan shall be prepared by a land use planner, an architect, or landscape architect. This determination may be based on a County-wide or area-wide inventory of visibly prominent ridgelines and large-scale viewsheds, or, in the absence of an inventory, upon a determination that the proposed project may be likely to impact a visually important ridgeline or viewshed.

The Management Plan shall include a Visual Analysis which shall normally include a determination

> of the geographical location and level of visual quality of the defined area. It shall normally include a determination of the number and type of existing and potential viewers, viewing distance, angle, focal point, and landscape and topographic variety and uniqueness. The Management Plan shall delineate specific protective measures and impact controls necessary to minimize visual impact to the maximum extent possible.

D) Analysis

By their Petition for Writ of Mandate, Petitioners challenge Condition #2 and Condition #3 of the Management Plan required by the County in connection with the issuance of their building permit. These conditions raise the following issues in this proceeding and whether required findings on such issues were made below, and if so, whether the findings were supported by substantial evidence. The issues presented by Conditions #2 and #3 are:

1. Whether a visually important ridgeline (VIR) was found to exist;

2. If so, whether any portion of the project extends above the VIR;

3. If so, whether the project is likely to impact the VIR;

4. If so, whether a Management Plan may be required;

5. If so, whether the Management Plan is reasonably related to the impact of the project

6. If not, are the County's proposed conditions a "taking" for the purposes of the companion inverse condemnation cause of action.

Petitioners assert three grounds for writ relief in their Corrected Complaint filed May 17, 2013:

1) No findings based on substantial evidence;

2) The restrictions imposed are not reasonably necessary to effectuate a substantial governmental purpose; and

3) The County's conduct constitutes a taking in violation of Plaintiffs' 5th Amendment constitutional rights.

In its Opposition, County argued that if the court determines at the writ stage that there has been no compensable taking, then the inverse condemnation cause of action need not be tried. Petitioners responded in their Reply Brief that Healing v. California Coastal Com. (1994) 22 Cal.App.4th 1158 dictates that "it is at the takings trial that the court determines whether a compensatory taking has occurred." Thus, Petitioners argued, while the Court at this stage may find the evidence sufficient to show a taking, the absence of such a finding does not equate to a finding that no taking has occurred, in which case, that issue is preserved for trial in the inverse condemnation phase. Petitioners are correct.

Separately, County argued that it is not properly held to a strict standard in evaluation of the evidence. County argued the evidence and findings are simply good enough to justify to the conditions imposed. Petitioners argued that the County's justification does not even meet a reduced standard, that is, that the analytical gap is simply too wide to bridge in the record before the Court. The Court also agrees.

I) Visually Important Ridgeline Finding

Petitioners first argued that the County failed to make any findings that the ridgeline on which Petitioners propose to build their home is a Visually Important Ridgeline. The Court agrees.

County argued that Petitioners waived any argument that the ridgeline in question was a VIR; however, the imposition of a Management Plan pursuant to the VIR ordinance is predicated on a finding that the ridgeline in question is in fact a VIR as defined in the ordinance. In order [for] the Petitioners to challenge the constitutionality of the negative easement, they must be permitted to establish all facts supporting that challenge. As Petitioners [] point out, constitutional issues can be raised at any time because neither the BOS nor the Planning Department sit in adjudication of constitutional issues.

The Court also notes that Petitioners did not waive this argument by failing to raise the issue at the appeal hearing. While not articulated perfectly, Petitioners did object, stating, "There was no evidence

whatsoever presented at the Verizon hearing, however, that the ridgeline when viewed from the east was visually significant to anyone." [AR 0068-0069.]

County argued that Petitioners' public stance in the cell tower proceedings shows their acknowledgment that the ridge is prominent, a fact found true in BOS Resolution 12-481. But in that proceeding, no determination was made that the ridge was a VIR. Further, even if this served as an evidentiary basis for a VIR finding, it cannot be the sole evidentiary finding because 1) Petitioners were entitled to change their position because the County rejected application of the VIR ordinance in that proceeding and made no VIR finding[6], 2) other evidence of ridgeline visibility is insufficient to establish the ridgeline as a VIR[7], 3) the assumption of the existence of a VIR that permeated the proceedings is not a substitute for evidence or required findings, 4) the Petitioners' cooperation in attempting to comply with the County's demands is not

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[6] In that proceeding, then on appeal, this Court found that, contrary to the County position, the VIR ordinance should have been considered under the facts of that case. The Appellate Court affirmed this trial court, but found oppositely, that is, that the VIR ordinance had no applicability to the communications tower application. In essence, this Court's analysis affirming County's approval of the cell tower relied on an attempt to harmonize various County ordinances, but the Court of Appeal decided the matter on the basis of the application of one ordinance being more specific than the other. The appeal is now final and County is judicially estopped to argue that a VIR finding was made in the cell tower proceedings because the VIR ordinance was not at issue.

[7] Visibility supports, but does not equate to "prominent" or "important" or "scenic".

a substitute for evidence or required findings, 5) the facts must show that the ridge is not only prominent, but that it is "of high natural scenic quality". As to this last point, the facts show that no "scenic" finding was ever made, no evidence was produced as to any scenic value, and in fact, the prominent scenic features of the ridge are two large NID water tanks sitting just below the summit of the ridgeline, sadly lacking in any natural scenic beauty.[8]

The County relied on site plan notes from 4/4/11 providing that the County's Zoning Administrator had determined that the ridgeline was a VIR. [AR 0485.] The appeal findings state: "Whereas, when reviewing the Appellants' building pemlit the Planning Department determined that the height of the two-store garage and office structure atop this ridgeline was likely visible from portions of Pleasant Valley Road and therefore pursuant to L-II 4.3.16 of the Zoning Ordinance required that a Management Plan be prepared." [AR 0286-0288.]

This finding is also insufficient as it provides no factual basis for the Zoning Administrator's decision. Rather, it simply assumes the correctness of that determination to support the conditions imposed under the ordinance. All other factual findings of BOS

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[8] And, yes, even though the tanks are not sitting strictly atop the ridgeline, they needed to be considered when making a finding of scenic value. They are part and parcel of the panoramic context of this ridgeline.

Resolution 12-481 likewise make the same assumption of correctness.

County argued that Petitioners' cooperation in submitting a Management Plan shows that they failed to object. This is disingenuous. The fact that the Petitioners cooperated toward the goal of the County issuing their permit should not be confused with "agreement" under circumstances where the cooperation was subsequently withdrawn at the point they believed the County was overreaching. As Attorney Haley pointed out in his April 10, 2012 letter, the sequence of events was an evolving one. (AR0491-0492)

Finally, County argued that the VIR finding is of little import. The Court could then simply refer the matter back to the BOS for the correct determination, pointing out something to the effect that it was clear at this time what the outcome would be. This argument is as troubling as it is improper, invoking the concept that the BOS would simply make a pre-determined finding without a meaningful hearing and in direct violation of the Petitioners' due process rights.

II) Findings Regarding Impacts

Petitioners' second argument is that there are no findings in the administrative record showing how Petitioners' project may impact the ridgeline. As noted above, staff presentation articulated the County's position – "we have consistently used the vegetation (as the ridgeline). So as long as the vegetation screens the home and the proposed structure, staff was okay with

that." However, the VIR ordinance standards are that "In no case shall the roofline or any portion of a structure extend above a visually important ridgeline." County relies on its finding that the roofline will be slightly above the ridgeline elevation, without reference to the vegetative tree cover which the County defines as the ridgeline. There was no finding or evidence of any kind that the roofline in this case would extend above the existing vegetation. Rather, the County's action was based entirely on apprehension that the vegetative canopy may one day be removed. In fact, the entire stated purpose of the Management Plan was explained by staff to the BOS as follows: "The only thing that the management plan is intended to do is to protect those areas" of existing vegetation.

The VIR ordinance provided that a Management Plan may be required when the County determines the project "may be likely" to impact a VIR. The apprehension expressed by the County fails to meet the "may be likely" test. No finding or evidence was in the record showing more.

The line of sight surveys do not support the county position. While they all show topography, none show the project lacking screening tree cover. The only other evidence in the record is the representation that staff made "notes" from a site visit to verify and consider the line of sight surveys and these notes (which are not in the record either verbatim or in summary form) are the basis for the configuration of the restricted area. (AR 0111) Again, the Court is left with no tangible evidence

to support application of the VIR ordinance, and hence, the negative easement deed.

However, even assuming the County had made required findings, the conditions attached to the Management Plan go too far. For example, under Condition #2 of the plan, Petitioners are required to maintain in perpetuity trees that are several hundred feet downslope and removed from the ridge top. This is the area bounded by Profiles #3 and #4. Apparently, the determination for this area was based only on Profile #4, where, because of the shallow incline, there exists more of a horizontal buffer of trees (which, it is noted, are not drawn to scale). The topography at Profile #3, to the immediate left of Profile #4, is steeper. Obviously, there must be some transition between the two, but it appears that was not taken into account. Further, even assuming that Profile #4 is the worst case scenario, it is clear that only trees immediately adjacent to the proposed structures need be maintained—enough trees to provide canopy coverage to the ridgeline, not all trees to the bottom of the property. Lower trees are important only if the upper ones are removed.

Petitioners briefing made the same argument as to Profiles #1 and #2. Even without Petitioners screening between the garage and the NID tanks, existing trees on NID property already screen the proposed garage. The state of the evidence is not to the contrary, yet the Petitioners are required to perpetually maintain trees in an area blocked by neighboring trees.

III) Permanent Dedication

Next, Petitioners contended that there is no connection between the potential impact of the project and the requirement for a permanent dedication. On the record before the Court, and for the reasons set forth above, the Court agrees. The proposed negative declaration is unsupported by the facts, and is overbroad, thus failing to show the proper nexus between the project and the condition. Because of this, the permanent dedication is constitutionally infirm and constitutes a taking or an exaction. The value of the taking is a question to be resolved at the trial in this matter set for July 22, 2014.

IV) Vagueness

Lastly, Petitioners argued that the negative easement required by the County is unconstitutionally vague and impossible to enforce. Again, the Court agrees.

Petitioners alleged that the terms of the negative easement are unconstitutionally vague and unenforceable. For example, Petitioners state that terms such as the "thinning of trees" is vague; that the removal or thinning required depends upon an evaluation of an unknown biologist who may be listed on the County website and whose credentials are unspecified; there are no provisions for any review or appeal; and that the easement does not clearly provide a description of replacement trees, as there is an unknown size, unknown number, and an unknown ratio.

However, the negative easement specifies that the biologist shall be qualified and listed on the Planning Department website. It further states that thinning shall only be completed as recommended by the Penn Valley Fire District for fire-safety purposes. The ratio of replanted trees shall be specified by the biologist.

While the terms are generalized, it is written with certain hard-set facts and factors to clarify the open-ended terms as the needs arise. If thinning of trees is done, it's with approval of the Fire District. Replanting of trees shall be specified by the biologist who is named on the Planning Department's website. If a specific name were provided in the easement, it could not be enforced if that individual were to retire or be unavailable. The terms of the easement are flexible and elastic, allowing for eventualities that may ensue over the course of many years.

That said, the deed restriction is fatally vague.

First and foremost, no mechanism was included in the deed or in County ordinances for the resolution of potential conflicts among the property owners, the County, the biologist, and the fire department. No avenue of relief is afforded concerning the decisions of any agency or person.

Secondly, as a practical matter, County could not confirm at oral argument that any biologist was on board or listed at its website, leaving the condition illusory.

Third, the restriction failed to address the impact of additional man planted or natural trees or new growth that might impact sightlines to the proposed structures. It restricted any tree removal to dead or dying trees (unless the term "thinning" also includes removal), including those trees that presently do not exist, and it does so in perpetuity.

Fourth, the term "thinning" was fatally vague. One cannot determine if it means removal of limbs or removal of trees. While it is also fatally overbroad, it failed to address thinning of seedlings and small trees that would naturally be seeded and grow from the existing canopy.

Fifth, the deed provided no standards for evaluations made by a qualified biologist, other than to determine if a tree is dead or dying, and then to impose conditions of replacement. It was unclear whether the biologist can or must be qualified to consider or recommend other actions to save a tree, or to implement generally accepted arboricultural, forestry or fire prevention standards and practices.

Sixth, while the deed addresses fire department recommendations, it failed to address fire department orders. It also assumes that the Penn Valley Fire District will remain in perpetuity and that fire jurisdiction will not transfer to another county, district or state agency, and further assumes that no other fire agency with jurisdiction will provide recommendations or impose fire prevention orders.

Seventh, the deed was vague as to the terms "removed" or "removal". In particular, are downed trees (i.e., from wind, lightning, disease, fire, etc.) removed for the purposes of imposing an obligation to replace them?

Eighth, the deed was vague as to the term "specifically screen" the proposed structures. Does this mean all trees in the restricted area, or just those that directly screen the structures? Does this include downslope trees that do not screen the structure unless upslope trees are removed?

Accordingly, the Court found that the deed restriction terms were so vague as to be both unconstitutional and unenforceable.

E. The Court Concluded:

"The Court is mindful of the challenges inherent in implementing an ordinance for the first time and the Court's obligation not to simply substitute its judgment for that of the County. No determination is made that the ridgeline in question is a VIR, nor does the Court propose any specific measures should that determination ultimately be made. Unfortunately, the record is permeated with distrust. Each side views the other as acting in bad faith, to the point that Petitioners believe further negotiation would be futile, even though, in the Court's view (and apparently in that of the BOS) there is plenty of room for resolution short of further contested hearings and writ proceedings. The parties may wish to consider whether a recorded deed

restriction is really necessary. But whatever the future holds for these parties, the County must act in accordance with its ordinance and due process. Nothing less is required."

Based upon the foregoing, the petition for writ of mandate was granted. The matter was remanded to the County for further proceedings consistent with this ruling. In the event County did not complete reprocessing of Petitioner's permit within 90 days from the date of filing the ruling, or in the event County earlier accepted the ruling as final, Conditions #2 and #3 of the Management Plan were to be ordered stricken as conditions of Petitioners' permit approval. The term "complete reprocessing of Petitioners' permit" meant a final determination of the Planning Department followed by the expiration of appeal time, or if further Appeal was taken to the BOS, the entry of a further BOS Resolution determining the issues. The Court reserved jurisdiction with respect to further proceedings involving any future BOS determination on the issues raised.[9]

PHASE TWO: WRIT DETERMINATION FOLLOWING COMPLETION OF REMAND

The Court's Initial Ruling on Phase Two (12/30/14):

After remand, County revised the approval conditions and, after further appeal, the BOS finalized the

[9] The Court made no determination at this stage of the proceedings as to whether the VIR ordinance was applicable to a building permit application.

conditions, including the proposed revised Conditions #2 and #3, including a revised deed restriction. The matter returned to Court on Petitioners' Supplemental Complaint. The Court initially concluded on December 31, 2014 that County could make VIR findings in the instant proceeding and that County had made adequate findings in that regard.[10] That finding, vacated in the 8/25/14 Pretrial Rulings and Order, is set forth in Appendix A (Foot notations added by Court for purposes of this Statement of Decision).

The Court also found that County had largely corrected the deficiencies found in Phase One.[11] Specifically, the Court found that the revised Management Plan, as amended by Board Resolution 14-397, was supported by the evidence and the VIR ordinance. The totality of the evidence from the prior permit proceedings and the remanded permit proceedings, including the evidence relied upon by the Board in its findings and the sightline evidence previously reviewed by the Court, provide substantial evidentiary support for the currently approved restricted area. In particular, the Court found:

a. The area of screening protection is downsized such that the issue of over-breadth found in the prior writ hearing has been resolved. The Court will not

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[10] This finding was nullified in the Court's 8/25/15 Pretrial Orders and Ruling.

[11] The findings on corrected deficiencies survive the rather extensive change in analysis and modification discussed *infra*, but are of no import given that the VTR ordinance itself is inapplicable.

second guess the Board findings on this issue. Further, because of the downsizing, the term "screening" is now sufficiently certain to be used in its ordinary sense, that is, to obscure sight, within the ridgeline, of the proposed garage.

b. The proposed deed restriction, based on the reduced area, now shows a sufficient nexus between the proposed project and the condition, such that the prior constitutional infirmity has been removed. The deed restriction no longer remains in perpetuity, but only so long as the project exists.

c. The provisions for thinning, removal, and for down and dead trees, are now sufficiently certain, setting forth an adequate process for determination of issues as they arise and considering relevant criteria such as biological, forestry and arboricultural issues. Tying the ratio of replanted trees to that in the general area of the removed tree is sufficiently certain.

d. The provision permitting satisfaction of screening by the owner agreeing to utilize trees off site (i.e., adjoining property) is unnecessary, but it is an accommodation that the Plaintiffs are permitted to utilize. No burden is placed on Plaintiffs as a result.

e. The provisions for review of an adverse County action are sufficient.

f. The provisions adequately address fire department orders and recommendations, regardless of changes in districts and jurisdictions.

g. The deed preparation provisions are ministerial in nature. The essential terms and conditions of the deed are set forth in the Management Plan.

Finally, the Court found that the restrictive deed was by statutory definition a conservation easement which could not be exacted in the permit process. Civil Code §815.3(b)[12]. The Court's reasoning in this regard is set forth in Appendix B.

County's Motion to Reconsider:

County moved to reconsider. Following full briefing, the Court reconsidered its 12/30/14 Ruling and modified and restated it without change in result, finding that Civil Code §815.1 negated a legitimate governmental interest where there was both a lack of authority in the VIR ordinance and a statutory prohibition in §815.1.

Court's Determination of Pretrial Issues and Its 8/25/15 Rulings and Order:

In connection with the then pending trial on inverse condemnation issues, the Court invited pretrial briefing and conducted extensive pretrial hearings in an effort to clarify trial issues. In the course of resolving constantly evolving arguments from both sides, and in order to avoid inconsistency in the later Phase Three Inverse Condemnation, it became clear, and the

[12] In its Pretrial Rulings and Order filed 8/25/2015, the Court determined this conclusion to be unnecessary.

Court so held, that County was without jurisdiction to apply its VIR ordinance to Petitioners' Building Permit Application. Because the Pretrial Rulings and Order detail the shifting positions of the parties and the Court's response, and because of its impact on the overall decision making in this action, a copy of the Pretrial Rulings and Order is set forth in full in Appendix C, and incorporated by reference as though fully set forth.

Conclusion:

Writ II was granted deleting permit Conditions #2 and #3 in their entirety, ordering County to issue the Erickson Building Permit. The Court further found that the permit applications did not expire because their issuance was tolled by County's improper application of the VIR ordinance to the Erickson permit. County was estopped to argue otherwise. Counsel for Erickson was to prepare the peremptory writ of mandate at such time as judgment was entered.

PHASE THREE: THE INVERSE CONDEMNATION TRIAL

The Inverse Condemnation phase proceeded to trial on January 5, 6, 7, 12 & 13, 2016 before the undersigned judge, sitting without a jury. The Court received documentary and oral evidence, considered the pleadings and the arguments of counsel following full briefing and issued its Tentative Decision. Following Proposals for content by both parties, the preparation of a Proposed Statement of Decision by Plaintiffs and

Objections by County, the Court elected to issue its own Statement of Decision, without further hearing, as stated herein.

As to the Inverse Condemnation phase, the Court finds by evidence more likely than not that:

1. Plaintiffs applied for a building permit on March 16, 2011.

2. As of the date of the Plaintiffs' application for building permit, County had made no prior finding of a visually important ridgeline (VIR) with respect to Plaintiff's property, or any property.

3. As of the date of the Plaintiffs' application for building permit, County had failed to properly identify the ridge as a resource subject to protection by the VIR ordinance. While there was some evidence that County considered the visibility of the ridgeline during the cell tower proceedings prior to the Plaintiffs' building permit application, there was no evidence at that time of any consideration of other VIR criteria contained in the County's VIR ordinance i.e., no finding that the ridgeline met the definition of a VIR per Land Use and Development Code § L-II 4.3.16. B. 1. ("Visibly prominent ridgelines, and large-scale viewsheds considered to be of high natural scenic quality and are highly visible from public roadways, parks and other public places.")

4. At best, County had examined the ridgeline under its cell tower ordinance (§ L-II 3.8.E) in connection with its approval of the Verizon cell tower on a neighboring parcel, but the VIR ordinance did not

apply to that proceeding, a conclusion later affirmed by the Third District Court of Appeal.

5. If it could be concluded that County had identified the ridgeline as a protectable resource, County did not do so in a way that would identify its extent, or which parcel or parcels were subject to that determination.

6. Despite its own ordinance and lack of a prior determination or identification, County wrongly determined that the Plaintiffs' building permit application was subject to the application of its VIR ordinance.

7. Prior to Plaintiffs' application for building permit, County had never applied or utilized the VIR ordinance. It had never made any finding in any public hearing or permit process that the ridge in question was a resource protected under the VIR ordinance. It had never required a management plan for any project, development or permit on the basis of the VIR ordinance.

8. County practice and procedure has been to apply all resource ordinances to building permits in the plan review process, but it had never had occasion to apply the VIR ordinance prior to considering Plaintiffs permit application.

9. County failed to distinguish between those resource standards applicable under Land Use and Development Code § L-II 4.3.2, and those not applicable.

10. County's position was and remains that the Planning Department in its plan review of building permits should and would consider the application

of all resource standards and it will not issue the Erickson permit without Erickson's compliance with Conditions #2 and #3, which conditions exist only as a result of the application of the VIR ordinance. County does not acknowledge that the language of Land Use and Development Code § L-II 4.3.2 excludes the VIR ordinance from application to the Erickson building permit.

11. In applying the VIR ordinance, County interpreted the term "ridgeline" to mean the top of the tree canopy, not the ground elevation. Plaintiffs proposed project did not extend above the existing natural tree canopy.

12. As a result of wrongly applying its VIR ordinance in processing Plaintiffs' building permit application, and as conditions of building permit approval, County imposed Conditions #2 and #3, relating to the maintenance of vegetative cover for the proposed construction. Plaintiffs objected to the conditions imposed and subsequently appealed the conditions to the Board of Supervisors (BOS), which denied the appeal. Plaintiffs timely filed this action.

13. During the planning review and appeal process, and in response to County's request for a Management Plan, Plaintiffs submitted site plans prepared by their engineer, Charles Durrett, and line-of-s[ight] surveys, photographs and analyses prepared by their line-of-sight expert, Martin Wood. Planners Todd Herman and Brian Foss made field inspections and took additional photographs. Attorney Allan Haley corresponded with the Planning Department concerning the issues. This

process eventually resulted in County imposing Conditions #2 and #3 and identifying a polygonal shaped area to which these conditions were applied. The conditions and affected area were ultimately approved by the Board of Supervisors. As the Court previously found in connection with the writ proceedings, in light of the field inspections by Herman and Foss, the Court cannot say that the BOS findings concerning the need for Conditions #2 and #3 were unsupported. Accordingly, the Court defers to the BOS on its findings in that regard. These findings facially support the BOS finding that the VIR was applicable due to the project impacts. (However. the finding of applicability is erroneous for other reasons more specifically discussed in this decision.)

14. Neither side produced evidence of education, training, guidance or written policy pertaining to the adoption or implementation of the VIR ordinance, its distinction from other resource provisions in the Land Use and Development Code, or appropriate elements of a management plan. However, the deposition testimony of Todd Herman showed no such materials existed.

15. County's intra-office communications at times were disrespectful to the Plaintiffs.[13] County was at times unclear and at times wrong as to whether County had made a prior finding that the ridgeline was a visually important ridgeline as defined in its ordinance. Plaintiffs lawfully removed trees on

[13] While the Court permitted a certain amount of leeway in Plaintiffs' presentation of its case, County correctly notes that this is not a trial for emotional distress.

their own property during the pendency of proceedings to approve a cell tower on adjoining property. This caused County additional work in reevaluating the cell tower application, which it viewed as a favorable project, and consequently, County was not pleased with the tree removal. Notwithstanding, the totality of the evidence concerning County's actions in processing the Plaintiffs' application falls short of showing animus, prejudice, ill will, an improper agenda or motive toward Plaintiffs or an intent to delay or derail Plaintiffs' project.

16. Because the Planning Department had no experience in applying this ordinance and it was culturally conditioned to consider all resources as applicable in its plan checking process, more likely than not, County's actions in applying the VIR ordinance stemmed from its own negligence in assuming proper application of the ordinance to Plaintiffs' building permit review. Plaintiffs' initial cooperation with County in arriving at a Management Plan reinforced County's mistaken reliance on the VIR ordinance. Once locked into a course of action, the parties focused on the necessity and scope of the conditions and spent little time on the issue of applicability.

17. Plaintiffs failed to show that the alleged conditions were a County response to Plaintiffs' opposition to the Verizon cell tower proceedings, that they were intended to screen the cell tower, or that they were retaliatory to Plaintiffs' lawful removal of trees on their own property.

18. Delay in the issuance of Plaintiffs' building permit has been the combined result of the following:

    a. Ordinary delays in the permit process, including ordinary litigation,

    b. Delays caused by County in erroneously applying its VIR ordinance,

    c. Delays by both sides caused by evolving and changing arguments during the course of the permit processing, hearing process and this litigation.

19. County failed to show that Plaintiffs no longer wished to build.

Having made the foregoing findings of fact, the Court re-adopts and incorporates by reference its May 19, 2014 ruling on the initial writ (Writ #1), its December 31, 2015 ruling on the subsequent writ (Writ #2), and its Pretrial Rulings and Order filed August 25, 2015 (including any modifications and/or clarifications of Writs #1 and #2, as set forth herein). To the extent this Statement of Decision is inconsistent with any prior ruling, this Statement of Decision is intended to prevail.

The Court now concludes that County has not made a permanent compensable taking because the Court has eliminated the offending condition of permit approval during the permit process, including its review by writ. Further, County has not made a temporary compensable taking for the reasons hereinafter set forth.

1. Even though County may not apply the VIR ordinance in this instance, in the abstract, County has a legitimate public interest in protecting its natural resources, including prominent ridgelines, for the benefit of the public.

2. However, contrary to County's argument,[14] as written in the Land Use and Development Code, the VIR ordinance (and hence its

[14] County argued in its Post-Trial Brief on Liability Issues, commencing at p.7, that because the Land Use and Development Code identifies 15 resources, they are all at play (i.e., "applicable") when the Planning Department considers site plan approval for a building permit, relying on L-II 5.4.B. This is contrary to L-II 4.3.2, discussed below. § L-II 4.3.2 is entitled "Applicability" and is clear as to which resources apply to building permits, the VIR ordinance not being included as applicable to such permits. Since this latter provision is more specific than L-II 5.4.B., this Court is of the view that the more specific provision applies.

County further argues that the VIR provisions are made applicable by the general purposes provisions of the zoning code which "provide for the conservation of natural amenities, such as open space, wetlands, native vegetation, and wildlife (§ L-II 1. 1.) and argues that the applicability provision should yield to the general provisions in the event of conflict. County ignores the fact that there is no conflict. County legislators chose to make various resources applicable to building permits, among them floodplains, significant mineral areas, steep slopes and erosion areas, watercourses, wetlands and riparian areas, and wildland fire hazards. They could have included visually important ridgelines, but they did not. County further likens the Planning Department staff identification of a visually important ridgeline in the building permit process to that of an avalanche hazard study, or a cultural resource study, or a consideration of floodplains or wetland areas, but ignore the fact that County cites the very provisions of its code which permit such an examination. In short, County has legislated its own method for consideration and implementation of its VIR ordinance, but County simply has argued it may do otherwise.

resource standards) does not apply to all permits, and is not included in the ministerial act of issuing building permits, unless compliance is otherwise required as a result of a prior determination that an affected ridgeline resource is in need of protection, that is, unless the resource becomes "applicable" by virtue of some prior determination. § L-II 4.3 .16 (VIR ordinance), § L-II 4.3.2 (VIR not included as applicable to building permit), § L-II 5.4.B ("The Planning Director shall issue the zoning compliance after determining that the site plan complies with all *applicable* provisions and standards of this Chapter, accompanied by written findings supporting the determination of zoning compliance." Emphasis added.)

3. Per the Land Use and Development Code, application of the VIR ordinance is clear. It is applicable to all Development Permits, Use Permits, and subdivisions (§ L-II 4.3.2), indicating it may be found to apply in broad or large scale land planning decisions other than building permits. Such a finding would be one avenue for County to make the predicate finding so as to make VIR standards "applicable" to subsequent applications for building permits.[15]

4. County made no VIR ordinance findings in the cell tower proceedings. The VIR ordinance

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[15] For example, if the VIR was found applicable to a subdivision atop a ridgeline, then, the predicate finding for later implementation is made-for a subsequent application to build within that subdivision, County could require a management plan. [ ]

was wholly inapplicable to the cell tower proceedings, which were governed by a different and separate provision of the Land Use and Development Code, § L-II 3.8., relating to communications towers. County's reliance on anything in the cell tower proceedings is misplaced. Such proceedings give no notice of any County action concerning determinations made as to the ridgeline in question here.

5. In light of the terms of its own ordinance, the lack of applicability to the building permit at issue in this matter, and the lack of a prior VIR determination or identification, County's determination in this case that the Plaintiffs' building permit application was subject to the application of its VIR ordinance was erroneous, arbitrary[16] and unjustified because:

    i. County had not previously made specific findings that the ridgeline was a visually important ridgeline, or that it was considered to be of high natural scenic quality; and,

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[16] County's contention in its objections to Plaintiffs' Proposed Statement of Decision, that this finding is inconsistent with the Court's findings that the BOS determinations were supported by the facts before them, misconstrues the Court's Tentative Decision. The BOS findings are accorded zero weight because the VIR ordinance does not apply. To the extent the BOS found that the VIR ordinance does apply, it never considered the issue here, that is, that the VIR ordinance does not apply to building permit applications. Thus, while the BOS might find that the ridgeline is scenic and prominent and that the management plan is fine and dandy, it cannot apply this resource in contravention of County ordinances or legally make any finding to that effect.

ii. County had not, consistent with any degree of due process to plaintiffs and other property owners affected thereby, made any prior identification of the ridgeline that would have provided notice to plaintiffs or the public that the ridgeline was a resource to be protected and/or reviewed in the building permit process during Planning Department Site Plan Review.

20. Plaintiffs established that the required conditions #2 and #3 (in fact, all conditions imposed as a result of the VIR ordinance) operate as an exaction because they are *ad hoc* detailed conditions applied one time to Plaintiffs' property as a building permit condition, are not authorized by Nevada County ordinances and could not otherwise be required of a homeowner, absent just compensation. They are not a proper exercise of police power.[17]

21. County's action in imposing Conditions #2 and #3 were to protect the public view of the subject ridgeline. They did not otherwise

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[17] County cites Echevarrieta v. City of Rancho Palos Verdes (2001) 86 Cal.App.4th 472 for the proposition that it has inherent police power to regulate aesthetics. The case is readily distinguishable. In that case, relying on a local ordinance, a permit was issued requiring trimming of vegetation on a neighbor's property. The permit in that case was issued pursuant to local ordinance. The case here is that the action was taken in contravention to local ordinance. Further, Echevarrieta can in no way be interpreted as a blanket authorization for the use of police power without some underlying form of legislative authorization. On a separate point, Echevarrieta was decided as a regulatory case, subject to Lucas, *supra*, and physical invasion analysis, not Nollan/Dolan.

facilitate the improvement of Plaintiffs' property. Hence, the exactions were for a public purpose.

22. The exaction of Conditions #2 and #3 (which in this Court's view constitute a temporary or permanent conservation easement or deed restriction) as a condition of issuance of Plaintiffs' building permit, without compensation, would be a taking if it caused damage to Plaintiffs. The taking is the County's appropriation of a valuable property right. Selby Realty Co. v. City of San Buenaventura (1973) 10 Cal.3d 110; Hilltop Properties v. State of California (1965) 233 Cal.App.2d 349. The fact that the restrictions could be considered temporary in nature, due to their expiration upon removal of the plaintiffs structures, would not in any way make them less of a taking. The taking is no less a taking even though the interest taken is not a fee interest, a traditional type easement pemlitting physical invasion (i.e., road, pipeline, public access, etc.), a fee, or in some other recognized form. The taking is no less a taking even though the interest might otherwise be lawfully required in the proper and lawful exercise of a police or regulatory power by County.

    6. County has shown, in general and in the abstract, a nexus between its legitimate state interest in protecting natural resources such as the instant ridgeline. However, County failed to show that such nexus is essential as to the plaintiffs' specific property because it had no authority

to impose any such conditions under the provisions of its ordinances. For the same reasons, County cannot show a rough proportionality between the conditions and the state interest which is supposed to be mitigated.

7. Whether a compensable taking occurred depends on whether Landgate, Inc. v. California Coastal Com. (1998) 17 Cal.4th 1006 (Landgate) applies, and, if so, what effect does it have on the outcome? The Court concludes that when the issue of a compensable taking is raised in the context of a permit application, Landgate has equal viability to Nollan/Dolan[18] exaction cases as it does to regulatory cases – that is, the Court must determine whether a taking has occurred as a result of something more than mere delay in the permit process. See, *i.e.*, Galland v. City of Clovis (2001) 24 Cal.4th 1003, in which Landgate was discussed in a due process context.

8. The preponderance of the evidence does not support a finding of intentional delay, animus, prejudice, ill will, or an improper agenda or motive toward Plaintiffs. Mere

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[18] Plaintiffs have stipulated that their cause of action is not premised upon Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 73 L. Ed. 2d 868, 102 S. Ct. 3164 (1982), Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1014, 120 L. Ed. 2d 798, 112 S. Ct. 2886 (1992) or Penn Central Transp. Co. v. New York City, 438 U.S. 104. 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978). See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538 (U.S. 2005)

delay is not shown by ordinary litigation attendant to the permit process.

9. Legal error, including an erroneous exercise of jurisdiction by the Planning Department, does not show something more than mere delay. Buckley v. California Coastal Com. (1998) 68 Cal.App.4th 178.

10. To be compensable, Plaintiffs must show that County's position was so unreasonable, from a legal standpoint, so as to be arbitrary, capricious and not in furtherance of any legitimate governmental objective (thus inferring other illegitimate motives, such as delay). Landgate, *supra* at 1024.

11. There is no compensable taking in this case because the delay in question was ordinary to the permit process, including litigation, and supported by the following chronology and facts:

    03/16/2011: Plaintiffs submit their site and architectural plans for a building permit.

    07/12/2012: County Planning conditionally approves permit, subject to application of County's VIR ordinance, including management plan.

    07/19/2012: Plaintiffs file their appeal of Conditions #2 and #3.

11/13/2012: Plaintiffs' appeal of permit conditions is denied by the County's Board of Supervisors (hereinafter, "BOS").

03/28/2013: Plaintiffs file their initial Complaint for Inverse Condemnation and for Writ of Mandamus.

06/06/2013: Plaintiffs file their First Amended Complaint Inverse Condemnation and for Writ of Mandamus.

05/09/2014: Hearing on Writ.

05/19/2014: Court issues its written ruling on Writ (hereafter "Writ 1"). Matter remanded to BOS for further proceedings.

07/15/2014: County issues further approval letter following Court's remand.

07/14/2014: Plaintiffs file further appeal of revised conditions #2 and #3.

08/12/2014: Plaintiffs' appeal of conditions #2 and #3 is denied by BOS.

09/29/2014: Plaintiffs file Supplemental Complaint following completion of the further BOS proceedings on remand.

12/19/2014: Court conducts further trial on the writ proceedings following completion of the remand to the BOS.

12/31/2014: Court issues ruling granting Writ in part (hereafter "Writ 2").

01/20/2015: County files alternate motions to vacate ruling, reconsider ruling, or for new trial.

03/06/2015: Court denies County's motions, but reconsiders and modifies its ruling on the Court's own motion. No change in result. Among other findings, Court concludes that County has not provided authority for its imposition of a deed restriction, either by the VIR ordinance or other authority.

07/10/2015: Parties file their respective Pretrial Statements. For the first time, County provides authority (Land Use and Development Code § L-II 4.3.3) for its imposition of a deed restriction.

07/24/2015: Pretrial Conference conducted with respect to the pending trial of the inverse condemnation claim. Court

addresses issues raised by parties and Court concerning prior rulings and pending inverse condemnation trial. Court orders briefing. Simultaneous briefing schedule set. Matter continued to 08/25/2015.

08/07/2015: Parties file opening briefs. For the first time, Plaintiffs specifically argue inapplicability of VIR ordinance per § L-II 4.3.2.

08/11/2015: Upon review of opening briefs, Court identifies further issue concerning applicability of VIR ordinance and orders briefing on that issue.

08/25/2015: Court issued its Pretrial Rulings and Order finding that the VIR ordinance should not have been considered by the Planning Department in its building permit approval.

01/05-13/2016: Matter proceeds to trial on phase one of inverse condemnation trial.

The Court also notes the following factors as ordinary to the permit and litigation process:

a. County required a management plan early in the permit process. Thereafter, the parties negotiated at length the specific terms of a management plan. On August 26, 2011, Attorney Haley's letter to County raised the issue of a lack of predicate findings to support County's requested conditions. The Plaintiffs' permit was conditionally approved sixteen months following initial permit application.

b. Permit appeals and litigation were timely filed throughout.

c. The issues presented were factually and legally complex. For example, prior to August 2015, Plaintiffs' pleadings and arguments focused on 1) the vagueness and overbreadth of the conditions imposed, 2) that the conditions were imposed for the improper, and perhaps retaliatory, purpose of screening the cell tower (which the Plaintiffs opposed) on the adjoining property, and 3) that the conditions were not supported by a predicate finding that the ridgeline was visually important. From and after August 2015, Plaintiffs more specifically additionally argued the non-application of the ordinance. On the other hand, County posited, *inter alia*, that Plaintiffs had failed to exhaust administrative remedies, defenses of waiver, estoppel, ripeness, as well as other procedural and substantive arguments. County first contended that it had made prior findings in the cell tower case, then in this case, then that no specific finding need be made at all—just an identification of a resource.

d. Other normal delays occurred as a result of calendaring to accommodate multiple schedules of attorneys and the Court.

e. The Court did not factually find intentional delay, animus, prejudice, ill will, or an improper agenda or motive toward Plaintiffs.

f. While the Court would expect County to know its own ordinances as a matter of course, and the Court finds legal error in County's application of its ordinances, there is little factual basis shown for finding the County's position in this litigation to be unreasonable or for the purpose of delay, as defined in Landgate. Plaintiffs appeared to rely on County's mistaken application and, as a result, did not argue the inapplicability of the ordinance to building permits until nearly two and a half years into the litigation process, which was four years from the date Attorney Haley first raised the related predicate finding issue. This required the Court in its August 25 Pretrial Rulings and Order to examine County's argument that Plaintiffs failed to exhaust administrative remedies, i.e., whether non-application due to no predicate finding and non-application due to the wording of the ordinances are sufficiently similar, or whether a constitutional argument otherwise excused exhaustion of remedies. County's arguments are neither surprising nor unexpected, and are designed, at a minimum, to preserve such issues for further review. Even though the Court finds County to be wrong in imposing the conditions in the first instance, it is not

unreasonable for County to preserve its procedural and substantive arguments pending this action becoming final. For example, should County prevail on an appeal of the exhaustion of administrative remedies issue, the result would preclude Plaintiffs from pursuing the impropriety of the conditions imposed.

g. The judgment on Plaintiffs writ petition cannot be entered until conclusion of the balance of their action. Morehart v. County of Santa Barbara (1994) 7 Cal.4th 725, 743. Ordinary delay in completing the proceedings further results from combining Plaintiffs' Writ Petition with the inverse condemnation complaint.

On remaining issues, the Court also concludes that:

1. The issues are ripe for decision for the reasons set forth in Appendix C concerning the denial of County's Code of Civil Procedure § 1260.040 motion;

2. The issues are not moot;

3. Erickson did not waive the right to object by negotiating in the absence of an agreement and their acceptance of the benefits of that agreement;

4. On exhaustion of administrative remedies, see the discussion of that issue in Phase One, above, and the discussion of the same issue in the 8/25/15 Pretrial Rulings and Order;

5. As to County's argument for Judicial Estoppel, the Court finds Plaintiffs/Petitioners are not judicially estopped. In the cell tower litigation, Erickson made the argument that the County was applying different standards in protecting the ridgetop. This does not mean that Erickson took a position that they had accepted the application of the VIR resource standards as to their property, and they certainly never accepted conditions #2 and #3 in any action. If they had done so, they would not be here continuing to litigate the issue. Erickson's issue in the cell tower litigation was that the height of the tower made it an eyesore and the same definition of ridgeline should apply to both Verizon and the Ericksons. Further, the Erickson application was not at issue in the cell tower litigation. They were not litigating their building permit versus the cell tower. The only common factual element between the two actions was that both proposed structures were planned on a ridgetop. From there, the criteria for approval (and applicability) were entirely different. Judicial estoppel requires totally inconsistent positions. MW Erectors, Inc. v. Niederhauser Ornamental & Metal Works Co.. Inc. (2005) 36 Cal. 4th 412, 422.

The foregoing decision precludes further trial on the issue of damages, including damages resulting from increases in design or building costs. Plaintiffs are deemed the prevailing party because the primary objective of the litigation was removal of the offending conditions, which objective Plaintiffs achieved in Writs

#1 and #2. As such, they shall be entitled to recovery of their costs.

DATED: August 17, 2016 **/s/ SEAN P. DOWL1NG**
SEAN P. DOWLING
Judge of the
Superior Court, Assigned

APPENDIX "A"

The Visually Important Ridgeline Finding

Petitioners argue that the County failed to make required and timely findings that the ridgeline on which Petitioners propose to build their home is a Visually Important Ridgeline. County has now made a VIR (Visually Important Ridgeline) finding in Resolution 14-397. This determination is supported by findings based on substantial evidence that the ridgeline is both prominent and of high scenic value, as contained in the Board Resolution. County considered the presence of NID water tanks and the camouflaged mono-pine cell tower in its determination that the ridgeline remains a VIR.

The finding of a VIR [] can be made in connection with the Plaintiffs' permit application and the reprocessing of that application following the original writ hearing.[19] In particular the Court finds City of Orange

[19] This finding was later found to be fundamentally wrong and vacated because the VIR ordinance is not applicable to Building Permit Applications.

v. Valenti (1974) 37 Cal.App.3d 240, 243-244, Sunset View Cemetery Assn v. Kraintz (1961) 196 Cal.App.2d 115, 122-123, and Munns v. Stenman (1957) 152 Cal.App.2d 543, 552-554 inapposite. Those cases involve the enactment of ordinances effecting a retroactive blockage of a proposed development or permit. Here, the VIR ordinance existed well before the permit application and provided notice to those planning hilltop construction that their project may be subject to the terms of the ordinance.

To hold otherwise requires the County to maintain a public inventory of all visually important ridges prior to any permit application in order to avoid retroactivity, and this is also the Petitioners' argument.[20] Clearly the ordinance provides to the contrary – "This determination may be based on a County-wide or area-wide inventory of visibly prominent ridgelines and large-scale viewsheds, or, in the absence of an inventory, *upon a determination that the proposed project may be likely to impact a visually important ridge line or viewshed."* Emphasis added. The record shows ample evidence to support the County's determination that the project would likely impact a VIR. While much of the Petitioners' argument is an "as applied" due process challenge to the ordinance, this particular inventory argument really addresses a facial unconstitutional issue which is, "Can the VIR statute ever be applied in any individual application process where

[20] This finding is correct only if the VIR ordinance is applicable, which it is not.

the County does not maintain an inventory (or prior determination) of VIRs?"

If addressed as a facial challenge, Petitioners must show there is no way in which the County can proceed without violating due process. The argument is inviting. In maintaining an inventory, a public hearing would be held for each affected property owner. Resolved would be the issue of whether the protected area is the peak of the most prominent ridge, or, as noted by Supervisor Anderson, the entire length of the line of sight within which this particular parcel exists. All property owners impacted by the proceeding would be given notice and an opportunity to be heard. Thereafter, the prospect of inconsistent treatment of ridgeline properties would be avoided.

However, the Court notes it should normally defer to the County in applying its own ordinances.[21] "A claim that a regulation is facially invalid is only tenable if the terms of the regulation will not pemlit those who administer it to avoid an unconstitutional application to the complaining parties. [Citations.] This restraint stems from the prudent judicial policy of avoiding officious checking of the political branches of the government. (See Tribe, American Constitutional Law (1988) § 3-10; [citations].)" San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal.App.4th 523, 547. Despite the possibility of inconsistent future VIR determinations, Petitioners

[21] However. County cannot apply its own ordinances in direct contradiction to their own ordinance terms.

have not demonstrated that the County will apply the ordinance inconsistently. Certainly the County is able to make consistent findings with each application.

Accordingly, the Court finds that the VIR ordinance may be applied concurrently with the permit application, rather than as precedent thereto.[22]

Because Petitioners did not show a facial or as applied unconstitutional VIR determination, the Management Plan is properly imposed as a condition pursuant to the VIR ordinance.

APPENDIX "B"

However, upon the Courts' further review and research, this Court is of the view that the deed requirement is an impermissible conservation deed extracted as a condition for the Petitioners' permit. Civil Code §815.1 defines a conservation easement as "any limitation in a deed, will, or other instrument in the form of an easement restriction, covenant or condition, which is or has been executed by or on behalf of the owner of the land subject to such easement and is binding upon successive owners of such land, and the purpose of which is to retain land predominantly in its natural, scenic, historical, agricultural, forested, or open-space condition." Clearly, the restrictive deed set forth in the Management Plan is a limitation in the form of an

[22] As noted above. this conclusion was later found to be fundamentally wrong and vacated because the VIR ordinance is not applicable to Building Permit Applications.

easement or restriction, covenant or condition, the purpose of which is to retain the polygonal shaped portion of Petitioners' land predominantly in its natural, scenic, historical, forested condition. The deed restriction could not be a better match for the definition of a conservation easement.

§815.3 permits a county to hold a conservation easement "if the conservation easement is voluntarily conveyed." However, "no local governmental entity may condition the issuance of an entitlement for use on the applicant's granting of a conservation easement pursuant to this chapter."

Only two cases have discussed this statute at any length, being San Mateo County Coastal Landowners' Assn. v. County of San Mateo [San Mateo] (1995), *supra*, and Building Industry Assn. of Central California v. County of Stanislaus [Stanislaus] (2010) 190 Cal.App.4th 582.

San Mateo clearly draws the distinction between a Civil Code §815 conservation easement and one imposed by a different provision of law such as the Subdivision Map Act. The issue in Stanislaus was whether a local ordinance requiring a conservation easement violated §815 if the easement was not required to be given by the applicant. In that case the appellate court specifically held that the easement in question was a §815 easement, in apparent conflict with the San Mateo case.

This Court is of the view that the proposed deed is in fact a conservation easement, clearly fitting the

definition of such under §815. The question of first impression is whether the deed is required as a condition of entitlement under §815.3, or under other law (as was found in San Mateo). While the VIR ordinance permits the imposition of a management plan, unless implied in that authority, it has no provision whatsoever for any kind of deed or the imposition of a management plan in the form of a deed. County can certainly argue that a deed is a reasonable protective element of a management plan. Since conservation deeds are specifically governed by §815, any implicit assumption they are permitted in the VIR ordinance is negated.

As argued by Petitioners, deeds have significant impacts on title, property values, and future uses. Management plans, while not defined in the VIR ordinance, are distinct from deeds. A management plan, in the context of the VIR ordinance, is a proposed course of action intended to administer how the VIR protection is to be maintained. However, a deed is a conveyance separate and apart from simple land management. In both San Mateo and Stanislaus, *supra*, the underlying law specifically provided for the deeds in question.

APPENDIX "C"

**IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF NEVADA**

Erickson *et al.*, *Plaintiffs,* vs. County of Nevada, *Defendant*,	CASE NO.: CU13-079389 Pretrial Rulings and Order

In this Pretrial Order, the Court clarifies and reconsiders portions of its prior Rulings, enters new findings and rulings and sets forth the remaining issues for trial in the inverse condemnation portion of the action. Herein, the Court concludes as follows:

1. The "taking" finding in Writ 1 is not controlling in the balance of this action.

2. The VIR ordinance does not apply to building permits.

3. Erickson has properly exhausted administrative remedies, and, alternatively, that such exhaustion is not required under the specific facts of this case.

4. Writ 2 is reconsidered. Upon reconsideration, Writ 2 is granted. Conditions #2 and #3 are ordered deleted. County shall issue Erickson's building permit without such conditions.

5. County is estopped to argue that the Erickson permit has expired.

6. Because the matter is not final the Court retains jurisdiction to make the foregoing modifications and orders.

7. County's motion under Code of Civil Procedure § 1260.040 is applicable to this proceeding, but it is denied.

8. The issues remaining are:

a. Whether Erickson can establish an actual taking, either temporary or permanent.

b. If so, what is the value of that taken.

c. If Erickson prevails, the amount of Erickson's costs, as defined and provided for in Code of Civil Procedure § 1036.

Factual Background

Plaintiffs and Petitioners Juliet Erickson and Peter Lockyer (hereafter collectively referred to as "Erickson) own property in Nevada County located atop a ridge overlooking the Lake Wildwood subdivision. They desired to construct a garage and office on their property and on or about March 16, 2011, they submitted their site and architectural plans for a building permit.

Nevada County (hereafter referred to simply as "County"), making a first time application of its Visually Important Ridgeline (VIR) ordinance, required

Erickson, as a condition of their building permit, to enter into a management plan and convey a restrictive deed containing the terms of the management plan in order to preserve the scenic view of the ridgetop. The management plan requires Erickson to maintain and replace trees which would otherwise screen the project from public view from below in Lake Wildwood and the adjacent area.

Separately, on an adjoining property owned by the Nevada Irrigation District, County approved and permitted the construction of a camouflaged Verizon wireless cell tower, to which Erickson objected. Erickson alleges that County's ulterior motive in imposing ridgeline screening was to in fact screen the Verizon cell tower, not their property.

Factual and Procedural History

The Court sets forth a short chronological synopsis of relevant events:

03/16/2011:	Plaintiffs submit their site and architectural plans for a building permit.
07/12/2012:	County Planning conditionally approves pemlit, subject to application of County's VIR ordinance, including management plan.
07/19/2012:	Plaintiffs file their appeal of Conditions #2 and #3.

11/13/2012: Plaintiffs' appeal of permit conditions is denied by the County's Board of Supervisors (hereinafter, "BOS").

03/28/2013: Plaintiffs file their initial Complaint for Inverse Condemnation and for Writ of Mandamus.

06/06/2013: Plaintiffs file their First Amended Complaint Inverse Condemnation and for Writ of Mandamus.

05/09/2014: Hearing on Writ.

05/19/2014: Court issues its written ruling on Writ (hereafter "Writ 1"). Matter remanded to BOS for further proceedings.

07/15/2014: County issues further approval letter following Court's remand.

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08/12/2014: Plaintiffs' appeal of conditions #2 and #3 is denied by BOS.

09/29/2014: Plaintiffs file Supplemental Complaint following completion of the further BOS proceedings on remand.

12/19/2014: Court conducts further trial on the writ proceedings following completion of the remand to the BOS.

12/31/2014: Court issues ruling granting Writ in part (hereafter "Writ 2").

01/20/2015: County files alternate motions to vacate ruling, reconsider ruling, or for new trial.

03/06/2015: Court denies County's motions, but reconsiders and modifies its ruling on the Court's own motion. No change in result. Among other findings, Court concludes that County has not provided authority for its imposition of a deed restriction, either by the VIR ordinance or other authority.

07/10/2015: Parties file their respective Pretrial Statements. For the first time, County provides authority (Land Use and Development Code § L-II 4.3.3) for its imposition of a deed restriction.[23]

07/24/2015: Pretrial Conference conducted with respect to the pending trial of the inverse condemnation claim. Court addresses issues raised by parties and Court concerning prior rulings and pending inverse condemnation trial. Court orders briefing. Simultaneous briefing schedule set. Matter continued to 08/25/2015.

08/07/2015: Parties file opening briefs. For the first time, Plaintiffs specifically argue inapplicability of VIR ordinance per § L-II 4.3.2.

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[23] Unless otherwise noted, all references are to the Nevada County Land Use and Development Code.

08/11/2015: Upon review of opening briefs, Court identifies further issue concerning applicability of VIR ordinance and orders briefing on that issue.

Issues raised at 07/24/2015 Pretrial Conference

At the Pretrial Conference, the Court discussed its concern that its prior rulings may have been undercut by the latent authority provided by County and that any incorrect prior ruling would poison the remaining issues to be tried. Further, issues raised by the parties in their respective pretrial briefs indicated a need to clarify certain of the Court's prior rulings. In order to resolve these issues and clearly identify trial issues, the following issues were identified, either by the parties, or by the Court on its own motion:

1. Does the Court have continuing jurisdiction to amend, modify, reconsider, vacate or re-decide Writ 2?

2. Has the Court previously made a "taking" finding in the writ proceedings that is binding upon the parties in the remaining inverse condemnation cause of action?

3. Did the Court correctly decide the Writ 2 holding that a Civil Code §815 et seq. conservation easement was improperly imposed as a condition of the Erickson building permit? Specifically, was the imposition of a restrictive deed authorized by other provisions of law, taking it out of the ambit of §815?

4. If Writ 2 decided the §815 issue correctly, does that determination apply not only to the deed, but the management plan terms which serve as the basis for the deed?

5. Should the Court grant or deny County's motion pursuant to Code of Civil Procedure § 1260.040?

Issues #1 through 4 concern the writ proceedings. The remaining issue #5 concerns the inverse condemnation cause of action. These issues are discussed seriatim.

1. Does the Court have continuing jurisdiction to amend, modify, reconsider, vacate or re-decide Writ 2?

No judgment has been entered on Writ 2. Additionally, because the inverse condemnation remains to be tried, the action is not complete for purposes of any appeal. Morehart v. County of Santa Barbara (1994) 7 Cal.4th 725, 743. On this point both parties seem to agree. Further, without continuing jurisdiction, the Court would be forced to simply perpetuate any prior error in disposing of the remaining cause of action, or alternatively, make inconsistent findings within the same action.

2. Has the Court previously made a "taking" finding in the writ proceedings that is binding upon the parties in the remaining inverse condemnation cause of action?

In Writ 1 this Court found "Condition #2 to constitute a taking", and further explained that "The proposed negative declaration is unsupported by the facts, and is overbroad, thus failing to show the proper nexus between the project and the condition. Because of this, the permanent dedication is constitutionally infirm and constitutes a taking or an exaction." The Court should have been clearer and this finding in fact now requires clarification.

Erickson asserts that this finding negates the necessity of a "taking" finding at the subsequent inverse condemnation stage of the proceedings. Whether the takings issue must be decided in the writ or inverse condemnation proceedings was previously argued and discussed in Writ 1.

Erickson argues that the sole purpose of the writ proceeding is to determine, on the record alone, if there has been a taking. County argues that Plaintiffs themselves have argued that this determination needs to be made in the inverse condemnation part of the case due to the need for evidence that is not present in the administrative record.[24] The Court notes the disconnect between these arguments and the applicable standard of review for administrative mandamus, that

[24] For example, See Petitioner's Reply Brief in Support of Writ of Mandate, 04/14/2014, I: 1-5: 11.

is, whether the findings of the administrative agency are supported by substantial evidence, or whether the agency acted without or in excess of its jurisdiction. Writ 1 was determined on the substantial evidence standard.[25] Because the negative declaration could not be factually supported, and because the conditions were vague and uncertain, the Court found the condition was constitutionally infirm.

Plaintiffs are not precluded from raising the issue in the inverse condemnation trial if the matter was not decided in the Writ decision. Healing v. California Coastal Com. (1994) 22 Cal.App.4th 1158; Patrick Media Group, Inc. v. California Coastal Com. (1992) 9 Cal.App.4th 592, 607-608, 614. Indeed, in Healing, *supra*, at p. 1178, the Court observed, " . . . it has become clear that administrative proceedings are not the proper forum for consideration of the takings issues relevant to an inverse condemnation claim and that, therefore, a petition for writ of administrative mandate does not provide a satisfactory substitute for an evidentiary trial of those issues."

Notwithstanding the above arguments, Writ 1 makes no finding that the taking is actual, present, future, contingent, potential, temporary, permanent, or otherwise. However, the context of the finding is fairly obvious. The condition, if it were imposed in its then form, would have been a taking without provision for

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[25] Erickson makes no request in this proceeding for a determination that abuse of discretion is shown by a failure to follow the law.

compensation. Indeed, because the matter was remanded for further proceedings, it would have been premature for the Court to determine a present taking, either temporary or permanent, until that aspect was completed.[26]

At this stage, even in light of the rulings the Court makes below, no actual taking has yet occurred or been found. While the administrative record shows evidence to support a prospective taking, and some evidence that suggests the taking was for an improper purpose (i.e., to impose on Erickson the requirement to screen the cell tower), that administrative record alone would not suffice to adopt a finding under Erickson's Nollan/Dolan/Koontz/Ehrlich theory. The administrative record simply does not support a present actual taking. Rather, it is prospective and contingent.

Erickson has long argued that it may take evidence external to the administrative record to establish its claim for inverse condemnation. They continue to have that opportunity when the Court makes a liability determination in the initial phase of the inverse condemnation portion of the case.

In sum, the prior finding is not the law of the case, is subject to its context, and is not binding on the parties, or the Court, as we proceed forward.[27]

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[26] Whether one can at this point retrospectively determine there to be a temporary taking is discussed below.

[27] The Court ratifies other prior Writ 1 findings that Condition #2 is not supported by substantial evidence.

3. Did the Court correctly decide the Writ 2 holding that a Civil Code §815 et seq. conservation easement was improperly imposed as a condition of the Erickson building permit? Specifically, was the imposition of a restrictive deed authorized by other provisions of law, taking it out of the ambit of §815?

The foregoing issue was raised because of the following evolution of the problem. The Court initially determined in its 12/31/2014 ruling (Writ 2) that the restrictive deed lacked legislative underpinnings because the VIR ordinance contained no provisions for a deed in addition to a management plan. The Court concluded that because the deed met the definition of a conservation easement (Civil Code §815.1), that it was unlawfully required as part of a permit process (Civil Code §815.3(b)). In this regard, the Court specifically considered San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal.App.4th 523, which stands for the proposition that easements and restrictions imposed under other provisions of law are not "conservation easements" for purposes of applying Civil Code §815 *et seq*. However, no party had provided the Court with any authority for a deed. Instead, County's argument was that the authority was inherent in the management plan provisions of the VIR ordinance, which this Court determined to be insufficient authority.

County requested reconsideration of the ruling on January 20, 2014, without citation to Land Use Code §L-II 4.3.3. It was not until receipt of its Pretrial

Statement on July 10, 2015, some six months later, that County first asserted this new legal basis for the deed, which is not found in the VIR ordinance, but in the General Provisions for the County's Resource Standards. (The VIR ordinance falls within the provisions of the Resource Standards (Land Use and Development Code §L-II 4.3).) After reviewing §L-II 4.3.3 (which extensively discusses management plans and deeds), this Court noted at the 08/24/2015 Pretrial Conference that had it been aware of such authority for a deed, it would have decided Writ 2 oppositely because the legal argument now showed the restrictive deed not to be governed by Civil Code §815 *et seq.*, which is 180 contrary to the Court's prior finding. This presented a conundrum as to how the Court should proceed with the inverse condemnation action in light of the new information. The Court requested briefing.[28]

In response, and also for the first time, Erickson directed the Court to §L-II 4.3.2, immediately preceding the aforementioned General Provisions. That section provides:

> Resource standards shall apply to all Development Permits, Use Permits, and subdivisions. The

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[28] The issue was whether San Mateo County Coastal Landowners' Assn. v. County of San Mateo, *supra*, 38 Cal.App.4th 523 exception to Civil Code §815 applied by virtue of another "provision of law." Erickson argued that only another state statute would satisfy this requirement. County is correct that its ordinances are provisions of law that would support the imposition of the restrictive deed in question (if the VIR ordinance were in fact applicable.) The entire issue so framed became moot once Erickson pointed the Court to §L-II 4.3.2.

following standards shall also apply to allowable uses subject to zoning compliance, and building permit issuance, unless otherwise provided:

1. Section 4.3.10 Floodplains.
2. Section 4.3.11.C.3 Significant Mineral Areas, as required.
3. Section 4.3.13 Steep Slopes and Erosion Potential.
4. Section 4.3.17 Watercourses, Wetlands and Riparian Areas
5. Section 4.3.18 Wildland Fire Hazard. (Ord. 2090, 7/9/02)

The Court again requested additional briefing.

Erickson argues that a plain reading of L-II 4.3.2 shows that the VIR ordinance is not even applicable to a building permit, and consequently, that the VIR standards never should have been imposed. County argues that the term "Development Permits" simply unartfully encompasses building permits and that it does apply. County further argues that even if the Court should determine the VIR standards do not apply, it is too late for Erickson to raise the issue as they have not exhausted their administrative remedies in that regard. County also argues that Erickson waived any objection by accepting the benefits of a management plan.

Specific briefing was requested on whether the term "Development Permits" includes building permits.

Acknowledging that the Nevada County Code "Definitions" (§L-II 6) do not specifically define "development permit", County argues that the definition of "development", found in §L-II 6.1, is instructive because it includes the construction of structures and other activities normally covered by a building permit. Further, County argues, §L-II 5.4.C. requires building permit applicants to submit site plans listing "all applicable resources listed in Article 4.3.3. . . ."

This Court cannot agree that the ordinance is poorly worded in regard to this issue. With certain exceptions, §L-II 4.3.2 makes "Resource Standards" applicable only to Development Permits, Use Permits, and subdivisions. §L-II 4.3.2 makes only five enumerated standards applicable to building permits. Those five do not include the VIR standards. Only "*applicable* resources" (italics added) are considered under §L-II 5.4.C. when an applicant submits a site plan.

The term "Development Permit", like the term 'Use Permit" appears with initial capital letters.[29] The Court sees this as a single term, a specific kind of permit, and not in the generic sense argued by County. In fact, as Erickson argues, a Development Permit is a specific kind of permit identified in Land Use Code §L-II 5.2 for projects described in §L-II 5.5.2. A "Development Permit" is a permit which provides a review process "for medium and high intensity land uses and development".

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[29] The Court notes, in contrast, that the more generic "building permit" is spelled with lower case letters.

County argues that the Declaration of Brian Foss shows that the Planning Department staff has always interpreted resource standards to apply to building permits and never interpreted §L-II 4.3.2 to prohibit enforcement of resource standards to building permits. However, the facts show that the VIR ordinance had never been previously applied to any project or building permit. This was the first time the County attempted to implement this particular resource standard. Further, while Courts should generally defer to counties for the interpretation of their own ordinances, the interpretation cannot be an unreasonable contradiction to the clear terms of the ordinance, nor a substitute for enactment of a particular provision, nor a mechanism that imposes on the public substantial additional burdens not authorized by the ordinance. The Court does not view the issue here as one of interpretation. Rather, it is one of jurisdiction and authority.

As to County's next argument, that Erickson has accepted the benefits of a management plan, this argument confuses Erickson's negotiation with their legal stance. While Erickson initially negotiated in an attempt to alleviate the impact of conditions imposed by the Planning Department, they never accepted the conditions, which is the reason they appealed. This point was specifically argued at the BOS Appeal hearing. AR 0119-0122.

What County has done here, by virtue of the application of its VIR ordinance, is impose a discretionary process overlay on a purely ministerial process. Land

Use and Development Code §L-II 4.3.2 is not applicable to building permits. No VIR had been designated through any public process as of the date that Erickson submitted their building permit application. No discretionary decision was necessary and none was authorized.

Prentiss v. City of South Pasadena (1993) 15 Cal.App.4th 85, 87-88 is on all fours with the present action. Therein, Prentiss sought a building permit for construction of an addition to their single family home from the City of South Pasadena, its building and planning division, and its building and planning director. "Respondents' application for the building permit became embroiled in controversy after appellants asserted that respondents' home was a 'qualified historic structure' within the meaning of the State Historical Building Code," thereby invoking CEQA procedures. The City "offered to issue a "mitigated negative declaration" under CEQA and to grant the building permit, on condition that respondents agree to recommendations of a consulting historical architect for changes in the building plans to preserve historical architectural compatibility. Prentiss filed an action for writ of mandate. The appellate court affirmed the trial court in granting the writ because CEQA did not apply to the ministerial issuance of the Prentiss building permit. In so holding the Court stated "Because respondents' application for a building permit required no variance or conditional use permit and fully complied with the Uniform Building Code, issuance of the requested building permit was a ministerial act to which

CEQA does not apply. Appellants fail to show that any statute or ordinance gave appellants discretion to deny the permit on historical architectural grounds." Prentiss, *supra*, at 87.

Like Prentiss, *supra*, the Erickson building permit required no variance or conditional use permit and apparently complied with the Uniform Building Code. The issuance of a building permit was a ministerial act to which the VIR process did not apply.

Over time, this case has been one of shifting sands. While it is now clear to the undersigned that County failed to follow its own resource standards by making the VIR applicable to the Erickson building permit, the Court finds disturbing the failure to raise this issue in the four plus years since the first submission of building plans. County argues that it is too late.

Whether Erickson's argument is timely is a two step analysis. First, was the issue raised in the administrative record and the pleadings, and secondly, if not raised, is the issue one which can be raised at any stage of the proceedings?

The first step is essentially an exhaustion of administrative remedies issue. "The inquiry in an administrative mandamus proceeding is whether there was a fair trial and whether the agency abused its discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the order is not supported by the findings or the findings are not supported by the evidence. (Code Civ.

Proc., § 1094.5, subd. (b).)" (Usher v. County of Monterey, (1998) 65 Cal.App.4th 210, 215.)

Pursuant to Code of Civil Procedure § 1094.5(b), the inquiry in an administrative writ proceeding shall extend to whether the respondent has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion. To prevail on grounds of abuse of discretion, plaintiff must establish that the County did not proceed in the manner required by law, its decision is not supported by the findings, or the findings are not supported by the evidence.

Where it is claimed that an agency's decision is not supported by findings, the inquiry is whether the agency rendering the adjudicatory decision set forth findings that enable a reviewing court to trace and examine the agency's mode of analysis and bridge the analytical gap between raw evidence and the decision or order. Topanga Association for a Scenic Community v. County of Los Angeles (1974) 11 Cal.3d 506, 515.

Petitioner has the burden of proof in an administrative mandamus proceeding in establishing that an agency's decision should be set aside. Arwine v. Board of Med. Examiners (1907) 151 Cal. 499, 503; Evidence Code §664. In reviewing the evidence, all conflicts must be resolved in favor of the prevailing party. Western States Petroleum Assoc. v. Superior Court (1995) 9 Cal.4th 559, 571.

County argues that Erickson failed to raise the exact issue in the administrative proceedings, citing

Tahoe Vista Concerned Citizens v. County of Placer (2000) 81 Cal.App.4th 577, 590 and Hagopian v. State of California (2014) 223 Cal.App.4th 349.

Following County's conditional approval on July 12, 2012, Erickson appealed Conditions #2 and #3, which included a management plan and restrictive deed based on an application of the VIR ordinance. Their appeal notice claimed that "The conditions and restrictions go far beyond what is required to screen the rooftop of the Lockyers' proposed garage/office building from lines of sight. . . . and are impose[d] as an unconstitutional taking in order to ensure the retention of a background canopy for the proposed cell tower. . . ." Citing differences in dealing with ridgeline applications between their property and the cell tower, Erickson claimed a taking without due process and compensation, a violation of the Fourteenth Amendment of the U.S. Constitution.

Petitioners asserted three grounds for writ relief in their Corrected Complaint filed May 17, 2013:

1) No findings based on substantial evidence;

2) The restrictions imposed are not reasonably necessary to effectuate a substantial governmental purpose; and

3) The County's conduct constitutes a taking in violation of Plaintiffs' 5th Amendment constitutional rights.

In their Opening Brief in Support of Writ of Mandate, filed March 3, 2014, Erickson argued, *inter alia*,

that County had made no evidentiary finding that the ridge was in fact a VIR and that County had no prior inventory or determination of VIR status.[30] County made its first argument that Erickson had failed to exhaust administrative remedies because these exact issues were not presented to the BOS.

In Writ 1, this Court discussed the exhaustion issue in determining whether application of the VIR was supported by substantial evidence and whether the issue had been adequately preserved in the administrative proceedings. This Court found that Erickson had done enough to preserve the issue because Erickson raised issues of whether the project was within certain sightlines and whether the project was above or within the tree canopy, thus permitting County to address its findings that the property was subject to a VIR.[31] Specifically, this Court ruled that "the imposition of a Management Plan pursuant to the VIR ordinance is predicated on a finding that the ridgeline in question is in fact a VIR as defined in the ordinance. In order [for] the Petitioners to challenge the constitutionality of the negative easement, they must be permitted to establish all facts supporting that challenge."

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[30] Following completion of remand proceedings before the BOS, Erickson's supplemental appeal filed 07/14/2014 specifically raised these arguments.

[31] In the Court's 05/19/2014 ruling on Writ I, the undersigned found that "While not articulated perfectly, Petitioners did object, stating, 'There was no evidence whatsoever presented at the Verizon hearing, however, that the ridgeline when viewed from the east was visually significant to anyone.' [AR 0068-0069.]"

Upon further review of the administrative record on this issue, Attorney Haley in fact directly raised the issue of no prior VIR finding at the BOS appeal hearing. AR 0119-0122. Thus, not only was the exact issue raised, but the [] exact argument was additionally raised, that is, Conditions #2 and #3 were improper because there was no predicate finding of a VIR at the time of the Erickson application.[32] This argument has additional impact in light of §L-II 4.3.2 because not only was there no predicate finding, but no such finding could be made due to the inapplicability of the VIR resource standard. On this basis alone, it is clear that Erickson exhausted all administrative remedies.

The current issue, however, is not whether findings support the VIR, but whether the VIR resource standard even applies in the first instance. The Court views this as simply two sides of the same coin. Basic authority to impose the conditions lies at the heart of their validity.

As noted in Mani Brothers Real Estate Group v. City of Los Angeles (2007) 153 Cal.App.4th 1385, 1394-1395:

> The rationale for exhaustion is that the agency "'is entitled to learn the contentions of interested parties before litigation is instituted. If [plaintiffs] have previously sought administrative relief . . . the [agency] will have

[32] In light of §L-II 4.3.2, this Court's prior Writ 2 ruling that the VIR finding could be made in the building permit process is incorrect and hence that ruling is vacated.

> had its opportunity to act and to render litigation unnecessary, if it had chosen to do so."' (Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal.App.3d 151, 162-163.) The "exact issue" must have been presented to the administrative agency to satisfy the exhaustion requirement. (Resource Defense Fund v. Local Agency Formation Com. (1987) 191 Cal.App.3d 886, 894.) However, "less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding" because, although not the case here, parties in such proceedings generally are not represented by counsel. (Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo, supra, 172 Cal.App.3d at p. 163.)

The "exact issue" appears to be more one of identification, rather than setting forth every possible argument. Less specificity is required for appeal in an administrative proceeding than in a judicial proceeding. An analysis of the cases using the term "exact issue" seems to indicate a more generic approach than that urged by County. Thus, general objections to a project are not sufficient, but objections to specific elements are specific enough.

In Mani, *supra*, 153 Cal.App.4th 1385, at p. 1395-1396, the Court held that petitioners raised the issues sufficiently by letters to City Council stating that an amended development plan would "create new substantial environmental effects and increase the severity of previously identified effects, such as the impact

on public services, traffic and shade and shadow", that the City should prepare a supplemental EIR, that the changes would "introduce new significant effects on public services, such as fire protection, police protection, schools and parks", etc.

In Hagopian v. State of California, *supra*, 223 Cal.App.4th 349, at 370-371, a Coastal Commission enforcement proceeding concerning Petitioner's unpermitted development of property, the court held that the Petitioners failed to exhaust administrative remedie[s] where "petitioners made no substantive showing at the hearing, objecting primarily on due process and jurisdictional grounds" but later made a new specific argument concerning historical use of their property as ground for an exemption to the required permit.

In Tahoe Vista Concerned Citizens v. County of Placer, *supra*, 81 Cal.App.4th 577, cited by County, the challenge was to a conditional use permit. Plaintiffs sued challenging the project's negative declaration and parking requirements, but their administrative appeal only specified the parking issue. It was held that the plaintiffs exhausted administrative remedies as to the parking issue, but were precluded as to the negative declaration.

This case is similar to the kind of exactness required in Tahoe Vista, *supra.* Here, plaintiffs did not challenge every condition. Only two specific exact conditions were appealed. The issues at the administrative level and appeal included argument concerning lack of a prior VIR finding, whether the VIR ordinance

even applied to the project and how the VIR was applied. Basic authority to impose such conditions was implicit. This Court is of the view that the appeal of Conditions #2 and #3 was sufficiently specific so that the County had the opportunity to evaluate and respond to them.

Notwithstanding, the Court next looks to whether Erickson may raise the §L-II 4.3.2 issue regardless of exhaustion of administrative remedies. Previously, Erickson argued that constitutional issues may be raised at any time.[33] Erickson relied on Healing v. California Coastal Com. (1994) 22 Cal.App.4th 1158, State of California v. Superior Court of Orange County (1974) 12 Cal.3d 237 and Buckley v. California Coastal Com. (1998) 68 Cal.App.4th 178.

Orange County, *supra*, is not particularly helpful. The issue there was whether the agency had the power to determine a constitutional challenge to the underlying law it was administering. There is no similar issue here in that Erickson is not constitutionally challenging the VIR ordinance.

Buckley, *supra*, is more on point. Therein the Court held that where the agency lacks subject matter jurisdiction, the petitioners were not required to file a writ petition or exhaust administrative remedies. In

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[33] Because of the simultaneous briefing which does not give Erickson the opportunity to file written response to the exhaustion arguments, on its own motion, the Court takes Judicial Notice of Petitioners' Reply Brief in Support of Writ of Mandate filed 04/14/2014.

that case, the Coastal Commission had no role in the permit requested and hence no jurisdiction to impose conditions. The Court stated at p. 190-191:

> Subject matter jurisdiction cannot be conferred by consent, waiver or estoppel. (Citations omitted.) Therefore, the fact that the Buckleys filed an application for a coastal development permit and the Commission denied the application did not confer on the Commission jurisdiction over the improvement of the lot. Because the Commission had no authority to deny the permit, the Buckleys were not required to seek judicial review of the denial. We do not disagree with any of the authorities cited by the Commission for the proposition that failure to obtain judicial review of a determination by an administrative agency by a timely petition for writ of administrative mandate renders the administrative action immune from collateral attack. (Citations omitted.) We simply hold that the cases do not apply here. fn. 4
>
> The rule of exhaustion of administrative remedies does not apply where the subject matter lies outside the administrative agency's jurisdiction. (Public Employment Relations Bd. v. Superior Court (1993) 13 Cal.App.4th 1816, 1827 [17 Cal.Rptr.2d 323]; Residents for Adequate Water v. Redwood Valley County Water Dist. (1995) 34 Cal.App.4th 1801, 1808 [41 Cal.Rptr.2d 123].) The Commission had no power to deny the Buckleys permission to improve any portion of their lot. Because it lacked power to make any determination, the

> denial of a permit to the Buckleys was a void act that could be set aside at any time. (Citation omitted.)

In this case, County has basic subject matter authority to issue building permits. This is a ministerial duty carried out by the Building Department through its Building Official. The Building Official defers review of the site plan to the Planning Department. It was the site plan review that produced the subject conditions at play here.

The Planning Department derives its authority to review site plans by delegation from the County. County cannot delegate unlawful acts to the Planning Department and the authority of the Planning Department is limited by the authority so delegated. Applied here, County and the Planning Department have limited authority to apply resource standards to the ministerial issuance of a building permit, and that limited authority does not include the VIR resource standards. See Prentiss v. City of South Pasadena, *supra*, 15 Cal.App.4th 85.

While Buckley and like cases do not adequately address the distinction between acting without jurisdiction and in excess of jurisdiction, this is not an instance of County and its Planning Department acting in excess. An example of that might be if the VIR was properly applied, but County required something more than a management plan, such as a ridgeline hiking trail across the Erickson property. Rather, the decision at issue in this case goes to the heart of the agency's

authority to make any application of the VIR ordinance at all.

Similar to Buckley, where the Planning Department lacks subject matter jurisdiction, the petitioners are not required to file a writ petition or exhaust administrative remedies. That issue may be raised at any time.

Further, failure to exhaust administrative remedies is excused if it is clear that exhaustion would be futile. (Sea & Sage Audubon Society, Inc. v. Planning Com. (1983) 34 Cal.3d 412,418. County's declarations unequivocally show that County applies all resource standards to every building permit application. County equally clearly, to this day, doggedly justifies its imposition of the VIR standards, despite the clear language of its ordinance to the contrary. The implication is that County would have made the same arguments here, even if Erickson had raised the issue.

Thus, this issue #3 is now somewhat recast. Whether the restrictive deed and management plan are conservation easements is a moot issue, even though they continue to fit the definition of Civil Code §815 *et seq*. Rather, these conditions are unlawfully imposed because County had no authority to do so in the first instance in connection with the issuance of a building permit. This is especially true where there has been no prior finding of a VIR.

In light of the above analysis, the court must again reconsider its prior ruling. The Court vacates its finding in Writ 2 that the VIR ordinance could be applied

at the building permit stage, and all findings that such application of the ordinance in this case is supported by sufficient findings and evidence. Consequently, all conditions resulting from the application of the VIR ordinance, including both the deed and the management plan, are jurisdictionally deficient in light of the failure to show any legal basis for imposing them.

The Writ 2 ruling and order is amended in that regard and the Court now orders that a writ will issue requiring County to delete such conditions and ordering the issuance of the Erickson building permit. In this regard, the Court further finds that the permit applications did not expire because their issuance was tolled by County's improper application of the VIR ordinance to the Erickson permit. County is estopped to argue otherwise. Counsel for Erickson shall prepare the peremptory writ of mandate at such time as judgment is entered on this and the remaining issues.

(Erickson requests that the writ issue now. County objects, citing Morehart v. County of Santa Barbara (1994) 7 Cal.4th 725 and Kurwa v. Kislinger (2013) 57 Cal.4th 1097. County's objection is valid. Erickson's request for an immediate writ to issue is denied.)

4. If Writ 2 decided the §815 issue correctly, does that determination apply not only to the deed, but the management plan terms which serve as the basis for the deed?

On the basis of the foregoing, the entirety of Conditions #2 and #3 are invalid.

5. Should the Court grant or deny County's motion pursuant to Code of Civil Procedure §1260.040?

County's motion raises the following issues, which are discussed in order:

First, is the motion available in this proceeding? Yes. Dina v. People ex rel. Dept. of Transportation (2007) 151 Cal.App.4th 1029.

Second, is the case ripe for decision? Yes. County's claim that the case is not ripe is unsupported. Ripeness cases such as Williamson Planning Comm'n v. Hamilton Bank (1985) 473 U.S. 172 [87 L.Ed.2d 126, 105 S.Ct. 3108, Hensler v. City of Glendale (1994) 8 Cal.4th 1, and San Mateo County Coastal Landowners' Assn. v. County of San Mateo (1995) 38 Cal.App.4th 523 apply when a generally applicable ordinance or law is enacted and a challenge made without first seeking an individualized determination of the application of that ordinance to the property in question. For example, this might occur when a county adopts a general plan that limits previously allowed development density and the plaintiff (without first making any application at all for use or variance), sues the county for inverse condemnation, assuming an adverse application of the new law. Here, the VIR ordinance is such a general law, but Erickson's claim is not that the adoption of the VIR ordinance itself has caused a taking of their property (not ripe), but that its individualized application to the Erickson property has caused a taking through the permit process (ripe).

Even in the absence of an individualized application, the ripeness rule does not apply if its application would be futile. Thus, even if the permit process were not complete, the County has been abundantly clear as to its intent to apply the VIR ordinance. As the ruling above indicates, any further action on Erickson's part would be futile.

Third, does the Nollan/Dolan/Ehrlich/ Koontz rule apply here? Perhaps. Whether this case is a land use regulation case (as County argues) or a takings case (as Erickson argues) is yet to be determined. If Erickson fails to show a taking under Nollan/Dolan and similar cases, then this is simply a land use regulation case and nothing more. Whether it is a takings case depends on evidence to be produced at trial. As noted earlier in these proceedings, County cannot dictate the theory of the Erickson's case.

Fourth, whether there has been a temporary taking? As discussed above, the Court has not made that determination. Both Landgate, Inc. v. California Coastal Com. (1998) 17 Cal.4th 1006 and Buckley v. California Coastal Com. (1998) 68 Cal.App.4th 178 hold that the mere delay and misapplication of an ordinance or law is not in itself sufficient to establish damages for a taking. The imposition of a condition to effect an unlawful objective is required. The Court assumes that issue will be addressed at the inverse condemnation trial.

Thus, this Court concludes that the motion, while applicable to this case, should be and is denied.

IT IS SO DECIDED AND ORDERED:

DATED: August 25, 2015 /s/ Sean P. Dowling
SEAN P. DOWLING
Judge of the Superior Court

S. PAONE
FILED
AUG 17 2016
Superior Court of the
State of California
County of Nevada

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF NEVADA

JULIET ERICKSON and PETER LOCKYER, *Petitioners/Plaintiffs*, *vs.* County of Nevada, *Respondent/Defendant.*	CASE NO.: CU13-079389 JUDGMENT

This matter having been heard on an original and supplemental petition for writ of mandamus, and having been tried and submitted on an amended and supplemental complaint for inverse condemnation, and having rendered its Statement of Decision, the Court now enters judgment herein as follows:

1. Let a writ of mandate issue from this Court to the Respondent/Defendant County of Nevada prohibiting said County of Nevada from imposing Conditions #2 and #3 described in the petition/complaint as conditions to Defendant's issuance of all permits necessary for them to proceed with their building project at 14060 Pleasant Valley Road, Penn Valley, California,

as said building project was otherwise previously submitted and approved by the County Building Department on July 25, 2011. The Court retains jurisdiction to the extent necessary to resolve any dispute over the implementation of its mandate.

2. Plaintiffs shall take nothing on their claim for Inverse Condemnation.

3. Because the Court finds the primary objective of the litigation to be the removal of the offending conditions, which objective Plaintiffs achieved in Writs #1 and #2, Plaintiffs are entitled to recover their costs.

IT IS SO ADJUDGED AND DECREED.

DATED: August 17, 2016.

s/ Sean P. Dowling

SEAN P. DOWLING
Judge of the Superior Court,
Assigned

Court of Appeal, Third Appellate District –
No. C082927

S266541

IN THE SUPREME COURT OF CALIFORNIA

En Banc

JULIET ERICKSON et al., Plaintiffs and Appellants,

v.

COUNTY OF NEVADA, Defendant and Respondent.

(Filed Mar. 17, 2021)

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice