IN THE CHANCERY COURT FOR THE TWENTIETH JUDICIAL DISTRICT DAVIDSON COUNTY, TENNESSEE

MRB DEVELOPERS, APRIL KHOURY, HOME BUILDERS ASSOCIATION OF MIDDLE TENNESSEE, OLD SOUTH CONSTRUCTION LLC, ASPEN CONSTRUCTION, and GREEN EGGS & HOMES,	)	
Plaintiffs,	)	**Case No. 19-534-I**
v.	)	
METROPOLITAN GOVERNMENT OF NASHVILLE AND DAVIDSON COUNTY,	)	
Defendant.	)	

REPLY SUPPORTING THE METROPOLITAN GOVERNMENT'S MOTION FOR SUMMARY JUDGMENT

The Court should grant the Metropolitan Government's motion for summary judgment because United States Supreme Court precedent dictates that the *Penn Central* standard of review applies to the Sidewalk Ordinance that Plaintiffs challenge. For the reasons presented in the Metropolitan Government's motion for summary judgment, which Plaintiffs did not address in their response,[1] the Sidewalk Ordinance passes that test.

The Supreme Court has never held that the *Nollan/Dolan* standard of review applies outside the limited context of ad hoc, administrative exactions. In fact, the Supreme Court has strongly suggested that *Nollan/Dolan* does not apply to legislative land use regulations of general application such as Nashville's sidewalk ordinance. The majority of lower courts, including this Court, have agreed. Therefore, the Court should reject Plaintiffs' attempt to extend *Nollan/Dolan* and conclude that the Sidewalk Ordinance passes the *Penn Central* test.

[1] Plaintiffs also do not dispute that the Court has dismissed their claim (Count II) alleging that the requirement to build curbs and gutters was beyond the scope of the Metropolitan Government's authority under the Sidewalk Ordinance.

I. *PENN CENTRAL*, NOT *NOLLAN/DOLAN*, APPLIES TO LEGISLATIVE LAND USE REGULATIONS OF GENERAL APPLICATION SUCH AS THE SIDEWALK ORDINANCE.

A. The Supreme Court's Takings Jurisprudence Guides This Court to Apply *Penn Central*.

In *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 538-39, 546 (2005), a unanimous Supreme Court explained how to choose the proper standard of review in Fifth Amendment takings cases. Physical invasions or regulations that obliterate a property's value are subject to *per se* standards. *Id*. at 538. The "special context" of "Fifth Amendment takings challenges to adjudicative land-use exactions" uses the nexus and rough proportionality test from *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) ("*Nollan/Dolan*"). *Lingle*, 544 U.S. at 538, 546. All other land use regulations are subject to the balancing test from *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 98 (1978) ("*Penn Central*"). *Lingle*, 544 U.S. at 539.

Because the Sidewalk Ordinance is not a physical taking,[2] an adjudicative exaction, or a regulation that removes all value from property, it is subject to the *Penn Central* test. *Knight v. Metro. Gov't of Nashville & Davidson Cty*., 572 F. Supp. 3d 428, 443 (M.D. Tenn. 2021). For the reasons presented in the Metropolitan Government's motion for summary judgment, it passes that test.

B. The Supreme Court Has Never Applied *Nollan/Dolan* to Anything Other Than *Ad Hoc* Administrative Exactions.

Plaintiffs urge the Court to extend *Nollan/Dolan* to legislative land use regulations of general application such as the Sidewalk Ordinance. But the Supreme Court has never

[2] The Sidewalk Ordinance is not a physical taking because it invokes a longstanding background restriction on property rights in the nature of a nuisance regulation. *Cedar Point Nursery v. Hassid,* 141 S. Ct. 2063, 2079 (2021); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1028-29 (1992). The Sidewalk Ordinance requires landowners in urban areas to build and maintain sidewalks along their street frontage, a requirement the Tennessee Supreme Court has long regarded as a form of nuisance abatement. *City of S. Fulton v. Edwards*, 251 S.W. 892, 893 (Tenn. 1923). *See* Def.'s Resp. to Pls'. Partial Mot. Summ. J. at 2-4.

applied *Nollan/Dolan* outside the special context of *ad hoc*, adjudicative decisions where the government wields vast power and discretion. *Lingle,* 544 U.S. at 546 (describing *Nollan* and *Dolan* as "Fifth Amendment takings challenges to adjudicative land-use exactions"); *Koontz v. St. Johns River Water Mgmt. Dist*., 570 U.S. 595, 614 (2013) (explaining that the "central concern" of *Nollan/Dolan* is to guard against abuse of the government's "substantial power and discretion in land-use permitting"). The *Lingle* court's citation aimed at administrative exactions drives this point home: "see also *Del Monte Dunes*, supra, at 702, 119 S.Ct. 1624 (emphasizing that we have not extended this standard 'beyond the special context of [such] exactions')." *Lingle*, 544 U.S. at 547 (quoting *City of Monterey v. Del Monte Dunes at Monterey, Ltd*., 526 U.S. 687, 702 (1999) (alteration in original)). This Court should heed these signals from a unanimous Supreme Court and decline to extend *Nollan/Dolan* to the Sidewalk Ordinance, which is a legislative regulation of general application that is subject to *Penn Central*.

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021), had nothing to say about the scope of *Nollan/Dolan.* That case's central holding was that even a temporary *per se* physical invasion taking is actionable. *Id.* at 2075, 2080. The high court did not address the question of law on which this case turns; thus, the dicta Plaintiffs cite is not binding. *See Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 737 (2007).

Nor should the court adopt the reasoning from *Cedar Point Nursery* that the "essential question" in any takings case is not "whether the government action at issue comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree)." 141 S. Ct. at 2072. Again, that language had nothing to do with the scope of *Nollan/Dolan*, which the Supreme Court addressed unanimously in *Lingle.* This Court should follow the Supreme Court's lead in *Dolan, Lingle,* and *Koontz* to restrict *Nollan/Dolan* to the situations it was

crafted to address: those wherein the government can easily abuse its discretion in adjudicative, case-by-case permitting decisions.

For the same reasons, the Court is not bound by Supreme Court dicta opining that the Takings Clause "is not addressed to the action of a specific branch or branches" of government. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713 (2010). This language comes from a non-controlling section of a plurality opinion in a judicial takings case. Even if *Stop the Beach Renourishment* were on point, the plurality hinted at the fitness of *Penn Central* for legislative land use regulations by observing that "the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, *depending on its nature and extent*." *Id*. at 714 (emphasis added).

Notably, Plaintiffs do not mention that most lower courts have rejected their arguments for extending *Nollan/Dolan*, including Part III of this Court and the Middle District of Tennessee. *Joni Elder d/b/a Dogtopia v. Metropolitan Gov't of Nashville and Davidson Cty., Tenn.,* No. 20-897-III, slip op. at *2 (May 27, 2021); *Knight*, 572 F. Supp. 3d at 440-43. Even after *Cedar Point Nursery*, courts continue to recognize that *Nollan/Dolan* should not apply to legislative land use regulations of general application. *See, e.g., Vill. Communities, LLC v. Cty. of San Diego*, No. 20-CV-01896-AJB-DEB, 2022 WL 2392458, at *5 (S.D. Cal. July 1, 2022).

C. *Penn Central* Is a Longstanding Check on Government Power That Is Well- Suited to Land Use Regulations Like the Sidewalk Ordinance.

Doctrinally speaking, *Nollan/Dolan* is not a takings test at all. It is a "special application of the unconstitutional conditions doctrine." *Lingle*, 544 U.S. at 530; *Koontz*, 570 U.S. at 604. *Penn Central* is a valid check on government power that has developed within the Supreme Court's Fifth Amendment takings jurisprudence. *Lingle*, 544 U.S. at 539-40.

Moreover, *Penn Central* is an appropriate test in this case because it is designed to evaluate regulatory schemes "adjusting the benefits and burdens of economic life to promote the common good." *Koontz*, 570 U.S. at 621 (quoting *Penn Central*, 438 U.S. at 124). The Sidewalk Ordinance is just such a regulation. It was designed to balance the impacts of development in denser areas of Nashville with a public need for safe transportation options as well as landowners' economic and possessory interests.

Contrary to Plaintiffs' arguments, the Metropolitan Government does not argue that a legislative act can *never* be a taking. *See* Pls'. Resp. at 12-14. Rather, its position is that the Sidewalk Ordinance should be analyzed as a *potential* taking under *Penn Central*. For the reasons presented in the Metropolitan Government's motion for summary judgment, which Plaintiffs have not challenged, the Sidewalk Ordinance is not a taking under that test.

II. THE NATURE OF THE REGULATION, NOT THE GOVERNMENT BRANCH, DICTATES THE DIFFERENCE IN STANDARD OF REVIEW.

A. Substantial Discretion in Land Permitting Is The Central Concern of *Nollan/Dolan*.

Over and over, Plaintiffs argue that the standard of review in a takings case does not depend solely on the identity of the government actor. (Pls'. Resp. at 1-2, 12-14.) The Metropolitan Government agrees. Rather, it is the nature of the regulation that matters, specifically how much discretion the government has in the permitting process. *See Koontz*, 570 U.S. at 614 (pinpointing discretion as part of the "central concern" of *Nollan/Dolan)*; *Dolan*, 512 U.S. at 387 (describing outlandish permit conditions enabled by vast discretion as "gimmickry"). *Nollan/Dolan*'s exacting standard is appropriate to restrain administrative arms of government that wield vast discretion to impose conditions unrelated to proposed land uses.

But a legislative land use regulation such as the Sidewalk Ordinance poses a low risk of extortion and is therefore properly considered under *Penn Central*. This is because legislative regulations such as the Sidewalk Ordinance apply automatically to broad categories of properties without discretion. *Knight*, 572 F. Supp. 3d at 440-43; *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 696 (Colo. 2001) (en banc). Thus, there is little risk that the government will extract concessions from landowners because legislation has already set fees and conditions. There is no room for negotiation or extortion. *See, e.g.*, *San Remo Hotel L.P. v. City & Cty. of San Francisco,* 41 P.3d 87, 104 (Cal. 2002) ("[N]o meaningful government discretion enters into either the imposition or the calculation of the in-lieu fee."); *Anderson Creek Partners, L.P. v. Cty. of Harnett*, 854 S.E.2d 1, 14-15 (N.C. Ct. App. 2020) ("[t]he Fees are predetermined, set out in the Ordinance, and non-negotiable; the Fees are not assessed on an ad hoc basis or dependent upon the landowner's particular project [. . .] but, unlike the conditions imposed in *Koontz*, the County does not view a landowner's proposed project and then make a demand based upon that specific parcel of real property.").

Thus, a legislative regulation that affords no discretion calls for a different standard from a situation where a government agency can dangle a carrot or brandish a stick before imposing fees or conditions, easily abusing power through gimmickry or pretext. *See Koontz*, 570 U.S. at 604-05; *Ehrlich v. City of Culver City*, 911 P.2d 429, 438-39 (Cal. 1996).

B. *Nollan, Dolan*, and *Koontz* All Involved Adjudicative Exactions With Vast Government Discretion.

Plaintiffs incorrectly state that the conditions in *Nollan* and *Dolan* were imposed legislatively. (Pls'. Resp. at 17.) In fact, the Supreme Court considered *Nollan* and *Dolan* to be ad hoc, adjudicative exactions, not legislative land use regulations — even a decade after *Dolan* was decided. *Lingle*, 544 U.S. at 546. The conditions in these cases and *Koontz* were

imposed by administrative bodies with substantial discretion. In each case, unelected bodies considered the plaintiffs' permit applications individually and imposed conditions that the plaintiffs could not have anticipated. Thus, *Nollan/Dollan*'s more exacting standard of review was appropriate.

In *Nollan*, the California Coastal Commission demanded a lateral easement along the Nollans' seawall to compensate for a "psychological" barrier that their beach house would supposedly create between the Ventura County seashore and a road on the other side of their house. 483 U.S. at 828, 835. Notably, the Commission didn't disclose this rationale until after the Nollans filed a writ of administrative mandamus. *Id.* at 828-29. Throughout the Nollans' permit saga, the Commission followed what the Supreme Court called "administrative regulations." *Id.* at 828-29. The impropriety of this patently unrelated condition and the permissive nature of the Coastal Commission's regulations reveal a wide degree of discretion.

In *Dolan*, the Supreme Court contrasted "essentially legislative" regulations "covering entire areas of the city" with Florence Dolan's case, which concerned an adjudicative condition on a permit. 512 U.S. at 385. Ms. Dolan's permit application went before the city planning commission, which made findings of fact specific to her parcel and proposed land use. *Id.* at 381-82. The commission issued an administrative order that required city council approval, which shows that an administrative body, not a legislative one, created the condition. *Id.* at 382. Moreover, the planning commission wanted to take not just all of Ms. Dolan's property that was in the floodplain next to a creek, but all of the property 15 feet above the floodplain. *Id.* at 388. Finally, as the Supreme Court noted, the city of Tigard could not explain why a private greenway would have served its purposes just

as well as a public one. *Id.* at 393. That the commission could demand such conditions further underscores the discretion it wielded.

The government's discretion was broadest of all in *Koontz*. From the start, the St. Johns River Water Management District exercised vast discretion to negotiate with Coy Koontz, who wanted to develop part of his wetland property in central Florida. *Koontz*, 570 U.S. at 600-02. Rejecting Mr. Koontz's initial plan, the District presented several options, including:

- increasing the size of the conservation easement parcel;
- changing the drainage system;
- using retaining walls instead of grading the property; or
- making improvements to District-owned land several miles away.

Id. at 602.

The District added that it would "favorably consider" other offers. *Id.* Throughout this process, the District acted under vague regulations that allowed it to impose "reasonable conditions" that might be "necessary to assure" that development would "not be harmful to the water resources of the district." *Id*. at 600.

The thread running through these cases is substantial government discretion to negotiate and impose fanciful conditions on development that a landowner would not be able to anticipate. That is not the case with the Sidewalk Ordinance here, which applies broadly and automatically, completely without discretion. (*See* Mem. L. Supporting Def.'s Mot. Summ. J. at 10-11.) Therefore, the heightened scrutiny of *Nollan/Dolan* is not appropriate here.

III. A VARIANCE AND APPEAL OPTION DOES NOT CONVERT THE SIDEWALK ORDINANCE TO AN EXACTION.

Plaintiffs argue that the Sidewalk Ordinance's variance and appeal process makes it discretionary and not generally applicable, but this argument misapprehends the absence of discretion in the ordinance's *application*. (Pls'. Resp. at 18.)

The ordinance allows a permit applicant to ask the Board of Zoning Appeals for a variance. (Metro. Code § 17.20.125, Ex. 1 to Compl.) This offers flexibility to permit applicants. It does not convert the sidewalk ordinance into an exaction because the ordinance applies uniformly, without regard to individual property features. (Metro Code § 17.20.120(A), Ex. 1 to Compl.) Thus, the Sidewalk Ordinance's requirements can be relaxed or eliminated, but only then does the Metropolitan Government individually assess a particular property. By that time, the ordinance has already been applied.

Such variance procedures are commonplace and do not transform zoning regulations into takings. If that were so, all of the Metropolitan Government's zoning code would suddenly be subject to constitutional takings challenges. Aware of this risk, courts have held that a variance option immunizes an ordinance from a facial takings challenge. *See Lake Nacimiento Ranch Co. v. County of San Luis Obispo*, 841 F.2d 872, 877 (9th Cir. 1987); *Home Builders Assn. v. City of Napa*, 90 Cal.App.4th 188, 108 Cal.Rptr.2d 60, 64 (2001). The Court should adopt this reasoning and reject any argument that a variance option can convert the sidewalk ordinance into an exaction.

Moreover, there is little discretion even in the variance and appeal process. The ordinance limits the kinds of variances the BZA can offer, namely an in-lieu fee, an alternative sidewalk design, or "other mitigation for the loss of the public improvement." (Metro. Code § 17.20.125, Ex. 1 to Compl.) Indeed, when Plaintiff April Khoury went before

the BZA, a member told her that the board could only offer her the option to pay an in-lieu fee because "we're not the legislative body." (Compl. ¶ 55.)

CONCLUSION

The Court should hold that the Sidewalk Ordinance is constitutional as a valid land use regulation under the *Penn Central* standard. The *Nollan/Dolan* standard has no application in this case. Accordingly, the Court should enter summary judgment in favor of the Metropolitan Government.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded by electronic mail and the Court's electronic filing system to:

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2001 Daily Journal D.A.R. 5713, 22 A.L.R.6th 785

HOME BUILDERS ASSOCIATION OF NORTHERN CALIFORNIA,
Plaintiff and Appellant,
v.
CITY OF NAPA et al., Defendants and Respondents; NAPA VALLEY COMMUNITY HOUSING et al., Interveners and Respondents.

No. A090437.
Court of Appeal, First District, Division 5, California.
June 6, 2001.

[Opinion certified for partial publication. *]

SUMMARY

A home builders association brought an action asserting a facial challenge to a city ordinance that imposed on residential developers a requirement that 10 percent of all newly constructed units be affordable. The trial court sustained the city's demurrer and dismissed the complaint. (Superior Court of Napa County, No. 26-07228, W. Scott Snowden, Judge.)

The Court of Appeal affirmed. It held that the ordinance did not, on its face, violate the takings clauses of the United States and California Constitutions. Although the ordinance imposed significant burdens on developers, it also provided significant benefits for those who complied, and it allowed a developer to appeal for a reduction, adjustment, or complete waiver of the requirements. The court held that, since the city had the ability to waive the requirements, the ordinance could not, on its face, result in a taking. Further, the waiver clause precluded a facial challenge even though it placed the burden on the developer to prove that a waiver would be appropriate. The court also held that the ordinance met the test of substantially advancing a legitimate state interest. Creating affordable housing for lowand moderateincome families is a legitimate state interest, and the ordinance would advance that interest. (Opinion by Jones, P. J., with Stevens and Simons, JJ., concurring.) ***189**

HEADNOTES

Classified to California Digest of Official Reports

(1)
Words, Phrases, and Maxims--Inclusionary Zoning or Inclusionary Housing Ordinance.
An inclusionary zoning or inclusionary housing ordinance is one that requires a residential developer to set aside a specified percentage of new units for lowor moderate-income housing.

(2)
Appellate Review § 128--Scope of Review--Function of Appellate Court-- Rulings on Demurrers.
On appeal from a judgment of dismissal after an order sustaining a demurrer, the appellate court reviews the record de novo, to determine whether the complaint states a cause of action as a matter of law. All facts properly pleaded are deemed to be true.

(3a, 3b, 3c)
Eminent Domain § 18--Compensation--Constitutional and Statutory Provisions--What Constitutes Taking or Damage--Inclusionary Zoning.
A city's inclusionary zoning ordinance, which imposed on residential developers a requirement that 10 percent of all newly constructed units be affordable, did not, on its face, violate the taking clauses of the United States and California Constitutions. Although the ordinance imposed significant burdens on developers, it also provided significant benefits for those who complied, and it allowed a developer to appeal for a reduction, adjustment, or complete waiver of the requirements. It was not true that the ordinance required developers to sell or rent 10 percent of their units to low-income individuals, since they had the alternatives of donating land or paying an in-lieu fee. Also, since the city had the ability to waive the requirements, the ordinance could not, on its face, result in a taking. Further, the waiver clause precluded a facial challenge even though it placed the burden on the developer to prove that a waiver would be appropriate.

[See 8 Witkin, Summary of Cal. Law (9th ed. 1988) Constitutional Law, § 938 et seq.; West's Key Number Digest, Eminent Domain k. 2(1.2).]

(4)
Eminent Domain § 18.2--Compensation--Constitutional and Statutory Provisions--Regulations--Facial Challenge.
A claim that a regulation is facially invalid because it effects an unconstitutional taking is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional application to the complaining parties. This is because a facial challenge is predicated on ***190** the theory that the mere enactment of the ordinance worked a taking of the plaintiff's property.

(5)
Zoning and Planning § 9--Content and Validity of Zoning Ordinances and Planning Enactments--Inclusionary Zoning Ordinance.
A city's inclusionary zoning ordinance, which imposed on residential developers a requirement that 10 percent of all newly constructed units be affordable, did not fail to substantially advance legitimate state interests, and thus the trial court, in an action by developers asserting a facial challenge to the ordinance, did not err in entering judgment for the city. Creating affordable housing for lowand moderate-income families is a legitimate state interest, and the ordinance would advance that interest. Although a heightened standard of judicial scrutiny applies to specific land use bargains between property owners and regulatory bodies, that standard is inapplicable to development exactions that are generally applicable through legislative action.

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Legal Aid of Napa and Richard A. Marcantonio for Interveners and Respondents Patricia Domingo, Heather Clayton, Donna Simon, Hilda Avia, Rainy Stegall and Hector Candelario.

JONES, P. J.

Home Builders Association of Northern California (HBA) appeals from a judgment entered after the trial court sustained a demurrer and dismissed its complaint asserting a facial challenge to an inclusionary zoning ordinance that was enacted by the City of Napa (City). HBA contends primarily that the trial court erroneously applied federal and California takings law. We disagree and will affirm the judgment.

I. Factual and Procedural Background

City, like many other localities in California, has a shortage of affordable housing. This shortage has negative consequences for all of City's population, but causes particularly severe problems for those on the lower end of the economic spectrum. Manual laborers, some of whom work in the region's wine or leisure industries, are forced to live in crowded, substandard housing. There is a large and growing population of homeless, including many families and teenagers. Workers from low-income families increasingly are forced to live greater distances from their places of employment, which causes increased traffic congestion and pollution.

City formed the Napa Affordable Housing Task Force to address these problems. The task force was a broad based community group that included representatives from nonprofit agencies, environmental groups, religious institutions, local industries, for-profit developers, and the local chamber of commerce. The purpose of the task force

was to "study the issues surrounding affordable housing in the City of Napa and ... make recommendations to the Housing Authority Commission."

The task force studied housing issues for several months. It formed subcommittees, conducted public hearings, and evaluated affordable housing ***192** solutions that had been enacted by other communities. (1)**(See fn. 1)** Ultimately the task force recommended that City enact an inclusionary housing ordinance[1] modeled after one that had been enacted by Napa County.

City responded by enacting the inclusionary zoning ordinance[2] that is at issue in the present appeal. The ordinance applies to all development in the city, including residential and nonresidential.

The primary mandate imposed by the ordinance on residential developers is a requirement that 10 percent of all newly constructed units must be "affordable" as that term is defined.[3] The ordinance offers developers two alternatives. First, developers of single-family units may, at their option, satisfy the so called inclusionary requirement through an "alternative equivalent proposal" such as a dedication of land, or the construction of affordable units on another site. Developers of multifamily units may also satisfy the 10 percent requirement through an "alternative equivalent proposal" if the city council, in its sole discretion, determines that the proposed alternative results in affordable housing opportunities equal to or greater than those created by the basic inclusionary requirement.

As a second alternative, a residential developer may choose to satisfy the inclusionary requirement by paying an in-lieu fee. Developers of single-family units may choose this option by right, while developers of multi-family units are permitted this option if the city council, again in its sole discretion, approves. All fees generated through this option are deposited into a housing trust fund, and may only be used to increase and improve the supply of affordable housing in City.

Developments that include affordable housing are eligible for a variety of benefits including expedited processing, fee deferrals, loans or grants, and density bonuses that allow more intensive development than otherwise would be allowed. In addition, the ordinance permits a developer to appeal for a reduction, adjustment, or *complete waiver* of obligations under the ordinance "based upon the absence of any reasonable relationship or nexus between the impact of the development and ... the inclusionary requirement." ***193**

HBA is a nonprofit corporation and association of builders, contractors, and related trades and professionals involved in the residential construction industry. In September 1999, HBA filed a complaint against City seeking to have the inclusionary zoning ordinance declared facially invalid. As is relevant here, HBA alleged the ordinance violated (1) the takings clauses of the federal and state Constitutions, (2) the Mitigation Fee Act (Gov. Code, § 66000 et seq.), (3) the due process clause of the federal Constitution, and (4) Proposition 218.

City demurred to the complaint, arguing it was entitled to prevail as a matter of law. City supported its demurrer with nearly 700 pages of reports and materials that it had relied upon when adopting the ordinance.

In December 1999, the trial court allowed a group of persons and entities to intervene in the action in support of the ordinance.[4] The interveners joined City's demurrer.

The trial court sustained the demurrer without leave to amend, and entered judgment in favor of City and the interveners. This appeal followed.

II. Discussion

A. *Introduction and Standard of Review*

HBA contends the trial court erred when it sustained the demurrer to its complaint. In arguing City's inclusionary zoning ordinance is facially invalid, HBA again asserts the ordinance violates (1) the takings clauses of the federal and state Constitutions, (2) the Mitigation Fee Act (Gov. Code, § 66000 et seq.), (3) the due process clause of the federal Constitution, and (4) Proposition 218.

The standard of review we apply is familiar. (2) On appeal from a judgment of dismissal after an order sustaining a demurrer, the appellate court reviews the record de novo, to determine whether the complaint states a cause of action as a matter of law. (*Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 125 [271 Cal.Rptr. 146, 793 P.2d 479, 16 A.L.R.5th 903].) All facts properly pleaded are deemed to be true. (*Ibid.*)

With these principles in mind, we consider the arguments that have been advanced concerning each claim. ***194**

B. *Takings Issues*

1. *Is the Ordinance Facially Invalid?*

(3a) HBA contends that City's inclusionary zoning ordinance is facially invalid because it violates the taking clauses of the federal and state Constitutions.

A claimant who advances a facial challenge faces an "uphill battle." (*Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 495 [107 S.Ct. 1232, 1247, 94 L.Ed.2d 472].) (4) " 'A claim that a regulation is *facially* invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional *application* to the complaining parties.' " (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo* (1995) 38 Cal.App.4th 523, 547 [45 Cal.Rptr.2d 117], quoting *Tahoe-Sierra Preservation Council v. State Water Resources Control Bd.* (1989) 210 Cal.App.3d 1421, 1442 [259 Cal.Rptr. 132].) This is because a facial challenge is predicated on the theory that "the mere enactment of the ... ordinance worked a taking of plaintiff's property ...." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 24 [32 Cal.Rptr.2d 244, 876 P.2d 1043].)

(3b) Here, City's inclusionary zoning ordinance imposes significant burdens on those who wish to develop their property. However the ordinance also provides significant benefits to those who comply with its terms. Developments that include affordable housing are eligible for expedited processing, fee deferrals, loans or grants, and density bonuses. More critically, the ordinance permits a developer to appeal for a reduction, adjustment, or *complete waiver* of the ordinance's requirements. Since City has the ability to waive the requirements imposed by the ordinance, the ordinance cannot and does not, on its face, result in a taking.

HBA contends the ordinance's waiver clause does not preclude a facial challenge because that clause improperly places the burden on the developer to prove that a waiver would be appropriate when the City has not established a justification for the exactions mandated by the ordinance. According to HBA, allocating the burden in this way is inconsistent with *Dolan v. City of Tigard* (1994) 512 U.S. 374, 391, footnote 8 [114 S.Ct. 2309, 2320, 129 L.Ed.2d 304]. HBA misreads *Dolan*. Quite to the contrary, the Supreme Court stated in *Dolan,* that when evaluating the validity of generally applicable zoning regulations, it is appropriate to place the burden on the party who is challenging the regulation. (*Ibid.*) As we will discuss below, City's inclusionary zoning ordinance is a generally applicable legislative enactment ***195** rather than an individualized assessment imposed as a condition of development. Thus, the burden shifting standard described in *Dolan* does not apply.

2. *Does the Ordinance Substantially Advance a Legitimate Interest?*

The Fifth Amendment to the United States Constitution states that "private property [shall not] be taken for public use without just compensation." Article I, section 19 of the California Constitution contains similar language, stating that governmental entities must pay just compensation when they "take" private property for public use.

In *Agins v. Tiburon* (1980) 447 U.S. 255 [100 S.Ct. 2138, 65 L.Ed.2d 106], the Supreme Court provided a test to determine whether a taking has occurred. The court said, "[t]he application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests ... or denies an owner economically viable use of his land ...." (*Id.* at p. 260 [100 S.Ct. at p. 2141].)

(5) Here, HBA contends that City's inclusionary zoning ordinance effects a taking under the first of these tests; i.e., that the ordinance is invalid because it fails to substantially advance legitimate state interests. We are unpersuaded.

First, we have no doubt that creating affordable housing for low and moderate income families is a legitimate state interest. Our Supreme Court has said that the "assistance of moderate-income households with their housing needs is recognized in this state as a legitimate governmental purpose." (*Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 970 [81 Cal.Rptr.2d 93, 968 P.2d 993].) This conclusion is consistent with repeated pronouncements from the state Legislature which has declared that "the development of a sufficient supply of housing to meet the needs of *all Californians* is a matter of statewide concern," (Gov. Code, § 65913.9, italics added) and that local governments have "a responsibility to use the powers vested in them to facilitate the improvement and development of housing to make adequate provision for the housing needs of *all economic segments of the community.*" (Gov. Code, § 65580, subd. (d), italics added.) Indeed, Witkin lists 12 separate statutes that are "designed to stimulate the construction of low and moderate income housing by the private sector." (4 Witkin, Summary of Cal. Law (9th ed. 1987) Real Property, § 54, p. 275; *id.* (2000 supp.) § 54, p. 134.)

Second, it is beyond question that City's inclusionary zoning ordinance will "substantially advance" the important governmental interest of providing affordable housing for lowand moderate-income families. By requiring ***196** developers in City to create a modest amount of affordable housing (or to comply with one of the alternatives) the ordinance will necessarily increase the supply of affordable housing. We conclude City's ordinance "substantially advance[s] legitimate state interests." (*Agins v. Tiburon, supra,* 447 U.S. at p. 260 [100 S.Ct. at p. 2141].)

HBA's principal constitutional claim is that City's ordinance is invalid under *Nollan v. California Coastal Comm'n* (1987) 483 U.S. 825 [107 S.Ct. 3141, 97 L.Ed.2d 677], and *Dolan v. City of Tigard, supra,* 512 U.S. 374.

In *Nollan* the court discussed the "substantially advance" test in the context of a governmental requirement that appellant property owners dedicate a portion of their beachfront property to the public as a condition for obtaining a rebuilding permit. In the course of its discussion, the court said there must be an "essential nexus" between a condition imposed on the use of land, and the impacts caused by the proposed use. (*Nollan v. California Coastal Comm'n, supra,* 483 U.S. at p. 837 [107 S.Ct. at p. 3148].)

Dolan also involved dedications of property that were a condition for granting a development permit. There the court said that a "rough proportionality" standard "best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." (*Dolan v. City of Tigard, supra,* 512 U.S. at p. 391 [114 S.Ct. at pp. 2319-2320].)

HBA contends City's ordinance is invalid under *Nollan* and *Dolan* because there is no "essential nexus" or "rough proportionality" between the exaction required by the ordinance, and the impacts caused by development of property.

We reject this argument because *Nollan* and *Dolan* are inapplicable under the facts of this case. "[T]he intermediate standard of judicial scrutiny formulated by the high court in *Nollan* and *Dolan* is intended to address ... land use 'bargains' between property owners and regulatory bodies —those in which the local government conditions permit approval for a given use on the owner's surrender of benefits which *purportedly* offset the impact of the proposed development. It is in this paradigmatic permit context—where the individual property owner-developer seeks to negotiate approval of a planned development—that the combined *Nollan* and *Dolan* test quintessentially applies." (*Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 868 [50 Cal.Rptr.2d 242, 911 P.2d 429].) "But a different standard of scrutiny ***197** [applies] to development fees that are generally applicable through legislative action 'because the heightened risk of the "extortionate" use of the police power to exact unconstitutional conditions is not present.' "[5] (*Santa Monica Beach, Ltd. v. Superior Court, supra,* 19 Cal.4th at p. 966, quoting *Ehrlich v. City of Culver City, supra,* 12 Cal.4th at p. 876.) "[I]ndividualized development fees warrant a type of review akin to the conditional conveyances at issue in *Nollan* and *Dolan,* whereas generally applicable development fees warrant the more deferential review that the *Dolan* court recognized is generally accorded to legislative determinations." (*Santa Monica Beach, Ltd. v. Superior Court, supra,* 19 Cal.4th at pp. 966-967.) The justification for these varying levels of scrutiny is founded in the nature of the two types of exactions. "It is one thing for courts to make a government agency adhere to its own justification for requiring the dedication of a particular portion of property as a condition of development; such adherence safeguards against the possibility that the justification is merely a pretext for taking the property without paying compensation.... But it is another thing for courts to require that a complex, generally applicable piece of economic legislation that will have many effects on many different persons and entities accomplish precisely the goals stated in a legislative preamble in order to preserve its constitutionality." (*Santa Monica Beach, Ltd. v. Superior Court, supra,* 19 Cal.4th at p. 972.)

Here, we are not called upon to determine the validity of a particular land use bargain between a governmental agency and a person who wants to develop his or her land. Instead we are faced with a facial challenge to economic legislation that is generally applicable to *all* development in City. We conclude the heightened standard of review described in *Nollan* and *Dolan* is inapplicable under these facts.

3. *Other Takings Issues*

HBA advances two additional arguments on the takings issue.

First HBA contends that even if the heightened level of scrutiny set forth in *Nollan* and *Dolan* are inapplicable, City's inclusionary zoning ordinance is still invalid under California cases such as *Rohn v. City of Visalia* (1989) 214 Cal.App.3d 1463 [263 Cal.Rptr. 319], *Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240 [220 Cal.Rptr. 2], and *Liberty* ***198** *v. California Coastal Com.* (1980) 113 Cal.App.3d 491 [170 Cal.Rptr. 247]. These decisions are inapposite. The issue in each was the validity of an ad hoc condition that was imposed on an individual developer. None of them involved a facial challenge to a generally applicable zoning ordinance that imposed obligations on all development in a given area. We conclude *Rohn, Whaler's Village,* and *Liberty* are not applicable under the facts of this case.

HBA also contends that the inclusionary zoning ordinance is invalid because the lack of housing for low and moderate income families in City is the product of City's own prior restrictive land use policies.

HBA has not cited any authority to support the proposition that a zoning ordinance which tries to solve problems caused by prior legislative decisions is invalid, and case law is directly to the contrary. For example, in *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104 [98 S.Ct. 2646, 57 L.Ed.2d 631], the Supreme Court ruled that New York could enact a landmark preservation law that was designed to mitigate the effects of prior policies that permitted "large numbers of historic structures, landmarks, and areas" to be destroyed. (*Id.* at p. 108 [98 S.Ct. at p. 2651].) If New York can enact a landmark preservation law to remedy a shortage of historic buildings created by its prior policies, City can enact an inclusionary zoning ordinance even if its prior policies contributed to a scarcity of available land and a shortage of affordable housing.

C. *Mitigation Fee Act*[*]

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D. *Due Process*

HBA contends the inclusionary zoning ordinance is facially invalid under the due process clause of the Federal Constitution because it "requires property owners who develop residential housing to sell or rent 10% of their units at prices or rents that are based entirely upon certain fixed percentages of the income levels of lower and very lowincome households." Imposing such a requirement violates the due process clause, HBA argues, because "the inclusionary zoning law provides no mechanism to make a fair return for property owners who are forced to sell or rent units at an amount unrelated to market prices."

We doubt seriously that HBA is entitled to a "fair return" under the due process clause. The "fair return" standard is commonly used to evaluate ***199** restrictions placed on historically regulated industries such as railroads and public utilities. (See, e.g., *Power Comm'n v. Pipeline Co.* (1942) 315 U.S. 575 [62 S.Ct. 736, 86 L.Ed. 1037].) It has also been used to evaluate rent control ordinances. (See, e.g., *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 679 [209 Cal.Rptr. 682, 693 P.2d 261].) However HBA has not cited, and we are not aware of, any case that holds a housing developer is entitled to "fair return" on his or her investment.

(3c) However we need not base our decision on this ground. First, it is not literally correct to say that City's ordinance "requires property owners who develop residential housing to sell or rent 10% of their units [to low income individuals]." Under the ordinance, any person who does not want to sell or rent a portion of his or her housing units to low income individuals may choose one of the alternatives, such as donating vacant land or paying an in-lieu fee. Thus HBA's argument is based on an incorrect premise.

Second, and more importantly, HBA's facial due process challenge must necessarily fail. As we have said, " 'A claim that a regulation is *facially* invalid is only tenable if the terms of the regulation will not permit those who administer it to avoid an unconstitutional *application* to the complaining parties....' " (*San Mateo County Coastal Landowners' Assn. v. County of San Mateo, supra,* 38 Cal.App.4th at p. 547, citation omitted.) When an ordinance contains provisions that allow for administrative relief, we must presume the implementing authorities will exercise their authority in conformity with the Constitution. (See *Fisher v. City of Berkeley, supra,* 37 Cal.3d at p. 684.)

Here, as we have noted, City's ordinance includes a clause that allows city officials to reduce, modify or waive the requirements contained in the ordinance "based upon the absence of any reasonable relationship or nexus between the impact of the development and ... the inclusionary requirement." Since City has the authority to completely waive a developer's obligations, a facial challenge under the due process clause must necessarily fail.

HBA contends the waiver clause does not preclude a facial challenge because it does not state expressly that a waiver may be granted based on a lack of a "fair return." However the power of an agency to make adjustments to guarantee a fair return is "not limited to those literally granted by the ordinance ...." (*City of Berkeley v. City of Berkeley Rent Stabilization Bd.* (1994) 27 Cal.App.4th 951, 962 [33 Cal.Rptr.2d 317].) When this standard is not expressly stated, it is "present by implication." (*Ibid.*) ***200**

E. *Proposition 218*[*]

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III. Disposition

The judgment is affirmed.

Stevens, J., and Simons, J., concurred.

A petition for a rehearing was denied June 27, 2001, and on July 2, 2001, the opinion was modified to read as printed above. Appellant's petition for review by the Supreme Court was denied September 12, 2001. ***201**

Footnotes

* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for publication with the exception of parts II.C and II.E.

1 An "inclusionary zoning" or "inclusionary housing" ordinance is one that requires a residential developer to set aside a specified percentage of new units for lowor moderateincome housing. (See Padilla, *Reflections on Inclusionary Housing and a Renewed Look at its Viability* (1995) 23 Hofstra L.Rev. 539, 540.)

2 In fact, City enacted two ordinances to address the inclusionary housing problem. We will refer to the ordinances collectively as the inclusionary zoning ordinance or simply, the ordinance.

3 The definition of "affordable" in the ordinance is complex. In general, the term refers to an amount that could be paid by persons who live in a household that earns significantly less than the area median income.

4 The interveners were Napa Valley Community Housing, Non-Profit Housing Association of Northern California, Housing California, Patricia Domingo, Heather Clayton, Donna Simon, Hilda Avia, Rainy Stegall, and Hector Candelario.

5 While the court in *Santa Monica Beach,* discussed the scope of *Nollan* and *Dolan* in the context of "development fees," the court has made clear that the same analysis applies whether a governmental entity requires the conveyance of property, or the payment of a fee. (See *Ehrlich v. City of Culver City, supra,* 12 Cal.4th at p. 876.)

* See footnote, *ante*, page 188.

* See footnote, *ante*, page 188.

841 F.2d 872
United States Court of Appeals,
Ninth Circuit.

LAKE NACIMIENTO RANCH CO., Plaintiff–Appellant,

v.

COUNTY OF SAN LUIS OBISPO, Defendant–Appellee.

Nos. 85–6475, 86–5858.
|
Argued and Submitted Sept. 9, 1987.
|
Decided Oct. 15, 1987.
|
Amended March 8, 1988.

Synopsis

Developer brought action challenging zoning restrictions placed on its land by county. The United States District Court for the Central District of California, Consuelo Bland Marshall, J., granted summary judgment in favor of county but denied county's request for attorney fees, and developer and county appealed. The Court of Appeals, 830 F.2d 977 affirmed and in amended opinion, Cynthia Holcomb Hall, Circuit Judge, held that: (1) claim that county's denial of request to develop private membership recreational vehicle club accomplished unconstitutional taking "as applied" to its property, was not ripe for consideration; (2) developer failed to show that county's zoning restrictions on its property were facially invalid on ground that they denied developer economically viable use of land; and (3) availability of adequate state remedies defeated developer's procedural due process claims against county.

Affirmed.

Attorneys and Law Firms

***874** Michael M. Berger and M. Reed Hunter, Los Angeles, Cal., for plaintiff-appellant.

Vicki E. Land and Thomas F. Winfield, III, Los Angeles, Cal., for defendant-appellee.

Appeal from the United States District Court for the Central District of California.

Before HALL, NOONAN and THOMPSON, Circuit Judges.

Opinion

CYNTHIA HOLCOMB HALL, Circuit Judge:

Plaintiff, Lake Nacimiento Ranch Company (Ranch) brought this action against the County of San Luis Obispo (County), alleging that the County's restrictions on its property accomplished an unconstitutional taking. The Ranch also claims that the County Board of Supervisors violated its right to due process because one of the voting supervisors had a conflict of interest. The district court granted summary judgment in favor of the County, which the Ranch now appeals. The district court also denied the County's request for attorneys' fees, which the County appeals.

I. *Overview*

Lake Nacimiento is an artificial reservoir created in 1960 and located in northern San Luis Obispo County. As required by California law, the County has a comprehensive long-term General Plan for development, which includes a Land Use Element. *See* Cal. Gov't Code § 65302 (West 1983). The Land Use Element describes the County's official policy on the location, growth and development of land uses. *Id.* § 65302(a). The County also has a zoning ordinance, called the Land Use Ordinance, which states the County's development standards and review procedures.

The County adopted the Nacimiento/San Antonio General Plan in 1971. In 1980, the County amended the Land Use Element and the Land Use Ordinance, reducing the allowed residential densities and reclassifying most of the remaining privately-owned, undeveloped land around the lake from a "Recreation" zone to a more restrictive "Rural Lands" zone. The Rural Lands category, like the Recreation category, expressly permits single-family residences and light agricultural uses. In fact, the Rural Lands category outlines 8 groups of allowed uses and 42 groups of special uses.

The property which is the subject of this action is owned by the Ranch and comprises approximately 1,500 acres

bordering the south shore of Lake Nacimiento. The Ranch acquired the property in 1964.[1] Since that time, the property has been held for investment and leased in the interim for cattle and horse grazing and for equestrian purposes. The 1980 amendments to the County's General Plan changed the land use designation for almost all of the Ranch's property from Recreation to Rural Lands.

In 1981, the Ranch applied for an amendment to the General Plan, requesting the redesignation of 800 acres of the property ***875** as a Recreation zone. On November 19, 1981, the County Planning Commission unanimously recommended the adoption of the requested amendment. On December 14, 1981, the County Board of Supervisors voted 3–2 to deny the Ranch's proposed amendment.

One of the supervisors voting against the amendment, Howard Mankins, was a member of the Cal–Shasta Club, a private, non-profit recreational organization owning property contiguous to the Ranch's property. The Cal–Shasta Club openly opposed the Ranch's application for an amendment. Had the amendment been enacted, more people would have had access to lake-shore properties for recreational purposes, thereby diluting the degree of exclusive use enjoyed by club members. The Ranch claims that Mankins owns a cabin, a boat dock, and has an interest in the common realty of the Cal–Shasta Club. Mankins did not disclose his membership in the Cal–Shasta Club or these alleged interests at the December 14 hearing or in the financial interest statements required by California law. *See* Cal. Gov't Code §§ 87100–03 (West 1987).

On June 11, 1982, the Ranch initiated this action against the County. The Ranch alleges two causes of action. First, the Ranch claims that the County's General Plan and its Land Use Ordinance so restrict the Ranch's ability to develop its property that they accomplish an unconstitutional taking of the property in violation of the fifth and fourteenth amendments. The Ranch requests orders invalidating, and enjoining the County from enforcing, the 1980 amendments as they apply to the Ranch. It also requests damages under 42 U.S.C. § 1983 for the taking. Second, the Ranch claims that under 42 U.S.C. § 1983, California law, and the United States Constitution it was denied its fourteenth amendment right to due process because Supervisor Mankins voted against the Ranch's proposed amendment despite his alleged, undisclosed conflict of interest. Pursuant to this cause of action, the Ranch requests damages and one of the following: either the invalidation of the vote of the Board of Supervisors and the sustaining of the Planning Commission's recommendation approving the amendment, or the invalidation of the 1981 decision changing the land use designation to Rural Lands.

The district court, in its unpublished opinion, granted the County's motion for summary judgment as to the Ranch's taking cause of action. Both parties moved for summary judgment as to the due process cause of action, and the district court granted the County's motion. The Ranch now appeals these decisions. The County also appeals from the district court's denial of its motion for attorneys' fees under 42 U.S.C. § 1988.

II. *The Ranch's Taking Claim*

On appeal, the Ranch argues that the district court erred in granting the County's summary judgment motion on the taking claim. We review the district court's grant of the County's summary judgment motion de novo. *Martino v. Santa Clara Valley Water District,* 703 F.2d 1141, 1145 (9th Cir.), *cert. denied,* 464 U.S. 874, 104 S.Ct. 151, 78 L.Ed.2d 141 (1983). We must determine, viewing all evidence and factual inferences in the light most favorable to the Ranch, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *See Ashton v. Cory,* 780 F.2d 816, 818 (9th Cir.1986).

A. *Standards For a Motion for Summary Judgment*

The Ranch claims that the district court failed to view the evidence in the light most favorable to the Ranch as the nonmoving party. The district court is obliged to apply this standard in considering a summary judgment motion, *Twentieth Century–Fox Film Corp. v. MCA, Inc.,* 715 F.2d 1327, 1328–29 (9th Cir.1983), and it apparently did so. Throughout its opinion, the district court accepted the Ranch's version of the material facts, unless the Ranch failed to submit evidence supporting its version. Therefore, the district court applied the correct standard in viewing the facts.

***876** The Ranch also claims that the district court erroneously placed the burden of proof on the Ranch, and not on the County. The Ranch misunderstands its own burden of proof, which has been clarified by the Supreme Court's recent decision, *Celotex Corp. v. Catrett,* 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Under *Celotex,* the Ranch, as the nonmoving party, may avoid summary judgment against it only by making "a showing sufficient to establish the existence of an element essential to [its] case, and on which [the Ranch] will bear the burden of proof." 106 S.Ct. at 2552–53. In contrast, the County, as the party seeking summary judgment, "bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Id.* at 2553. The County was not required to "support its motion with affidavits or other similar materials *negating* the opponent's claim." *Id.* (emphasis in original). The district court properly required the Ranch to make "sufficient showings" supporting the essential elements of its case whenever the Ranch would have carried the burden of proof at trial.

B. *The Ranch's "As Applied" Challenge*

The Ranch claims that the district court failed to address its claim that the General Plan, the Land Use Ordinance, and the Board of Supervisors' denial of the amendment "as applied" to its property accomplished an unconstitutional taking. The Ranch argues that the district court only addressed its "facial" challenge to these County actions. This is not the case. The district court decided that the Ranch's "as applied" taking claim was not ripe for consideration. We review de novo the district court's ruling that the Ranch's claim was not ripe. *Assiniboine and Sioux Tribes v. Board of Oil and Gas,* 792 F.2d 782, 787 (9th Cir.1986).

In order for an "as applied" regulatory taking claim to be ripe, a plaintiff must establish two components: (1) that the regulation has gone so far that it has "taken" plaintiff's property; and (2) that any compensation tendered for such taking is not "just." *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340, 106 S.Ct. 2561, 2566, 91 L.Ed.2d 285 (1986); *Kinzli v. City of Santa Cruz,* 818 F.2d 1449, 1453, *modified,* 830 F.2d 968 (9th Cir. 1987). To establish that the regulation has "gone too far," the Ranch must show that the County has made "a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald,* 106 S.Ct. at 2566. This final determination requires two decisions against the Ranch: a rejected development plan and the denial of a variance. *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172, 187–88, 105 S.Ct. 3108, 3117–18, 87 L.Ed.2d 126 (1985); *Kinzli,* 818 F.2d at 1454.

The Ranch admits that it has submitted to the County only an *informal* development proposal for a private membership recreational vehicle club in conjunction with its request for an amendment to the Land Use Ordinance. The County's response to the informal request shows that it viewed the proposal as "tentative." The County's response specified the numerous deficiencies in the informal proposal and suggested ways to remedy them. In light of these facts, the County's denial of this informal request is not a final and authoritative decision exposing the nature and extent of permissible development under the Rural Lands classification. *See MacDonald,* 106 S.Ct. at 2567–69.

The Ranch correctly argues that it can avoid the ripeness requirement of a final determination if it can show that the submission of a development plan and an application for a variance would be futile. *American Savings and Loan Ass'n v. County of Marin,* 653 F.2d 364, 371 (9th Cir.1981). The Ranch has the "heavy burden" of showing futility. *Id.* The Ranch cannot, at this point, meet this burden. As explained in *Kinzli,* "*at least one* meaningful ***877** application" for a development project must be made. *Kinzli,* 818 F.2d at 1454–55 (emphasis in original). In addition, the Ranch must have also made a meaningful application for a variance under the zoning ordinance. *Id.* at 1455 n. 6. Since the Ranch has failed to submit such applications, it may not argue that it would be futile to secure a final determination from the County.[2]

C. *The Ranch's Facial Challenge*

As the district court properly recognized, the Ranch may challenge the zoning restriction on the basis that the "mere enactment" of the restriction constitutes a taking of its property. *Agins v. Tiburon,* 447 U.S. 255, 260, 100 S.Ct. 2138, 2141, 65 L.Ed.2d 106 (1980); *Martino,* 703 F.2d at 1146 n. 2. The Ranch, however, faces an "uphill battle in making a facial attack on the [zoning restriction] as a taking." *Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 1247, 94 L.Ed.2d 472 (1987). The district court, therefore, properly placed the burden of proof on the Ranch.

The County's zoning restriction is facially invalid if: (1) it does not substantially advance legitimate state interests, or (2) it denies an owner economically viable use of his land. *Agins,* 447 U.S. at 260, 100 S.Ct. at 2141; *Hodel v. Virginia Surface Mining & Reclamation Ass'n,* 452 U.S. 264, 295–96, 101 S.Ct. 2352, 2370, 69 L.Ed.2d 1 (1981). The County's ordinance meets the first test, *see Cormier v. County of San*

Luis Obispo, 161 Cal.App.3d 850, 207 Cal.Rptr. 880 (1984), and the Ranch does not argue otherwise.

Under the second test, the precise meaning of "economically viable use" of land is elusive and has not been clarified by the Supreme Court. *MacLeod v. County of Santa Clara,* 749 F.2d 541, 548 (9th Cir.1984), *cert. denied,* 472 U.S. 1009, 105 S.Ct. 2705, 86 L.Ed.2d 721 (1985). Generally, the existence of permissible uses determines whether a development restriction denies a property holder the economically viable use of its property. *Agins,* 447 U.S. at 262, 100 S.Ct. at 2142; *Hodel,* 452 U.S. at 296, 101 S.Ct. at 2370, *William C. Haas & Co. v. City and County of San Francisco,* 605 F.2d 1117 (9th Cir.1979), *cert. denied,* 445 U.S. 928, 100 S.Ct. 1315, 63 L.Ed.2d 761 (1980). The Ranch bears the ultimate burden of proof in showing that the restriction, on its face, denies beneficial uses. *See Keystone,* 107 S.Ct. at 1247 (plaintiffs face an uphill burden in making a facial attack); *Hodel,* 452 U.S. at 296–97, 101 S.Ct. at 2370–71 (Court scrutinized the restriction's language, yet did not require the governmental entity to prove the availability of beneficial uses); *Agins,* 447 U.S. at 262, 100 S.Ct. at 2142 (same).

The district court found that the Ranch had failed to make a sufficient showing that there was no available beneficial use under the General Plan and Land Use Ordinance.[3] Specifically, the district court held that the Ranch failed to submit any evidence showing that a dude ranch in combination with other uses (other than a working ranch) was not economically viable. Moreover, the availability both of a variance under Land Use Ordinance § 22.01.044 and of additional special uses under § 22.08.120 strongly suggests that there are other economically beneficial uses not expressly included. This fact alone logically prevents the ordinance from being overrestrictive on its face, since the Ranch could apply for a variance or waiver of the restrictions.

Ranch argues that the County's regulation deprives it of the opportunity to recoup ***878** its "profit expectation." Without commenting on the significance of Ranch's profit expectations, we find Ranch's argument unpersuasive.[4] Ranch remains free to pursue its profit expectations by submitting a development application to the County. *See Agins,* 447 U.S. at 262, 100 S.Ct. at 2142.

III. *Conflict of Interest*

The Ranch claims that the County deprived it of due process in passing the 1980 General Plan and in denying the amendment sought by the Ranch. The basis for this claim is the Ranch's allegation that Supervisor Mankins participated in and voted on these matters despite his personal financial interest therein, stemming from his interest in the cabin, boat dock, and in real estate owned by the Cal–Shasta Club. The district court relied on two grounds in granting the County's motion for summary judgment on this claim. First, the court held that the Ranch's 42 U.S.C. § 1983 claim for violation of procedural due process is improper since California's Political Reform Act of 1974[5] provides a statutory remedy for the violation. Second, the district court held that there was no evidence showing that the alleged deprivation of due process under section 1983 was the result of County policy or custom.

A. *Official Policy or Custom*

The district court granted summary judgment because the Ranch failed to present any evidence showing that the County had a policy or custom of allowing financially interested officials to participate in decision-making. In its complaint, the Ranch did not allege that the County had such a policy. The Ranch, however, claims that because Mankins was an official who himself made policy, his act of voting constituted official County policy.[6] The district court properly rejected this argument.

42 U.S.C. § 1983 requires that a deprivation of constitutional rights occur "under color of" state law. The County, as a municipality, may be liable under section 1983 only if the alleged violation was pursuant to "official municipal policy." *Monell v. New York City Department of Social Services,* 436 U.S. 658, 691, 98 S.Ct. 2018, 2036, 56 L.Ed.2d 611 (1978). In *Pembaur v. City of Cincinnati,* 475 U.S. 469, 106 S.Ct. 1292, 89 L.Ed.2d 452 (1986), the Supreme Court explained the circumstances under which the actions of an official constitute "official municipal policy." *Id.* 106 S.Ct. at 1299–1300. The Court stated that "municipal liability under section 1983 attaches where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials *responsible for establishing final policy* with respect to the subject matter in question." *Id.* at 1300 (emphasis added).

The Ranch erroneously argues that the "subject matter in question" is the actual decision regarding the zoning restrictions. This argument is based upon ***879** the Ranch's mistaken attempt to piggyback its taking claim on its

procedural due process claim. The "subject matter in question," however, is Mankins'*participation* in the decision-making process despite his alleged conflict. This participation is the source of any denial of procedural due process. *See id.* at 1300 ("subject matter" is law enforcement practices, not the indictment which resulted from such practices).

The question of whether Mankins had such "final policy-making authority" is a question of California law. *See id.* Under California law, Mankins did not have final authority to establish the County's official policy regarding participation in decision-making by an official with a conflict of interest. The Board of Supervisors may only establish official policy by a majority of the supervisors. Cal. Gov't Code § 25005 (West 1968). The Board adopted Resolution No. 76–456 by unanimous vote, requiring disqualification whenever a conflict of interest exists. Since the Ranch presented no material evidence showing that the County approved Mankins' participation, the district court properly granted summary judgment for the County on this basis.

B. *Adequate State Remedies*

The Ranch also claims that the district court erred in holding that the availability of adequate state remedies defeated its due process claim. The district court relied upon *Parratt v. Taylor,* 451 U.S. 527, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981), where the Supreme Court dismissed an inmate's section 1983 claim against prison officials for a deprivation of property in violation of his due process rights. The Court explained that the inmate had not stated a claim for relief under section 1983 since the inmate failed to seek adequate compensation through available state procedures. *Id.* at 543–44, 101 S.Ct. at 1917. The district court here held that *Parratt* required the Ranch to first seek compensation, available under California law, *see supra* note 5, before it could bring an action for deprivation of its right to procedural due process.

The Ranch argues that *Parratt* 's requirement of first seeking compensation through state procedures only applies to "prisoner" cases. This argument is meritless, since this requirement is broadly-stated and has been applied in cases other than those involving inmate actions against prison officials. *See, e.g., Mann v. City of Tucson,* 782 F.2d 790, 792–93 (9th Cir.1986) (search and seizure case).

The Ranch also argues that *Parratt* is not applicable since the Ranch alleges a violation of its *substantive* due process rights. The district court recognized that this issue is unresolved. *Cf. Mann,* 782 F.2d at 792–93 (*Parratt* not applicable where plaintiff is challenging the deprivation itself as opposed to procedural impropriety). Nevertheless, we need not decide this question. As discussed above, the Ranch's due process claim arising from Mankins' alleged conflict of interest is an attack on the decision-making process itself. The Ranch recasts its taking claim as a substantive due process claim, and then inappropriately links it to Mankins' conflict of interest. *See Hamilton Bank,* 473 U.S. at 199–200, 105 S.Ct. at 3123–24 (substantive due process claim is essentially the same as the taking claim). The Ranch is essentially claiming that this process was tainted by a voting supervisor's conflict of interest. This type of procedural claim is governed by *Parratt. Mann,* 782 F.2d at 792–93.

The Ranch also argues that the remedies available under California law are inadequate, such that *Parratt* is inapplicable. This argument is incorrect. First, *Parratt* applies whenever a *procedure* for redress of a deprivation of procedural due process is available. 451 U.S. at 543, 101 S.Ct. at 1917; *McRorie v. Shimoda,* 795 F.2d 780, 786 (9th Cir.1986). The fact that more remedies are available under section 1983 than are available under the state procedure is irrelevant under these circumstances. *Parratt,* 451 U.S. at 453–54, 101 S.Ct. at 1917. Second, in claiming that the remedy is inadequate, the Ranch once again erroneously focuses upon its injury from the alleged taking of the property. Therefore, the Ranch's section 1983 claim is ***880** barred because there is an available state remedy.[7]

C. *Claim under California Law and Under the Fourteenth Amendment*

The Ranch brought its due process claim under section 1983, California law, and under the the fourteenth amendment. As discussed above, the district court properly granted summary judgment for the County under section 1983. The district court also implicitly dismissed the claim as one under California law, and this decision was not an abuse of discretion. *Arizona v. Cook Paint & Varnish Co.,* 541 F.2d 226, 227 (9th Cir.1976), *cert. denied,* 430 U.S. 915, 97 S.Ct. 1327, 51 L.Ed.2d 593 (1977).

However, the district court did not address the question of whether the Ranch could bring its claim of deprivation of due process directly under the fourteenth amendment, irrespective of implementing civil rights legislation (i.e., section 1983).

The question of whether plaintiff may bring a direct cause of action under the fourteenth amendment is difficult and

"extremely important," and has been left unanswered by the Supreme Court. *Mt. Healthy City School District Board of Education v. Doyle,* 429 U.S. 274, 278, 97 S.Ct. 568, 571, 50 L.Ed.2d 471 (1977); *Aldinger v. Howard,* 427 U.S. 1, 4 n. 3, 96 S.Ct. 2413, 2415 n. 3, 49 L.Ed.2d 276 (1976). *See generally* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3573.1 & n. 20 (1984). On the record before us, we need not decide this issue. The Ranch has not clearly raised this issue,[8] and it has focused its case on section 1983.

IV. *Attorneys' Fees*

The County argues at length that the district court erred in denying its request for attorneys' fees under 42 U.S.C. § 1988. We review the district court's denial for an abuse of discretion. *Hensley v. Eckerhard,* 461 U.S. 424, 437, 103 S.Ct. 1933, 1941, 76 L.Ed.2d 40 (1983).

In light of this standard of review, we uphold the decision of the district court. The district court applied the proper test in finding that "there is absolutely no indication that the plaintiff's action was 'groundless or without foundation.' " *See Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). The County substantiates its claim that the district court abused its discretion by pointing to allegedly controlling Supreme Court decisions predating the final decision below. However, many questions raised by the Ranch have been decided only recently. *See, e.g., Kinzli* (1987); *Pembaur* (1986). Under these circumstances, we fail to find an abuse of discretion.

V. *Conclusion*

We affirm the decision of the district court. The Ranch's "as applied" challenge is not ripe for consideration; its facial challenge is unsupported. The claim based upon conflict of interest fails under section 1983. Finally, the district court did not abuse its discretion in denying the County's request for attorneys' fees.

AFFIRMED.

All Citations

841 F.2d 872

Footnotes

1 The property was acquired as part of a 3,000 acre parcel. The Ranch paid about $1 million for the entire parcel. Part of the parcel has been sold.

2 The recent Supreme Court decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987), is consistent with the Supreme Court's previous rulings dealing with ripeness. In *First English Evangelical,* the Court held that the taking claim was ripe because the state court below had assumed that a taking had occurred. *Id.* 107 S.Ct. at 2384. The Court thereby distinguished its rulings in *MacDonald* and in *Agins. Id. See also Kinzli*, 830 F.2d at 968 n. *

3 It is important to note that the Land Use Ordinance itself incorporates an extensive list of available uses, including single-family dwellings.

4 Some controversy exists concerning the appropriateness of considering a land owner's "profit expectations" in determining on a facial challenge whether a regulation denies the land owner the "economically viable use" of the owner's property. *Compare Williamson County Regional Planning Comm'n v. Hamilton Bank,* 473 U.S. 172, 190–91 & n. 12, 105 S.Ct. 3108, 3119 & n. 12, 87 L.Ed.2d 126 (1985) *with Keystone Bituminous Coal Ass'n v. DeBenedictis,* 480 U.S. 470, 107 S.Ct. 1232, 1249, 94 L.Ed.2d 472 (1987).

5 Under California Government Code § 87100, a public official is barred from participating in a governmental decision "in which he knows or has reason to know he has a financial interest." Cal.Gov't Code § 87100 (West 1987). Under section 91003, the Ranch is able to bring an action for injunctive relief. Cal.Gov't Code § 91003 (West 1987). Under section 91004, damages are available. Cal.Gov't Code § 91004 (West 1987). The Ranch is incorrect in arguing that damages are only available if they are sought by a prosecutor, since the statute states that damages are available in actions brought by "a person residing within the jurisdiction." *Id.*

6 On appeal, the Ranch argues that the County waived any claim that Mankins acted contrary to County policy because throughout this litigation, the County has asserted Mankins' right to vote. Apparently, the Ranch offers this theory for the first time on appeal. We decline to address this argument, since it was not raised below. *Rainbow Pioneer No. 44–18–04A v. Hawaii–Nevada Investment,* 711 F.2d 902, 905 (9th Cir.1983).

7 The Ranch's claim under California law is not barred by the statute of limitations. Under the Political Reform Act, a claim must be filed within four years of the date of a violation. Cal.Gov't Code § 91000(c) (West 1987). However, under California's doctrine of equitable tolling of the statute of limitations, the statute may be tolled where: (1) a litigant has several legal remedies and pursues one remedy in good faith in another forum; (2) there is no tolling provision in the relevant statute; and (3) notice of the claim to defendant is timely. *Nelson v. International Paint Co.,* 716 F.2d 640, 645 (9th Cir.1983); *Addison v. State,* 21 Cal.3d 313, 318–19, 146 Cal.Rptr. 224, 226–27, 578 P.2d 941 (1978).

8 At oral argument, the Ranch stated that it believed it had a direct cause of action under the fourteenth amendment for its taking claim. It apparently does not argue that it has a direct cause of action for a procedural due process violation. At least it fails to cite any authority or clearly state this claim.

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130 S.Ct. 2592
Supreme Court of the United States

STOP THE BEACH RENOURISHMENT, INC.

v.

FLORIDA DEPARTMENT OF ENVIRONMENTAL PROTECTION et al.

No. 08–1151.
|
Argued Dec. 2, 2009.
|
Decided June 17, 2010.

Synopsis

Background: After unsuccessfully challenging decision of the Florida Department of Environmental Protection (FDEP) which granted a permit, pursuant to the state's Beach and Shore Preservation Act, to restore eroded beach, nonprofit corporation formed by owners of adjoining beachfront property brought action in Florida state court to challenge the project. The Florida District Court of Appeal, 27 So.3d 48, reversed and remanded the agency's decision and certified to the Florida Supreme Court question of whether the Act unconstitutionally deprived property owners of littoral rights without just compensation. Answering the question in the negative, the Florida Supreme Court, Bell, J., 998 So.2d 1102, quashed the remand and denied rehearing. Certiorari was granted.

The Supreme Court, Justice Scalia, held that Florida Supreme Court did not engage in an unconstitutional taking of littoral property owners' rights to future accretions, and to contact with the water, by upholding State's decision to restore eroded beach by filling in submerged land.

Affirmed.

Justices Kennedy, Sotomayor, Breyer, and Ginsburg joined the majority opinion in part.

Justice Kennedy filed opinion concurring in part and concurring in the judgment, in which Justice Sotomayor joined.

Justice Breyer filed opinion concurring in part and concurring in the judgment, in which Justice Ginsburg joined.

Justice Stevens did not participate.

****2594** *Syllabus* [*]

Florida owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore. The mean high-water line is the ordinary boundary between private beachfront, or littoral property, and state-owned land. Littoral owners have, *inter alia,* rights to have access to the water, to use the water for certain purposes, to have an unobstructed view of the water, and to receive accretions and relictions (collectively, accretions) to the littoral property. An accretion occurs gradually and imperceptibly, while a sudden change is an avulsion. The littoral owner automatically takes title to dry land added to his property by accretion. With avulsion, however, the seaward boundary of littoral property remains what it was: the mean high-water line before the event. Thus, when an avulsion has added new land, the littoral owner has no right to subsequent accretions, because the property abutting the water belongs to the owner of the seabed (ordinarily the State).

Florida's Beach and Shore Preservation Act establishes procedures for depositing sand on eroded beaches (restoration) and maintaining the deposited sand (nourishment). When such a project is undertaken, the state entity that holds title to the seabed sets a fixed "erosion control line" to replace the fluctuating mean high-water line as the boundary between littoral and state property. Once the new line is recorded, the common law ceases to apply. Thereafter, when accretion moves the mean high-water line seaward, the littoral property remains bounded by the permanent erosion-control line.

Respondents the city of Destin and Walton County sought permits to restore 6.9 miles of beach eroded by several hurricanes, adding about 75 feet of dry sand seaward of the mean high-water line (to be denominated the erosion-control line). Petitioner, ****2595** a nonprofit corporation formed by owners of beachfront property bordering the project (hereinafter Members) brought an unsuccessful

administrative challenge. Respondent the Florida Department of Environmental Protection approved the permits, and this suit followed. The State Court of Appeal concluded that the Department's order had eliminated the Members' littoral rights (1) to receive accretions to their property and (2) to have their property's contact with the water remain intact. Concluding that this would be an unconstitutional taking and would require an additional administrative requirement to be met, it set aside the order, remanded the proceeding, and certified to the Florida Supreme Court the question whether the Act unconstitutionally deprived the Members of littoral rights without just compensation. The State Supreme Court answered "no" and quashed the remand, concluding that the Members did not own the property supposedly taken. Petitioner sought rehearing on the ground that the Florida Supreme Court's decision effected a taking of the Members' littoral rights contrary to the Fifth and Fourteenth Amendments; rehearing was denied.

Held: The judgment is affirmed.

998 So.2d 1102, affirmed.

Justice SCALIA delivered the opinion of the Court with respect to Parts I, IV, and V, concluding that the Florida Supreme Court did not take property without just compensation in violation of the Fifth and Fourteenth Amendments. Pp. 2610 – 2613.

(a) Respondents' arguments that petitioner does not own the property and that the case is not ripe were not raised in the briefs in opposition and thus are deemed waived. Pp. 2610 – 2611.

(b) There can be no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and to contact with the water superior to the State's right to fill in its submerged land. That showing cannot be made. Two core Florida property-law principles intersect here. First, the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and of littoral landowners. Second, if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water. Prior Florida law suggests that there is no exception to this rule when the State causes the avulsion. Thus, Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for ownership purposes. The right to accretions was therefore subordinate to the State's right to fill. Pp. 2611 – 2612.

(c) The decision below is consistent with these principles. Cf. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1028–1029, 112 S.Ct. 2886, 120 L.Ed.2d 798. It did not abolish the Members' right to future accretions, but merely held that the right was not implicated by the beach-restoration project because of the doctrine of avulsion. Relying on dicta in the Florida Supreme Court's *Sand Key* decision, petitioner contends that the State took the Members' littoral right to have the boundary always be the mean high-water line. But petitioner's interpretation of that dictum contradicts the clear law governing avulsion. One cannot say the Florida Supreme Court contravened established property law by rejecting it. Pp. 2612 – 2613.

****2596** Justice SCALIA, joined by THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO, concluded in Parts II and III that if a court declares that what was once an established right of private property no longer exists, it has taken that property in violation of the Takings Clause. Pp. 2601 – 2610.

(a) Though the classic taking is a transfer of property by eminent domain, the Clause applies to other state actions that achieve the same thing, including those that recharacterize as public property what was previously private property, see *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163–165, 101 S.Ct. 446, 66 L.Ed.2d 358. The Clause is not addressed to the action of a specific branch or branches. It is concerned simply with the act, not with the governmental actor. This Court's precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary. See *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741; *Webb's Fabulous Pharmacies, supra.* Pp. 2601 – 2608.

(b) For a judicial taking, respondents would add to the normal takings inquiry the requirement that the court's decision have no "fair and substantial basis." This test is not obviously appropriate, but it is no different in this context from the requirement that the property owner prove an established property right. Respondents' additional arguments —that federal courts lack the knowledge of state law required to decide whether a state judicial decision purporting to

clarify property rights has instead taken them; that common-law judging should not be deprived of needed flexibility; and that applying the Takings Clause to judicial decisions would force lower federal courts to review final state-court judgments, in violation of the *Rooker-Feldman* doctrine, see *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415–416, 44 S.Ct. 149, 68 L.Ed. 362; *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476, 103 S.Ct. 1303, 75 L.Ed.2d 206—are unpersuasive. And petitioner's proposed "unpredictability test"—that a judicial taking consists of a decision that "constitutes a sudden change in state law, unpredictable in terms of the relevant precedents," *Hughes v. Washington,* 389 U.S. 290, 296, 88 S.Ct. 438, 19 L.Ed.2d 530 (Stewart, J., concurring)—is misdirected. What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was well established. Pp. 2608 – 2610.

Justice KENNEDY, joined by Justice SOTOMAYOR, agreed that the Florida Supreme Court did not take property without just compensation, but concluded that this case does not require the Court to determine whether, or when, a judicial decision determining property owners' rights can violate the Takings Clause. If and when future cases show that the usual principles, including constitutional ones that constrain the judiciary like due process, are inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented. Pp. 2613 – 2618.

Justice BREYER, joined by Justice GINSBURG, agreed that no unconstitutional taking occurred here, but concluded that it is unnecessary to decide more than that to resolve this case. Difficult questions of constitutional law—*e.g.,* whether federal courts may review a state court's decision to determine if it unconstitutionally takes private property without compensation, and what the proper test is for evaluating whether a state-court property decision enacts an unconstitutional taking—need not be addressed in order to dispose "of the immediate case." *Whitehouse* ****2597** *v. Illinois Central R. Co.,* 349 U.S. 366, 373, 75 S.Ct. 845, 99 L.Ed. 1155. Such questions are better left for another day. Pp. 2618 – 2619.

SCALIA, J., announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, in which ROBERTS, C.J., and KENNEDY, THOMAS, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined, and an opinion with respect to Parts II and III, in which ROBERTS, C.J., and THOMAS and ALITO, JJ., joined. KENNEDY, J., filed an opinion concurring in part and concurring in the judgment, in which SOTOMAYOR, J., joined, *post*, pp. 2613 – 2618. BREYER, J., filed an opinion concurring in part and concurring in the judgment, in which GINSBURG, J., joined, *post*, pp. 2618 – 2619. STEVENS, J., took no part in the decision of the case.

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Opinion

Justice SCALIA announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, IV, and V, and an opinion with respect to Parts II and III, in which THE CHIEF JUSTICE, Justice THOMAS, and Justice ALITO join.

***707** We consider a claim that the decision of a State's court of last resort took property without just compensation in violation of the Takings Clause of the Fifth Amendment, as applied against the States through the Fourteenth, see *Dolan v. City of Tigard,* 512 U.S. 374, 383–384, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994).

I

A

Generally speaking, state law defines property interests, *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 164, 118 S.Ct. 1925, 141 L.Ed.2d 174 (1998), including property rights in navigable waters and the lands underneath them, see *United States v. Cress,* 243 U.S. 316, 319–320, 37 S.Ct. 380, 61 L.Ed. 746 (1917); *St. Anthony Falls–Water Power Co. v. St. Paul Water Comm'rs,* 168 U.S. 349, 358–359, 18 S.Ct. 157, 42 L.Ed. 497 (1897). In ****2598** Florida, the State owns in trust for the public the land permanently submerged beneath navigable waters and the foreshore (the land between the low-tide line and the mean high-water line). Fla. Const., Art. X, § 11; *Broward v. Mabry,* 58 Fla. 398, 407–409, 50 So. 826, 829–830 (1909). Thus, the mean high-water line (the average reach of high tide over the preceding 19 years) is the ordinary boundary between private beachfront, or littoral[1] property, and state-owned ***708** land. See *Miller v. Bay–To–Gulf, Inc.,* 141 Fla. 452, 458–460, 193 So. 425, 427–428 (1940) *(per curiam);* Fla. Stat. §§ 177.27(14)-(15), 177.28(1) (2007).

Littoral owners have, in addition to the rights of the public, certain "special rights" with regard to the water and the foreshore, *Broward,* 58 Fla., at 410, 50 So., at 830, rights which Florida considers to be property, generally akin to easements, see *ibid.; Thiesen v. Gulf, Fla. & Ala. R. Co.,* 75 Fla. 28, 57, 78, 78 So. 491, 500, 507 (1918) (on rehearing). These include the right of access to the water, the right to use the water for certain purposes, the right to an unobstructed view of the water, and the right to receive accretions and relictions to the littoral property. *Id.,* at 58–59, 78 So., at 501; *Board of Trustees of Internal Improvement Trust Fund v. Sand Key Assoc., Ltd.,* 512 So.2d 934, 936 (Fla.1987). This is generally in accord with well-established common law, although the precise property rights vary among jurisdictions. Compare *Broward, supra,* at 409–410, 50 So., at 830, with 1 J. Lewis, Law of Eminent Domain § 100 (3d ed.1909); 1 H. Farnham, Law of Waters and Water Rights § 62, pp. 278–280 (1904) (hereinafter Farnham).

At the center of this case is the right to accretions and relictions. Accretions are additions of alluvion (sand, sediment, or other deposits) to waterfront land; relictions are lands once covered by water that become dry when the water recedes. F. Maloney, S. Plager, & F. Baldwin, Water Law and Administration: The Florida Experience § 126, pp. 385–386 (1968) (hereinafter Maloney); 1 Farnham § 69, at 320. (For simplicity's sake, we shall refer to accretions and relictions collectively as accretions, and the process whereby they occur as accretion.) In order for an addition to dry land to qualify as an accretion, it must have occurred gradually and imperceptibly—that is, so slowly that one could not see the change occurring, though over time the difference became apparent. *Sand Key, supra,* at 936; *County of St. Clair v. Lovingston,* 23 Wall. 46, 66–67, 23 L.Ed. 59 (1874). When, on the other hand, there is a "sudden or perceptible loss of or ***709** addition to land by the action of the water or a sudden change in the bed of a lake or the course of a stream," the change is called an avulsion. *Sand Key, supra,* at 936; see also 1 Farnham § 69, at 320.

In Florida, as at common law, the littoral owner automatically takes title to dry land added to his property by accretion; but formerly submerged land that has become dry land by avulsion continues to belong to the owner of the seabed (usually the State). See, *e.g., Sand Key, supra,* at 937; Maloney § 126.6, at 392; 2 W. Blackstone, Commentaries on the Laws of England 261–262 (1766) (hereinafter ****2599** Blackstone). Thus, regardless of whether an avulsive event exposes land previously submerged or submerges land previously exposed, the boundary between littoral property and sovereign land does not change; it remains (ordinarily) what was the mean high-water line before the event. See *Bryant v. Peppe,* 238 So.2d 836, 838–839 (Fla.1970); J. Gould, Law of Waters § 158, p. 290 (1883). It follows from this that, when a new strip of land has been added to the shore by avulsion, the littoral owner has no right to subsequent accretions. Those accretions no longer add to *his* property, since the property abutting the water belongs not to him but to the State. See Maloney § 126.6, at 393; 1 Farnham § 71a, at 328.

B

In 1961, Florida's Legislature passed the Beach and Shore Preservation Act, 1961 Fla. Laws ch. 61–246, as amended, Fla. Stat. §§ 161.011–161.45 (2007). The Act establishes procedures for "beach restoration and nourishment projects," § 161.088, designed to deposit sand on eroded beaches (restoration) and to maintain the deposited sand (nourishment). § 161.021(3), (4). A local government may apply to the Department of Environmental Protection (Department) for the funds and the necessary permits to

restore a beach, see §§ 161.101(1), 161.041(1). When the project involves placing fill on the State's submerged lands, authorization is required from the Board of Trustees of the Internal Improvement ***710** Trust Fund (Board), see § 253.77(1), which holds title to those lands, § 253.12(1).

Once a beach restoration "is determined to be undertaken," the Board sets what is called "an erosion control line." § 161.161(3)-(5). It must be set by reference to the existing mean high-water line, though in theory it can be located seaward or landward of that.[2] See § 161.161(5). Much of the project work occurs seaward of the erosion-control line, as sand is dumped on what was once submerged land. See App. 87–88. The fixed erosion-control line replaces the fluctuating mean high-water line as the boundary between privately owned littoral property and state property. § 161.191(1). Once the erosion-control line is recorded, the common law ceases to increase upland property by accretion (or decrease it by erosion). § 161.191(2). Thus, when accretion to the shore moves the mean high-water line seaward, the property of beachfront landowners is not extended to that line (as the prior law provided), but remains bounded by the permanent erosion-control line. Those landowners "continue to be entitled," however, "to all common-law riparian rights" other than the right to accretions. § 161.201. If the beach erodes back landward of the erosion-control line over a substantial portion of the shoreline covered by the project, the Board may, on its own initiative, or must, if asked by the owners or lessees of a majority of the property affected, direct the agency responsible for maintaining the beach to return the beach to the condition contemplated by the project. If that is not done within a year, the project is canceled and the erosion-control line is null and void. § 161.211(2), (3). Finally, by regulation, if ***711** the use of submerged land would "unreasonably infringe on riparian rights," the ****2600** project cannot proceed unless the local governments show that they own or have a property interest in the upland property adjacent to the project site. Fla. Admin. Code Rule 18–21.004(3)(b) (2009).

C

In 2003, the city of Destin and Walton County applied for the necessary permits to restore 6.9 miles of beach within their jurisdictions that had been eroded by several hurricanes. The project envisioned depositing along that shore sand dredged from further out. See *Walton Cty. v. Stop the Beach Renourishment, Inc.,* 998 So.2d 1102, 1106 (Fla.2008). It would add about 75 feet of dry sand seaward of the mean high-water line (to be denominated the erosion-control line). The Department issued a notice of intent to award the permits, App. 27–41, and the Board approved the erosion-control line, *id.,* at 49–50.

Petitioner here, Stop the Beach Renourishment, Inc., is a nonprofit corporation formed by people who own beachfront property bordering the project area (we shall refer to them as Members). It brought an administrative challenge to the proposed project, see *id.,* at 10–26, which was unsuccessful; the Department approved the permits. Petitioner then challenged that action in state court under the Florida Administrative Procedure Act, Fla. Stat. § 120.68 (2007). The District Court of Appeal for the First District concluded that, contrary to the Act's preservation of " 'all common-law riparian rights,' " the order had eliminated two of the Members' littoral rights: (1) the right to receive accretions to their property; and (2) the right to have the contact of their property with the water remain intact. *Save Our Beaches, Inc. v. Florida Dept. of Environmental Protection,* 27 So.3d 48, 58 (2006) (emphasis deleted). This, it believed, would be an unconstitutional taking, which would "unreasonably infringe on riparian rights," and therefore require the showing ***712** under Fla. Admin. Code Rule 18–21.004(3)(b) that the local governments owned or had a property interest in the upland property. It set aside the Department's final order approving the permits and remanded for that showing to be made. 27 So.3d, at 60. It also certified to the Florida Supreme Court the following question (as rephrased by the latter court):

> "On its face, does the Beach and Shore Preservation Act unconstitutionally deprive upland owners of littoral rights without just compensation?"[3] 998 So.2d, at 1105 (footnotes omitted).

The Florida Supreme Court answered the certified question in the negative, and quashed the First District's remand. *Id.,* at 1121. It faulted the Court of Appeal for not considering the doctrine of avulsion, which it concluded permitted the State to reclaim the restored beach on behalf of the public. *Id.,* at 1116–1118. It described the right to accretions as a future contingent interest, not a vested property right, and held that there is no littoral right to contact with the water independent of the littoral right of access, which the Act does not infringe. *Id.,* at 1112, 1119–1120. Petitioner sought rehearing on the ground that the Florida Supreme Court's decision itself effected a taking of the Members' littoral rights contrary to the Fifth and Fourteenth Amendments to the

Federal Constitution.[4] The request **2601 for rehearing was denied. We granted certiorari, 557 U.S. 903, 129 S.Ct. 2792, 174 L.Ed.2d 290 (2009).

*713 II

A

Before coming to the parties' arguments in the present case, we discuss some general principles of our takings jurisprudence. The Takings Clause—"nor shall private property be taken for public use, without just compensation," U.S. Const., Amdt. 5—applies as fully to the taking of a landowner's riparian rights as it does to the taking of an estate in land.[5] See *Yates v. Milwaukee,* 10 Wall. 497, 504, 19 L.Ed. 984 (1871). Moreover, though the classic taking is a transfer of property to the State or to another private party by eminent domain, the Takings Clause applies to other state actions that achieve the same thing. Thus, when the government uses its own property in such a way that it destroys private property, it has taken that property. See *United States v. Causby,* 328 U.S. 256, 261–262, 66 S.Ct. 1062, 90 L.Ed. 1206 (1946); *Pumpelly v. Green Bay Co.,* 13 Wall. 166, 177–178, 20 L.Ed. 557 (1872). Similarly, our doctrine of regulatory takings "aims to identify regulatory actions that are functionally equivalent to the classic taking." *Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005). Thus, it is a taking when a state regulation forces a property owner to submit to a permanent physical occupation, *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 425–426, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982), or deprives him of all economically beneficial use of his property, *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1019, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). Finally (and here we approach the situation before us), States effect a taking if they recharacterize as public property what was previously private property. See *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163–165, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980).

The Takings Clause (unlike, for instance, the *Ex Post Facto* Clauses, see Art. I, § 9, cl. 3; § 10, cl. 1) is not addressed to the action of a specific branch or branches. It is concerned *714 simply with the act, and not with the governmental actor ("nor shall private property *be taken*" (emphasis added)). There is no textual justification for saying that the existence or the scope of a State's power to expropriate private property without just compensation varies according to the branch of government effecting the expropriation. Nor does common sense recommend such a principle. It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat. See *Stevens v. Cannon Beach,* 510 U.S. 1207, 1211–1212, 114 S.Ct. 1332, 127 L.Ed.2d 679 (1994) (SCALIA, J., dissenting from denial of certiorari).

Our precedents provide no support for the proposition that takings effected by the judicial branch are entitled to special treatment, and in fact suggest the contrary. **2602 *PruneYard Shopping Center v. Robins,* 447 U.S. 74, 100 S.Ct. 2035, 64 L.Ed.2d 741 (1980), involved a decision of the California Supreme Court overruling one of its prior decisions which had held that the California Constitution's guarantees of freedom of speech and of the press, and of the right to petition the government, did not require the owner of private property to accord those rights on his premises. The appellants, owners of a shopping center, contended that their private-property rights could not "be denied by invocation of a state constitutional provision *or by judicial reconstruction of a State's laws of private property,*" *id.*, at 79, 100 S.Ct. 2035 (emphasis added). We held that there had been no taking, citing cases involving legislative and executive takings, and applying standard Takings Clause analysis. See *id.,* at 82–84, 100 S.Ct. 2035. We treated the California Supreme Court's application of the constitutional provisions as a regulation of the use of private property, and evaluated whether that regulation violated the property owners' "right to exclude others," *id.,* at 80, 100 S.Ct. 2035 (internal quotation marks omitted). Our opinion addressed only the claimed taking by the constitutional provision. Its failure to speak separately to the claimed taking by "judicial reconstruction of a State's laws of private property" certainly does not suggest that a taking *715 by judicial action cannot occur, and arguably suggests that the same analysis applicable to taking by constitutional provision would apply.

Webb's Fabulous Pharmacies, supra, is even closer in point. There the purchaser of an insolvent corporation had interpleaded the corporation's creditors, placing the purchase price in an interest-bearing account in the registry of the Circuit Court of Seminole County, to be distributed in satisfaction of claims approved by a receiver. The Florida Supreme Court construed an applicable statute to mean that the interest on the account belonged to the county, because the account was "considered 'public money,' " *Beckwith v. Webb's Fabulous Pharmacies,* 374 So.2d 951, 952–953

(1979) *(per curiam)*. We held this to be a taking. We noted that "[t]he usual and general rule is that any interest on an interpleaded and deposited fund follows the principal and is to be allocated to those who are ultimately to be the owners of that principal," 449 U.S., at 162, 101 S.Ct. 446. "Neither the Florida Legislature by statute, nor the Florida courts by judicial decree," we said, "may accomplish the result the county seeks simply by recharacterizing the principal as 'public money.' " *Id.,* at 164, 101 S.Ct. 446.

In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking. To be sure, the manner of state action may matter: Condemnation by eminent domain, for example, is always a taking, while a legislative, executive, or judicial restriction of property use may or may not be, depending on its nature and extent. But the particular state *actor* is irrelevant. If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation. "[A] State, by *ipse dixit,* may not transform private property into public property without compensation." *Ibid.*

***716** B

Justice BREYER's concurrence says that we need neither (1) to decide whether the judiciary can ever effect a taking, nor (2) to establish the standard for determining whether it has done so. See *post,* at 2618 – 2619 (opinion concurring in part and ****2603** concurring in judgment). The second part of this is surely incompatible with Justice BREYER's conclusion that the "Florida Supreme Court's decision in this case did not amount to a 'judicial taking.' " *Post,* at 2619. One cannot know whether a takings claim is invalid without knowing what standard it has failed to meet.[6] Which means that Justice BREYER must either (1) grapple with the artificial question of what would constitute a judicial taking if there were such a thing as a judicial taking (reminiscent of the perplexing question how much wood would a woodchuck chuck if a woodchuck could chuck wood?), or (2) answer in the negative what he considers to be the "unnecessary" constitutional question whether there is such a thing as a judicial taking.

It is not true that deciding the constitutional question in this case contradicts our settled practice. To the contrary, we have often recognized the existence of a constitutional right, or established the test for violation of such a right (or both), and then gone on to find that the claim at issue fails. See, *e.g., New Jersey v. T.L.O.,* 469 U.S. 325, 333, 341–343, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985) (holding that the Fourth Amendment applies to searches and seizures conducted by public-school officials, establishing the standard for finding a violation, but concluding that the claim at issue failed); *Strickland v. Washington,* 466 U.S. 668, 687, 698–700, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) (recognizing a constitutional right to effective assistance of counsel, establishing the test for its violation, but holding that the claim at issue failed); ***717** *Hill v. Lockhart,* 474 U.S. 52, 58–60, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985) (holding that a *Strickland* claim can be brought to challenge a guilty plea, but rejecting the claim at issue); *Jackson v. Virginia,* 443 U.S. 307, 313–320, 326, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979) (recognizing a due process claim based on insufficiency of evidence, establishing the governing test, but concluding that the claim at issue failed); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 390, 395–397, 47 S.Ct. 114, 71 L.Ed. 303 (1926) (recognizing that block zoning ordinances could constitute a taking, but holding that the challenged ordinance did not do so); *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 241, 255–257, 17 S.Ct. 581, 41 L.Ed. 979 (1897) (holding that the Due Process Clause of the Fourteenth Amendment prohibits uncompensated takings, but concluding that the court below made no errors of law in assessing just compensation). In constitutional-tort suits against public officials, we have found the defendants entitled to immunity only after holding that their action violated the Constitution. See, *e.g., Wilson v. Layne,* 526 U.S. 603, 605–606, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999). Indeed, up until last Term, we *required* federal courts to address the constitutional question before the immunity question. See *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001), overruled by *Pearson v. Callahan,* 555 U.S. 223, 236, 129 S.Ct. 808, 817–18, 172 L.Ed.2d 565 (2009).

"Assuming without deciding" would be less appropriate here than it was in many of those earlier cases, which established constitutional rights quite separate from any that had previously been acknowledged. Compared to *Strickland*'s proclamation of a right to effective assistance of counsel, for example, proclaiming that a ****2604** taking can occur through judicial action addresses a point of relative detail.

In sum, Justice BREYER cannot decide that petitioner's claim fails without first deciding what a valid claim would consist of. His agreement with Part IV of our opinion necessarily implies agreement with the test for a judicial

taking (elaborated in Part II–A) which Part IV applies: whether the state court has "declare[d] that what was once an established right of private property no longer exists," *supra,* at 2602. ***718** Justice BREYER must either agree with that standard or craft one of his own. And agreeing to or crafting a *hypothetical* standard for a *hypothetical* constitutional right is sufficiently unappealing (we have eschewed that course many times in the past) that Justice BREYER might as well acknowledge the right as well. Or he could avoid the need to agree with or craft a hypothetical standard by *denying* the right. But embracing a standard while being coy about the right is, well, odd; and deciding this case while addressing *neither* the standard *nor* the right is quite impossible.

Justice BREYER responds that he simply advocates resolving this case without establishing "*the precise* standard under which a party wins or loses." *Post,* at 2619 (emphasis added). But he relies upon no standard at all, precise or imprecise. He simply pronounces that this is not a judicial taking if there is such a thing as a judicial taking. The cases he cites to support this Queen–of–Hearts approach provide no precedent. In each of them the existence of the right in question was settled,[7] and we faced a choice between *competing* standards that had been applied by the courts.[8] We simply held that the right in question had not been infringed under *any* of them. There is no established right here, and no competing standards.

***719** C

Like Justice BREYER's concurrence, Justice KENNEDY's concludes that the Florida Supreme Court's action here does not meet the standard for a judicial taking, while purporting not to determine what is the standard for a judicial taking, or indeed whether such a thing as a judicial taking even exists. That approach is invalid for the reasons we have discussed.

Justice KENNEDY says that we need not take what he considers the bold and risky step of holding that the Takings Clause applies to judicial action, because the Due Process Clause "would likely prevent a State from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat," *post,* at 2615 (opinion concurring in part and concurring in judgment) (internal quotation marks omitted). He invokes the Due Process Clause "in ****2605** both its substantive and procedural aspects," *post,* at 2614, not specifying which of his arguments relates to which.

The first respect in which Justice KENNEDY thinks the Due Process Clause can do the job seems to sound in procedural due process. Because, he says, "[c]ourts, unlike the executive or legislature, are not designed to make policy decisions" about expropriation, "[t]he Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights" violates the Due Process Clause. *Post,* at 2615. Let us be clear what is being proposed here. This Court has held that the separation-of-powers principles that the Constitution imposes upon the Federal Government do not apply against the States. See *Dreyer v. Illinois,* 187 U.S. 71, 83–84, 23 S.Ct. 28, 47 L.Ed. 79 (1902). But in order to avoid the bold and risky step of saying that the Takings Clause applies to *all* government takings, Justice KENNEDY would have us use procedural due process to impose judicially crafted separation-of-powers limitations upon the States: Courts cannot be used to perform the governmental function of expropriation. The asserted reasons ***720** for the due process limitation are that the legislative and executive branches "are accountable in their political capacity" for takings, *post,* at 2613, and "[c]ourts ... are not designed to make policy decisions" about takings, *post,* at 2615. These reasons may have a lot to do with sound separation-of-powers principles that ought to govern a democratic society, but they have nothing whatever to do with the protection of individual rights that is the object of the Due Process Clause.

Of course even taking those reasons at face value, it is strange to proclaim a democracy deficit and lack of special competence for the judicial taking of an individual property right, when this Court has had no trouble deciding matters of much greater moment, contrary to congressional desire or the legislated desires of most of the States, with no special competence except the authority we possess to enforce the Constitution. In any case, our opinion does *not* trust judges with the relatively small power Justice KENNEDY now objects to. It is we who propose setting aside judicial decisions that take private property; it is he who insists that judges cannot be so limited. Under his regime, the citizen whose property has been judicially redefined to belong to the State would presumably be given the Orwellian explanation: "The court did not take your property. Because it is neither politically accountable nor competent to make such a decision, it cannot take property."

Justice KENNEDY's injection of separation-of-powers principles into the Due Process Clause would also have the ironic effect of preventing the assignment of the expropriation

function to the branch of government whose procedures are, by far, the *most* protective of individual rights. So perhaps even this first respect in which Justice KENNEDY would have the Due Process Clause do the work of the Takings Clause pertains to substantive, rather than procedural, due process. His other arguments undoubtedly pertain to that, as evidenced by his assertion that "[i]t is ... natural to read the Due Process Clause as limiting the power of courts ***721** to eliminate or change established property rights," *post,* at 2614, his endorsement of the proposition that the Due Process Clause imposes "limits on government's ability to diminish property values by regulation," *ibid.,* and his contention that "the Due Process Clause would likely prevent a State from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat," *post,* at 2615 (internal quotation marks omitted).

****2606** The first problem with using substantive due process to do the work of the Takings Clause is that we have held it cannot be done. "Where a particular Amendment 'provides an explicit textual source of constitutional protection' against a particular sort of government behavior, 'that Amendment, not the more generalized notion of "substantive due process," must be the guide for analyzing these claims.' " *Albright v. Oliver,* 510 U.S. 266, 273, 114 S.Ct. 807, 127 L.Ed.2d 114 (1994) (four-Justice plurality opinion) (quoting *Graham v. Connor,* 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)); see also 510 U.S., at 281, 114 S.Ct. 807 (KENNEDY, J., concurring in judgment) ("I agree with the plurality that an allegation of arrest without probable cause must be analyzed under the Fourth Amendment without reference to more general considerations of due process"). The second problem is that we have held for many years (logically or not) that the "liberties" protected by substantive due process do not include economic liberties. See, *e.g., Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.,* 335 U.S. 525, 536, 69 S.Ct. 251, 93 L.Ed. 212 (1949). Justice KENNEDY's language ("If a judicial decision ... eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law," *post,* at 2614) propels us back to what is referred to (usually deprecatingly) as "the *Lochner* era." See *Lochner v. New York,* 198 U.S. 45, 56–58, 25 S.Ct. 539, 49 L.Ed. 937 (1905). That is a step of much greater novelty, and much more unpredictable effect, than merely applying the Takings Clause to judicial action. And the third and last problem with using substantive due process is that either (1) it will not do all that the Takings Clause does, or (2) if it does all that the Takings ***722** Clause does, it will encounter the same supposed difficulties that Justice KENNEDY finds troublesome.

We do not grasp the relevance of Justice KENNEDY's speculation, *post,* at 2616, that the Framers did not envision the Takings Clause would apply to judicial action. They doubtless did not, since the Constitution was adopted in an era when courts had no power to "change" the common law. See 1 Blackstone 69–70 (1765); *Rogers v. Tennessee,* 532 U.S. 451, 472–478, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001) (SCALIA, J., dissenting). Where the text they adopted is clear, however ("nor shall private property be taken for public use"), what counts is not what they envisioned but what they wrote. Of course even after courts, in the 19th century, did assume the power to change the common law, it is not true that the new "common-law tradition ... allows for incremental modifications to property law," *post,* at 2615, so that "owners may reasonably expect or anticipate courts to make certain changes in property law," *post,* at 2615. In the only sense in which this could be relevant to what we are discussing, that is an astounding statement. We are talking here about judicial elimination of established private-property rights. If that is indeed a "common-law tradition," Justice KENNEDY ought to be able to provide a more solid example for it than the only one he cites, *post,* at 2615, a state-court change (from "noxious" to "harmful") of the test for determining whether a neighbor's vegetation is a tortious nuisance. *Fancher v. Fagella,* 274 Va. 549, 555–556, 650 S.E.2d 519, 522 (2007). But perhaps he does not really mean that it is a common-law tradition to eliminate property rights, since he immediately follows his statement that "owners may reasonably expect or anticipate courts to make certain changes in property law" with the contradictory statement that "courts cannot abandon settled principles," *post,* at 2615. If no "settled principl[e]" ****2607** has been abandoned, it is hard to see how property law could have been "change[d]," rather than merely clarified.

***723** Justice KENNEDY has added "two additional practical considerations that the Court would need to address before recognizing judicial takings," *post,* at 2616. One of them is simple and simply answered: the assertion that "it is unclear what remedy a reviewing court could enter after finding a judicial taking," *post,* at 2617. Justice KENNEDY worries that we may only be able to mandate compensation. That remedy is even rare for a legislative or executive taking, and we see no reason why it would be the exclusive remedy for a judicial taking. If we were to hold that the Florida Supreme Court had effected an uncompensated taking in the present case, we would simply reverse the Florida Supreme

Court's judgment that the Beach and Shore Preservation Act can be applied to the property in question. Justice KENNEDY's other point, *post,* at 2616 – 2617—that we will have to decide when the claim of a judicial taking must be asserted—hardly presents an awe-inspiring prospect. These, and all the other "difficulties," *post,* at 2613, "difficult questions," *post,* at 2615, and "practical considerations" *post,* at 2616–2617, that Justice KENNEDY worries *may perhaps* stand in the way of recognizing a judicial taking, are either nonexistent or insignificant.

Finally, we cannot avoid comment upon Justice KENNEDY's donning of the mantle of judicial restraint—his assertion that it is we, and not he, who would empower the courts and encourage their expropriation of private property. He warns that if judges know that their action is covered by the Takings Clause, they will issue "sweeping new rule[s] to adjust the rights of property owners," comfortable in the knowledge that their innovations will be preserved upon payment by the State. *Post,* at 2616. That is quite impossible. As we have said, if we were to hold that the Florida Supreme Court had effected an uncompensated taking in this case, we would not validate the taking by ordering Florida to pay compensation. We would simply reverse the Florida Supreme Court's judgment that the Beach and Shore Preservation Act can be applied to the Members' property. The ***724** power to effect a *compensated* taking would then reside, where it has always resided, not in the Florida Supreme Court but in the Florida Legislature—which could either provide compensation or acquiesce in the invalidity of the offending features of the Act. Cf. *Davis v. Michigan Dept. of Treasury,* 489 U.S. 803, 817–818, 109 S.Ct. 1500, 103 L.Ed.2d 891 (1989). The only realistic incentive that subjection to the Takings Clause might provide to any court would be the incentive to get reversed, which in our experience few judges value.

Justice KENNEDY, however, while dismissive of the Takings Clause, places no other constraints on judicial action. He puts forward some extremely vague applications of substantive due process, and does not even say that they (whatever they are) will *for sure* apply. ("It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights," *post,* at 2614; "courts ... may not have the power to eliminate established property rights by judicial decision," *post,* at 2615; "the Due Process Clause would likely prevent a State from doing by judicial decree what the Takings Clause forbids it to do by legislative fiat," *post,* at 2615 (internal quotation marks omitted); we must defer applying the Takings Clause until "[i]f and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners," *post,* at 2618.)

****2608** Moreover, and more importantly, Justice KENNEDY places no constraints whatever upon *this* Court. Not only does his concurrence only *think about* applying substantive due process; but because substantive due process is such a wonderfully malleable concept, see, *e.g., Lawrence v. Texas,* 539 U.S. 558, 562, 123 S.Ct. 2472, 156 L.Ed.2d 508 (2003) (referring to "liberty of the person both in its spatial and in its more transcendent dimensions"), even a firm commitment to apply it would be a firm commitment to nothing in particular. Justice KENNEDY's desire to substitute substantive due process for the Takings Clause ***725** suggests, and the rest of what he writes confirms, that what holds him back from giving the Takings Clause its natural meaning is not the *intrusiveness* of applying it to judicial action, but the *definiteness* of doing so; not a concern to preserve the powers of the States' political branches, but a concern to preserve this Court's discretion to say that property may be taken, or may not be taken, as in the Court's view the circumstances suggest. We must not say that we are bound by the Constitution never to sanction judicial elimination of clearly established property rights. Where the power of this Court is concerned, one must *never* say never. See, *e.g., Vieth v. Jubelirer,* 541 U.S. 267, 302–305, 124 S.Ct. 1769, 158 L.Ed.2d 546 (2004) (plurality opinion); *Sosa v. Alvarez–Machain,* 542 U.S. 692, 750–751, 124 S.Ct. 2739, 159 L.Ed.2d 718 (2004) (SCALIA, J., concurring in part and concurring in judgment). The great attraction of substantive due process as a substitute for more specific constitutional guarantees is that it *never* means never—because it never means anything precise.

III

Respondents put forward a number of arguments which contradict, to a greater or lesser degree, the principle discussed above, that the existence of a taking does not depend upon the branch of government that effects it. First, in a case claiming a judicial taking they would add to our normal takings inquiry a requirement that the court's decision have no "fair and substantial basis." This is taken from our jurisprudence dealing with the question whether a state-court decision rests upon adequate and independent state grounds, placing it beyond our jurisdiction to review. See E. Gressman,

K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, Supreme Court Practice, ch. 3.26, p. 222 (9th ed.2007). To ensure that there is no "evasion" of our authority to review federal questions, we insist that the nonfederal ground of decision have "fair support." *Broad River Power Co. v. South Carolina ex rel. Daniel,* 281 U.S. 537, 540, 50 S.Ct. 401, 74 L.Ed. 1023 (1930); see also ***726** *Ward v. Board of Comm'rs of Love Cty.*, 253 U.S. 17, 22–23, 40 S.Ct. 419, 64 L.Ed. 751 (1920). A test designed to determine whether there has been an evasion is not obviously appropriate for determining whether there has been a taking of property. But if it is to be extended there it must mean (in the present context) that there is a "fair and substantial basis" for believing that petitioner's Members did not have a property right to future accretions which the Act would take away. This is no different, we think, from our requirement that petitioner's Members must prove the elimination of an established property right.[9]

****2609** Next, respondents argue that federal courts lack the knowledge of state law required to decide whether a judicial decision that purports merely to clarify property rights has instead taken them. But federal courts must often decide what state property rights exist in nontakings contexts, see, *e.g., Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577–578, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972) (Due Process Clause). And indeed they must decide it to resolve claims that legislative or executive action has effected a taking. For example, a regulation that deprives a property owner of all economically beneficial use of his property is not a taking if the restriction "inhere[s] in the title itself, in the restrictions that background principles ***727** of the State's law of property and nuisance already place upon land ownership." *Lucas,* 505 U.S., at 1029, 112 S.Ct. 2886. A constitutional provision that forbids the uncompensated taking of property is quite simply insusceptible of enforcement by federal courts unless they have the power to decide what property rights exist under state law.

Respondents also warn us against depriving common-law judging of needed flexibility. That argument has little appeal when directed against the enforcement of a constitutional guarantee adopted in an era when, as we said *supra,* at 2606, courts had no power to "change" the common law. But in any case, courts have no peculiar need of flexibility. It is no more essential that judges be free to overrule prior cases that establish property entitlements than that state legislators be free to revise pre-existing statutes that confer property entitlements, or agency-heads pre-existing regulations that do so. And insofar as courts merely clarify and elaborate property entitlements that were previously unclear, they cannot be said to have taken an established property right.

Finally, the city and county argue that applying the Takings Clause to judicial decisions would force lower federal courts to review final state-court judgments, in violation of the so-called *Rooker-Feldman* doctrine. See *Rooker v. Fidelity Trust Co.,* 263 U.S. 413, 415–416, 44 S.Ct. 149, 68 L.Ed. 362 (1923); *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462, 476, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983). That does not necessarily follow. The finality principles that we regularly apply to takings claims, see *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 186–194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985), would require the claimant to appeal a claimed taking by a lower court to the state supreme court, whence certiorari would come to this Court. If certiorari were denied, the claimant would no more be able to launch a lower-court federal suit against the taking effected by the state supreme-court opinion than he would be able to launch such a suit against ***728** a legislative or executive taking approved by the state supreme-court opinion; the matter would be res judicata. And where the claimant was not a party to the original suit, he would be able to challenge in federal ****2610** court the taking effected by the state supreme-court opinion to the same extent that he would be able to challenge in federal court a legislative or executive taking previously approved by a state supreme-court opinion.

For its part, petitioner proposes an unpredictability test. Quoting Justice Stewart's concurrence in *Hughes v. Washington,* 389 U.S. 290, 296, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967), petitioner argues that a judicial taking consists of a decision that " 'constitutes a sudden change in state law, unpredictable in terms of relevant precedents.' " See Brief for Petitioner 17, 34–50. The focus of petitioner's test is misdirected. What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established. A "predictability of change" test would cover both too much and too little. Too much, because a judicial property decision need not be predictable, so long as it does not declare that what had been private property under established law no longer is. A decision that clarifies property entitlements (or the lack thereof) that were previously unclear might be difficult to predict, but it does not eliminate established property rights. And the predictability test covers too little, because a judicial elimination of established private-property rights that is foreshadowed by dicta or even by holdings years in advance

is nonetheless a taking. If, for example, a state court held in one case, to which the complaining property owner was not a party, that it had the power to limit the acreage of privately owned real estate to 100 acres, and then, in a second case, applied that principle to declare the complainant's 101st acre to be public property, the State would have taken an acre from the complainant even though the decision was predictable.

***729** IV

We come at last to petitioner's takings attack on the decision below. At the outset, respondents raise two preliminary points which need not detain us long. The city and the county argue that petitioner cannot state a cause of action for a taking because, though the Members own private property, petitioner itself does not; and that the claim is unripe because petitioner has not sought just compensation. Neither objection appeared in the briefs in opposition to the petition for writ of certiorari, and since neither is jurisdictional,[10] we deem both waived. See this Court's Rule 15.2; cf. *Oklahoma City v. Tuttle,* 471 U.S. 808, 815–816, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985).

Petitioner argues that the Florida Supreme Court took two of the property rights of the Members by declaring that those rights did not exist: the right to accretions, and the right to have littoral property touch the water (which petitioner distinguishes from the mere right of access to the water).[11] Under petitioner's theory, ****2611** because no prior Florida decision had said that the State's filling of submerged ***730** tidal lands could have the effect of depriving a littoral owner of contact with the water and denying him future accretions, the Florida Supreme Court's judgment in the present case abolished those two easements to which littoral-property owners had been entitled. This puts the burden on the wrong party. There is no taking unless petitioner can show that, before the Florida Supreme Court's decision, littoral-property owners had rights to future accretions and contact with the water superior to the State's right to fill in its submerged land. Though some may think the question close, in our view the showing cannot be made.

Two core principles of Florida property law intersect in this case. First, the State as owner of the submerged land adjacent to littoral property has the right to fill that land, so long as it does not interfere with the rights of the public and the rights of littoral landowners. See *Hayes v. Bowman,* 91 So.2d 795, 799–800 (Fla.1957) (right to fill conveyed by State to private party); *State ex rel. Buford v. Tampa,* 88 Fla. 196, 210–211, 102 So. 336, 341 (1924) (same). Second, as we described *supra,* at 2598 – 2599, if an avulsion exposes land seaward of littoral property that had previously been submerged, that land belongs to the State even if it interrupts the littoral owner's contact with the water. See *Bryant,* 238 So.2d, at 837, 838–839. The issue here is whether there is an exception to this rule when the State is the cause of the avulsion. Prior law suggests there is not. In *Martin v. Busch,* 93 Fla. 535, 112 So. 274 (1927), the Florida Supreme Court held that when the State drained water from a lakebed belonging to the State, causing land that was formerly below the mean high-water line to become dry land, that land continued to belong to the State. *Id.*, at 574, 112 So., at 287; see also *Bryant, supra,* at 838–839 (analogizing the situation in *Martin* to an avulsion). " 'The riparian rights doctrine of accretion and reliction,' " the Florida Supreme Court later explained, " 'does not apply to such lands.' " *Bryant, supra,* at 839 (quoting ***731** *Martin, supra,* at 578, 112 So., at 288 (Brown, J., concurring)). This is not surprising, as there can be no accretions to land that no longer abuts the water.

Thus, Florida law as it stood before the decision below allowed the State to fill in its own seabed, and the resulting sudden exposure of previously submerged land was treated like an avulsion for purposes of ownership. The right to accretions was therefore subordinate to the State's right to fill. *Thiesen v. Gulf, Fla. & Ala. R. Co.* suggests the same result. That case involved a claim by a riparian landowner that a railroad's state-authorized filling of submerged land and construction of tracks upon it interfered with the riparian landowners' rights to access and to wharf out to a shipping channel. The Florida Supreme Court determined that the claimed right to wharf out did not exist in Florida, and that therefore only the right of access was compensable. 75 Fla., at 58–65, 78 So., at 501–503. Significantly, although the court recognized that the riparian-property owners had rights to ****2612** accretion, see *id.,* at 64–65, 78 So., at 502–503, the only rights it even suggested would be infringed by the railroad were the right of access (which the plaintiff had claimed) and the rights of view and use of the water (which it seems the plaintiff had not claimed), see *id.,* at 58–59, 78, 78 So., at 501, 507.

The Florida Supreme Court decision before us is consistent with these background principles of state property law. Cf. *Lucas,* 505 U.S., at 1028–1029, 112 S.Ct. 2886; *Scranton v. Wheeler,* 179 U.S. 141, 163, 21 S.Ct. 48, 45 L.Ed. 126 (1900). It did not abolish the Members' right to future accretions, but merely held that the right was not implicated by the

beach-restoration project, because the doctrine of avulsion applied. See 998 So.2d, at 1117, 1120–1121. The Florida Supreme Court's opinion describes beach restoration as the reclamation by the State of the public's land, just as *Martin* had described the lake drainage in that case. Although the opinion does not cite *Martin* and is not always clear on this point, it suffices that its characterization of the littoral right to accretion is consistent with *Martin* ***732** and the other relevant principles of Florida law we have discussed.

What we have said shows that the rule of *Sand Key,* which petitioner repeatedly invokes, is inapposite. There the Florida Supreme Court held that an artificial accretion does not change the right of a littoral-property owner to claim the accreted land as his own (as long as the owner did not cause the accretion himself). 512 So.2d, at 937–938. The reason *Martin* did not apply, *Sand Key* explained, is that the drainage that had occurred in *Martin* did not lower the water level by " 'imperceptible degrees,' " and so did not qualify as an accretion. 512 So.2d, at 940–941.

The result under Florida law may seem counterintuitive. After all, the Members' property has been deprived of its character (and value) as oceanfront property by the State's artificial creation of an avulsion. Perhaps state-created avulsions ought to be treated differently from other avulsions insofar as the property right to accretion is concerned. But nothing in prior Florida law makes such a distinction, and *Martin* suggests, if it does not indeed hold, the contrary. Even if there might be different interpretations of *Martin* and other Florida property-law cases that would prevent this arguably odd result, we are not free to adopt them. The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established. We cannot say that the Florida Supreme Court's decision eliminated a right of accretion established under Florida law.

Petitioner also contends that the State took the Members' littoral right to have their property continually maintain contact with the water. To be clear, petitioner does not allege that the State relocated the property line, as would have happened if the erosion-control line were *landward* of the old mean high-water line (instead of identical to it). Petitioner argues instead that the Members have a separate right for the boundary of their property to be always the mean high-water ***733** line. Petitioner points to dicta in *Sand Key* that refers to "the right to have the property's contact with the water remain intact," 512 So.2d, at 936. Even there, the right was included in the definition of the right to access, *ibid.,* which is consistent with the Florida Supreme Court's later description that "there is no independent right of contact with the water" but it "exists to preserve the upland owner's core littoral right of access to the water," 998 So.2d, at 1119. Petitioner's expansive interpretation of the dictum in *Sand Key* would cause it to contradict the clear Florida law governing ****2613** avulsion. One cannot say that the Florida Supreme Court contravened established property law by rejecting it.[12]

V

Because the Florida Supreme Court's decision did not contravene the established property rights of petitioner's Members, Florida has not violated the Fifth and Fourteenth Amendments. The judgment of the Florida Supreme Court is therefore affirmed.

It is so ordered.

Justice STEVENS took no part in the decision of this case.

Justice KENNEDY, with whom Justice SOTOMAYOR joins, concurring in part and concurring in the judgment.
The Court's analysis of the principles that control ownership of the land in question, and of the rights of petitioner's members as adjacent owners, is correct in my view, leading to my joining Parts I, IV, and V of the Court's opinion. As Justice BREYER observes, however, this case does not require ***734** the Court to determine whether, or when, a judicial decision determining the rights of property owners can violate the Takings Clause of the Fifth Amendment of the United States Constitution. This separate opinion notes certain difficulties that should be considered before accepting the theory that a judicial decision that eliminates an "established property right," *ante,* at 2608, constitutes a violation of the Takings Clause.

The Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom. The right to retain property without the fact or even the threat of that sort of expropriation is, of course, applicable to the States under the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & Q. R. Co. v. Chicago,* 166 U.S. 226, 239, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

The right of the property owner is subject, however, to the rule that the government does have power to take property for a public use, provided that it pays just compensation. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 314–315, 107 S.Ct. 2378, 96 L.Ed.2d 250 (1987). This is a vast governmental power. And typically, legislative bodies grant substantial discretion to executive officers to decide what property can be taken for authorized projects and uses. As a result, if an authorized executive agency or official decides that Blackacre is the right place for a fire station or Greenacre is the best spot for a freeway interchange, then the weight and authority of the State are used to take the property, even against the wishes of the owner, who must be satisfied with just compensation.

In the exercise of their duty to protect the fisc, both the legislative and executive branches monitor, or should monitor, the exercise of this substantial power. Those branches are accountable in their political capacity for the proper discharge of this obligation.

***735** To enable officials to better exercise this great power in a responsible way, some States allow their officials to take a ****2614** second look after property has been condemned and a jury returns a verdict setting the amount of just compensation. See, *e.g.,* Cal.Civ.Proc.Code Ann. § 1268.510 (West 2007). If the condemning authority, usually acting through the executive, deems the compensation too high to pay for the project, it can decide not to take the property at all. The landowner is reimbursed for certain costs and expenses of litigation and the property remains in his or her hands. See, *e.g.,* § 1268.610(a).

This is just one aspect of the exercise of the power to select what property to condemn and the responsibility to ensure that the taking makes financial sense from the State's point of view. And, as a matter of custom and practice, these are matters for the political branches—the legislature and the executive—not the courts. See *First English, supra,* at 321, 107 S.Ct. 2378 ("[T]he decision to exercise the power of eminent domain is a legislative function").

If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And this Court has long recognized that property regulations can be invalidated under the Due Process Clause. See, *e.g., Lingle v. Chevron U.S.A. Inc.,* 544 U.S. 528, 542, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005); *Goldblatt v. Hempstead,* 369 U.S. 590, 591, 592–593, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962); *Demorest v. City Bank Farmers Trust Co.,* 321 U.S. 36, 42–43, 64 S.Ct. 384, 88 L.Ed. 526 (1944); *Broad River Power Co. v. South Carolina ex rel. Daniel,* 281 U.S. 537, 539, 540–541, 50 S.Ct. 401, 74 L.Ed. 1023 (1930); *Washington ex rel. Seattle Title Trust Co. v. Roberge,* 278 U.S. 116, 121, 49 S.Ct. 50, 73 L.Ed. 210 (1928); *Nectow v. Cambridge,* 277 U.S. 183, 188, 48 S.Ct. 447, 72 L.Ed. 842 (1928); *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926); see also *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413, 43 S.Ct. 158, 67 L.Ed. 322 (1922) (there ***736** must be limits on government's ability to diminish property values by regulation "or the contract and due process clauses are gone"). It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.

The Takings Clause also protects property rights, and it "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge." *Eastern Enterprises v. Apfel,* 524 U.S. 498, 545, 118 S.Ct. 2131, 141 L.Ed.2d 451 (1998) (KENNEDY, J., concurring in judgment and dissenting in part). Unlike the Due Process Clause, therefore, the Takings Clause implicitly recognizes a governmental power while placing limits upon that power. Thus, if the Court were to hold that a judicial taking exists, it would presuppose that a judicial decision eliminating established property rights is "otherwise constitutional" so long as the State compensates the aggrieved property owners. *Ibid.* There is no clear authority for this proposition.

When courts act without direction from the executive or legislature, they may not have the power to eliminate established property rights by judicial decision. "Given that the constitutionality" of a judicial decision altering property rights "appears to turn on the legitimacy" of whether the court's judgment eliminates or changes established property rights "rather than on the availability of compensation, ... the more appropriate constitutional analysis arises under general due process principles rather than under the Takings ****2615** Clause." *Ibid.* Courts, unlike the executive or legislature, are not designed to make policy decisions about "the need for, and likely effectiveness of, regulatory actions." *Lingle, supra,* at 545, 125 S.Ct. 2074. State courts generally operate under a common-law tradition that allows for

incremental modifications to property law, but "this tradition cannot justify a *carte blanch* judicial authority to change property definitions wholly free of constitutional limitation." Walston, ***737** The Constitution and Property: Due Process, Regulatory Takings, and Judicial Takings, 2001 Utah L.Rev. 379, 435.

The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause. *Lingle,* 544 U.S., at 542, 125 S.Ct. 2074; see *id.,* at 548–549, 125 S.Ct. 2074 (KENNEDY, J., concurring); see also *Perry v. Sindermann,* 408 U.S. 593, 601, 92 S.Ct. 2694, 33 L.Ed.2d 570 (1972) (" '[P]roperty' " interests protected by the Due Process Clauses are those "that are secured by 'existing rules or understandings' " (quoting *Board of Regents of State Colleges v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972))). Thus, without a judicial takings doctrine, the Due Process Clause would likely prevent a State from doing "by judicial decree what the Takings Clause forbids it to do by legislative fiat." *Ante,* at 2601. The objection that a due process claim might involve close questions concerning whether a judicial decree extends beyond what owners might have expected is not a sound argument; for the same close questions would arise with respect to whether a judicial decision is a taking. See *Apfel, supra,* at 541, 118 S.Ct. 2131 (opinion of KENNEDY, J.) ("Cases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law"); *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 123, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978) ("The question of what constitutes a 'taking' for purposes of the Fifth Amendment has proved to be a problem of considerable difficulty").

To announce that courts too can effect a taking when they decide cases involving property rights would raise certain difficult questions. Since this case does not require those questions to be addressed, in my respectful view, the Court should not reach beyond the necessities of the case to announce a sweeping rule that court decisions can be takings, as that phrase is used in the Takings Clause. The evident reason for recognizing a judicial takings doctrine would be ***738** to constrain the power of the judicial branch. Of course, the judiciary must respect private ownership. But were this Court to say that judicial decisions become takings when they overreach, this might give more power to courts, not less.

Consider the instance of litigation between two property owners to determine which one bears the liability and costs when a tree that stands on one property extends its roots in a way that damages adjacent property. See, *e.g., Fancher v. Fagella,* 274 Va. 549, 650 S.E.2d 519 (2007). If a court deems that, in light of increasing urbanization, the former rule for allocation of these costs should be changed, thus shifting the rights of the owners, it may well increase the value of one property and decrease the value of the other. This might be the type of incremental modification under state common law that does not violate due process, as owners may reasonably expect or anticipate courts to make certain changes in property law. The usual due process constraint is that courts cannot abandon settled principles. See, *e.g., Rogers v. Tennessee,* ****2616** 532 U.S. 451, 457, 121 S.Ct. 1693, 149 L.Ed.2d 697 (2001) (citing *Bouie v. City of Columbia,* 378 U.S. 347, 354, 84 S.Ct. 1697, 12 L.Ed.2d 894 (1964)); *Apfel, supra*, at 548–549, 118 S.Ct. 2131 (opinion of KENNEDY, J.); see also *Perry, supra,* at 601, 92 S.Ct. 2694; *Roth, supra,* at 577, 92 S.Ct. 2701.

But if the state court were deemed to be exercising the power to take property, that constraint would be removed. Because the State would be bound to pay owners for takings caused by a judicial decision, it is conceivable that some judges might decide that enacting a sweeping new rule to adjust the rights of property owners in the context of changing social needs is a good idea. Knowing that the resulting ruling would be a taking, the courts could go ahead with their project, free from constraints that would otherwise confine their power. The resulting judgment as between the property owners likely could not be set aside by some later enactment. See *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 217, 115 S.Ct. 1447, 131 L.Ed.2d 328 (1995) (leaving open whether legislation reopening ***739** final judgments violates Due Process Clause). And if the litigation were a class action to decide, for instance, whether there are public rights of access that diminish the rights of private ownership, a State might find itself obligated to pay a substantial judgment for the judicial ruling. Even if the legislature were to subsequently rescind the judicial decision by statute, the State would still have to pay just compensation for the temporary taking that occurred from the time of the judicial decision to the time of the statutory fix. See *First English,* 482 U.S., at 321, 107 S.Ct. 2378.

The idea, then, that a judicial takings doctrine would constrain judges might just well have the opposite effect. It would give

judges new power and new assurance that changes in property rights that are beneficial, or thought to be so, are fair and proper because just compensation will be paid. The judiciary historically has not had the right or responsibility to say what property should or should not be taken.

Indeed, it is unclear whether the Takings Clause was understood, as a historical matter, to apply to judicial decisions. The Framers most likely viewed this Clause as applying only to physical appropriation pursuant to the power of eminent domain. See *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1028, n. 15, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992). And it appears these physical appropriations were traditionally made by legislatures. See 3 J. Story, Commentaries on the Constitution of the United States § 1784, p. 661 (1833). Courts, on the other hand, lacked the power of eminent domain. See 1 W. Blackstone, Commentaries 135 (W. Lewis ed. 1897). The Court's Takings Clause jurisprudence has expanded beyond the Framers' understanding, as it now applies to certain regulations that are not physical appropriations. See *Lucas, supra,* at 1014, 112 S.Ct. 2886 (citing *Mahon,* 260 U.S. 393, 43 S.Ct. 158, 67 L.Ed. 322). But the Court should consider with care the decision to extend the Takings Clause in a manner that might be inconsistent with historical practice.

***740** There are two additional practical considerations that the Court would need to address before recognizing judicial takings. First, it may be unclear in certain situations how a party should properly raise a judicial takings claim. "[I]t is important to separate out two judicial actions—the decision to change current property rules in a way that would constitute a taking, and the decision to require compensation." Thompson, Judicial Takings, 76 Va. L.Rev. 1449, 1515 (1990). In some contexts, these issues could arise ****2617** separately. For instance, assume that a state-court opinion explicitly holds that it is changing state property law, or that it asserts that it is not changing the law but there is no "fair or substantial basis" for this statement. *Broad River,* 281 U.S., at 540, 50 S.Ct. 401. (Most of these cases may arise in the latter posture, like inverse condemnation claims where the State says it is not taking property and pays no compensation.) Call this Case A. The only issue in Case A was determining the substance of state property law. It is doubtful that parties would raise a judicial takings claim on appeal, or in a petition for a writ of certiorari, in Case A, as the issue would not have been litigated below. Rather, the party may file a separate lawsuit—Case B—arguing that a taking occurred in light of the change in property law made by Case A. After all, until the state court in Case A changes the law, the party will not know if his or her property rights will have been eliminated. So res judicata probably would not bar the party from litigating the takings issue in Case B.

Second, it is unclear what remedy a reviewing court could enter after finding a judicial taking. It appears under our precedents that a party who suffers a taking is only entitled to damages, not equitable relief: The Court has said that "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use ... when a suit for compensation can be brought against the sovereign subsequent to the taking," *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 1016, 104 S.Ct. 2862, 81 L.Ed.2d 815 (1984), and the Court subsequently held that the Takings ***741** Clause requires the availability of a suit for compensation against the States, *First English, supra,* at 321–322, 107 S.Ct. 2378. It makes perfect sense that the remedy for a Takings Clause violation is only damages, as the Clause "does not proscribe the taking of property; it proscribes taking without just compensation." *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City,* 473 U.S. 172, 194, 105 S.Ct. 3108, 87 L.Ed.2d 126 (1985).

It is thus questionable whether reviewing courts could invalidate judicial decisions deemed to be judicial takings; they may only be able to order just compensation. In the posture discussed above where Case A changes the law and Case B addresses whether that change is a taking, it is not clear how the Court, in Case B, could invalidate the holding of Case A. If a single case were to properly address both a state court's change in the law and whether the change was a taking, the Court might be able to give the state court a choice on how to proceed if there were a judicial taking. The Court might be able to remand and let the state court determine whether it wants to insist on changing its property law and paying just compensation or to rescind its holding that changed the law. Cf. *First English,* 482 U.S., at 321, 107 S.Ct. 2378 ("Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain"). But that decision would rest with the state court, not this Court; so the state court could still force the State to pay just compensation. And even if the state court decided to rescind its decision that changed the law, a temporary taking would have occurred in the interim. See *ibid.*

These difficult issues are some of the reasons why the Court should not reach beyond the necessities of the case to recognize a judicial takings doctrine. It is not wise, from an institutional standpoint, to reach out and decide questions that have not been discussed at much length by **2618 courts and *742 commentators. This Court's dicta in *Williamson County, supra,* at 194–197, 105 S.Ct. 3108, regarding when regulatory takings claims become ripe, explain why federal courts have not been able to provide much analysis on the issue of judicial takings. See *San Remo Hotel, L.P. v. City and County of San Francisco,* 545 U.S. 323, 351, 125 S.Ct. 2491, 162 L.Ed.2d 315 (2005) (Rehnquist, C.J., concurring in judgment) ("*Williamson County*'s state-litigation rule has created some real anomalies, justifying our revisiting the issue"). Until *Williamson County* is reconsidered, litigants will have to press most of their judicial takings claims before state courts, which are "presumptively competent ... to adjudicate claims arising under the laws of the United States." *Tafflin v. Levitt,* 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990). If and when future cases show that the usual principles, including constitutional principles that constrain the judiciary like due process, are somehow inadequate to protect property owners, then the question whether a judicial decision can effect a taking would be properly presented. In the meantime, it seems appropriate to recognize that the substantial power to decide whose property to take and when to take it should be conceived of as a power vested in the political branches and subject to political control.

Justice BREYER, with whom Justice GINSBURG joins, concurring in part and concurring in the judgment.
I agree that no unconstitutional taking of property occurred in this case, and I therefore join Parts I, IV, and V of today's opinion. I cannot join Parts II and III, however, for in those Parts the plurality unnecessarily addresses questions of constitutional law that are better left for another day.

In Part II of its opinion, see *ante,* at 2601 – 2602, the plurality concludes that courts, including federal courts, may review the private property law decisions of state courts to determine whether the decisions unconstitutionally take "private property" for "public use, without just compensation." U.S. *743 Const., Amdt. 5. And in doing so it finds "irrelevant" that the "particular state *actor*" that takes private property (or unconstitutionally redefines state property law) is the judicial branch, rather than the executive or legislative branch. *Ante,* at 2602; cf. *Hughes v. Washington,* 389 U.S. 290, 296–298, 88 S.Ct. 438, 19 L.Ed.2d 530 (1967) (Stewart, J., concurring).

In Part III, the plurality determines that it is "not obviously appropriate" to apply this Court's " 'fair and substantial basis' " test, familiar from our adequate and independent state ground jurisprudence, when evaluating whether a state-court property decision enacts an unconstitutional taking. *Ante,* at 2608. The plurality further concludes that a state-court decision violates the Takings Clause not when the decision is "unpredictab[le]" on the basis of prior law, but rather when the decision takes private property rights that are "established." *Ante,* at 2609 – 2610. And finally, it concludes that all those affected by a state-court property law decision can raise a takings claim in federal court, *but for* the losing party in the initial state-court proceeding, who can only raise her claim (possibly for the first time) in a petition for a writ of certiorari here. *Ante,* at 2609 – 2610.

I do not claim that all of these conclusions are unsound. I do not know. But I do know that, if we were to express our views on these questions, we would invite a host of federal takings claims without the mature consideration of potential procedural or substantive legal principles that might limit federal interference in matters **2619 that are primarily the subject of state law. Property owners litigate many thousands of cases involving state property law in state courts each year. Each state-court property decision may further affect numerous nonparty property owners as well. Losing parties in many state-court cases may well believe that erroneous judicial decisions have deprived them of property rights they previously held and may consequently bring federal takings claims. And a glance at Part IV makes clear that such cases can involve state property law issues of considerable *744 complexity. Hence, the approach the plurality would take today threatens to open the federal-court doors to constitutional review of many, perhaps large numbers of, state-law cases in an area of law familiar to state, but not federal, judges. And the failure of that approach to set forth procedural limitations or canons of deference would create the distinct possibility that federal judges would play a major role in the shaping of a matter of significant state interest—state property law.

The plurality criticizes me for my cautious approach, and states that I "cannot decide that petitioner's claim fails without first deciding what a valid claim would consist of." *Ante,* at 2604. But, of course, courts frequently find it possible to resolve cases—even those raising constitutional questions—without specifying the precise standard under which a party wins or loses. See, *e.g., Smith v. Spisak,* 558 U.S. 139, 156,

130 S.Ct. 676, 688, 175 L.Ed.2d 595 (2010) ("With or without such deference, our conclusion is the same"); *Quilloin v. Walcott,* 434 U.S. 246, 256, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) (rejecting an equal protection claim "[u]nder any standard of review"); *Mercer v. Theriot,* 377 U.S. 152, 156, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964) *(per curiam)* (finding evidence sufficient to support a verdict "under any standard"). That is simply what I would do here.

In the past, Members of this Court have warned us that, when faced with difficult constitutional questions, we should "confine ourselves to deciding only what is necessary to the disposition of the immediate case." *Whitehouse v. Illinois Central R. Co.,* 349 U.S. 366, 373, 75 S.Ct. 845, 99 L.Ed. 1155 (1955); see also *Lyng v. Northwest Indian Cemetery Protective Assn.,* 485 U.S. 439, 445, 108 S.Ct. 1319, 99 L.Ed.2d 534 (1988) ("A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them"); *Ashwander v. TVA,* 297 U.S. 288, 346–347, 56 S.Ct. 466, 80 L.Ed. 688 (1936) (Brandeis, J., concurring) ("The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. It is not the habit of the Court to decide questions ***745** of a constitutional nature unless absolutely necessary to a decision of the case" (citations and internal quotation marks omitted)). I heed this advice here. There is no need now to decide more than what the Court decides in Parts IV and V, namely, that the Florida Supreme Court's decision in this case did not amount to a "judicial taking."

All Citations

560 U.S. 702, 130 S.Ct. 2592, 177 L.Ed.2d 184, 70 ERC 1505, 78 USLW 4578, 10 Cal. Daily Op. Serv. 7553, 2010 Daily Journal D.A.R. 9081, 22 Fla. L. Weekly Fed. S 484

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Many cases and statutes use "riparian" to mean abutting any body of water. The Florida Supreme Court, however, has adopted a more precise usage whereby "riparian" means abutting a river or stream and "littoral" means abutting an ocean, sea, or lake. *Walton Cty. v. Stop the Beach Renourishment, Inc.,* 998 So.2d 1102, 1105, n. 3 (2008). When speaking of the Florida law applicable to this case, we follow the Florida Supreme Court's terminology.

2 We assume, as the parties agree we should, that in this case the erosion-control line is the pre-existing mean high-water line. Tr. of Oral Arg. 11–12. Respondents concede that, if the erosion-control line were established landward of that, the State would have taken property. Brief for Respondent Department et al. 15; Brief for Respondent Walton County et al. 6.

3 The Florida Supreme Court seemingly took the question to refer to constitutionality under the Florida Constitution, which contains a clause similar to the Takings Clause of the Federal Constitution. Compare Fla. Const., Art. X, § 6, cl. (a), with U.S. Const., Amdt. 5.

4 We ordinarily do not consider an issue first presented to a state court in a petition for rehearing if the state court did not address it. See *Adams v. Robertson,* 520 U.S. 83, 89, n. 3, 117 S.Ct. 1028, 137 L.Ed.2d 203 (1997) *(per curiam)*. But where the state-court decision itself is claimed to constitute a violation of federal law, the state court's refusal to address that claim put forward in a petition for rehearing will not bar our review. See *Brinkerhoff–Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673, 677–678, 50 S.Ct. 451, 74 L.Ed. 1107 (1930).

5 We thus need not resolve whether the right of accretion is an easement, as petitioner claims, or, as Florida claims, a contingent future interest.

6 Thus, the landmark case of *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 124–128, 138, 98 S.Ct. 2646, 57 L.Ed.2d 631 (1978), held that there was no taking only after setting forth a multifactor test for determining whether a regulation restricting the use of property effects a taking.

7 See *Smith v. Spisak,* 558 U.S. 139, 149 – 156, 130 S.Ct. 676, 684–688, 175 L.Ed.2d 595 (2010) (ineffective assistance of counsel); *Quilloin v. Walcott,* 434 U.S. 246, 255, 98 S.Ct. 549, 54 L.Ed.2d 511 (1978) (equal protection); *Mercer v.*

Theriot, 377 U.S. 152, 155, 84 S.Ct. 1157, 12 L.Ed.2d 206 (1964) *(per curiam)* (right to judgment notwithstanding the verdict where evidence is lacking).

8 See *Spisak, supra,* at 155 – 156, 130 S.Ct., at 688. *Quilloin*'s cryptic rejection of the claim "[u]nder any standard of review," 434 U.S., at 256, 98 S.Ct. 549, could only refer to the various levels of scrutiny—such as "strict" or "rational basis"—that we had applied to equal-protection claims, see *Loving v. Virginia,* 388 U.S. 1, 8–9, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967). And in *Mercer,* which found the evidence "sufficient under any standard which might be appropriate—state or federal," 377 U.S., at 156, 84 S.Ct. 1157, one of the parties had argued for an established standard under Louisiana law, and the other for an established federal standard. Compare Brief for Petitioner in *Mercer v. Theriot,* O.T.1963, No. 336, pp. 18–22, with Brief for Respondent in *Mercer v. Theriot*, p. 5.

9 Justice BREYER complains that we do not set forth "procedural limitations or canons of deference" to restrict federal-court review of state-court property decisions. See *post,* at 2618 – 2619. (1) To the extent this is true it is unsurprising, but (2) fundamentally, it is false: (1) It is true that we make our own determination, without deference to state judges, whether the challenged decision deprives the claimant of an established property right. That is unsurprising because it is what this Court does when determining state-court compliance with *all* constitutional imperatives. We do not defer to the judgment of state judges in determining whether, for example, a state-court decision has deprived a defendant of due process or subjected him to double jeopardy. (2) The test we have adopted, however (deprivation of an *established* property right), contains within itself a considerable degree of deference to state courts. A property right is not established if there is doubt about its existence; and when there is doubt we do not make our own assessment but accept the determination of the state court.

10 Petitioner meets the two requirements necessary for an association to assert the Article III standing of its Members. See *Food and Commercial Workers v. Brown Group, Inc.,* 517 U.S. 544, 555–557, 116 S.Ct. 1529, 134 L.Ed.2d 758 (1996). And the claim here is ripe insofar as Article III standing is concerned, since (accepting petitioner's version of Florida law as true) petitioner has been deprived of property.

11 Petitioner raises two other claims that we do not directly address. First, petitioner tries to revive its challenge to the beach-restoration project, contending that it (rather than the Florida Supreme Court's opinion) constitutes a taking. Petitioner's arguments on this score are simply versions of two arguments it makes against the Florida Supreme Court's opinion: that the Department has replaced the Members' littoral-property rights with versions that are inferior because statutory; and that the Members previously had the right to have their property contact the water. We reject both, *infra,* at 2612 – 2613, and n. 12. Second, petitioner attempts to raise a challenge to the Act as a deprivation of property without due process. Petitioner did not raise this challenge before the Florida Supreme Court, and only obliquely raised it in the petition for certiorari. We therefore do not reach it. See *Adams,* 520 U.S., at 86–87, 117 S.Ct. 1028.

12 Petitioner also argues that the Members' other littoral rights have been infringed because the Act replaces their common-law rights with inferior statutory versions. Petitioner has not established that the statutory versions are inferior; and whether the source of a property right is the common law or a statute makes no difference, so long as the property owner continues to have what he previously had.

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United States District Court, S.D. California.

VILLAGE COMMUNITIES, LLC, et al., Plaintiffs,
v.
COUNTY OF SAN DIEGO; Board of Supervisors of County of San Diego; and Does 1–20, Defendants.

Case No.: 20-cv-01896-AJB-DEB
|
Signed July 1, 2022

Attorneys and Law Firms

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ORDER:

(1) DENYING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT; and

(2) GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, PARTIAL SUMMARY JUDGMENT

Anthony J. Battaglia, United States District Judge

***1** Presently pending before the Court is (1) Defendants Board of Supervisors of San Diego (the "Board") and County of San Diego's (the "County") (collectively, "Defendants") Motion for Summary Judgment, (Doc. No. 36), and (2) Plaintiffs' Motion for Partial Summary Judgment, (Doc. No. 37). The motions have been fully briefed. (Doc. Nos. 40–43.) The Court thereafter ordered supplemental briefing on one issue as discussed below. (Doc. No. 52.) Defendants filed their supplemental brief on June 17, 2022, (Doc. No. 53), and Plaintiffs responded on June 24, 2022, (Doc. No. 54). For the reasons set forth below, the Court **DENIES** Plaintiffs' motion for partial summary judgment and **GRANTS IN PART AND DENIES IN PART** Defendants' motion for summary judgment.

I. BACKGROUND

In 2010, the County granted then-applicant Accretive Investments a "Plan Amendment Authorization" for the Lilac Hills Ranch planned community (the "Project") on 608 acres of land in unincorporated North San Diego County, California (the "Property"). (Doc. No. 37-1 at 10.) In 2012, Accretive submitted its development application to the County, and the Project underwent environmental and public review between May 2012 and 2015. (*Id.*) In September 2015, the San Diego County Planning Commission voted to recommend Environmental Impact Review certification and project approval to the Board, subject to modifications. (*Id.* at 11.) However, later that year, the California Supreme Court issued a decision affecting the 2015 Project's greenhouse gas emissions analysis, which paused movement on the project. (*Id.*)

In 2016, Accretive placed a modified version of the 2015 Project on the ballot as a voter initiative, but it was rejected by 64% of county voters. (*Id.*; Doc. No. 36-1 at 5.) In 2017, Village Communities overtook the Project and resumed processing the application. (Doc. No. 37-1 at 12.) After acquiring the Property, Village Communities revised the proposed project, working with the County's Planning Commission staff to address various concerns. (*Id.*) Nonetheless, on June 20, 2020, the Board formally voted to deny the project, and Plaintiffs filed suit. (*Id.* at 26.)

This case ultimately concerns wildfire safety, as the Property sought to be developed is in a high-risk area for such disasters. Plaintiffs assert that through its work with Planning Commission staff, it revised the Project to mitigate the risk down to acceptable levels consistent with the County's General Plan, a master zoning document that governs all future development within the County's boundaries. Despite these revisions, Plaintiffs allege Defendants denied the permit only after Village Communities refused to meet an alleged unconstitutional condition—namely, acquiring "fuel modification easements" from fifty adjacent landowners.

A fuel modification easement grants the easement holder the right to enter property and control vegetation on the portion of the property subject to the easement. In the context of wildfires, the permitted entry typically involves destroying and removing vegetation that serves as "fuel" for fires, which can help stop a fire's spread across a roadway. Here, the main road leading to and from the Project site is a two-lane road called West Lilac Road, which is surrounded to the north and east by an area called Keys Canyon that is characterized by large, dense, flammable brush. (Doc. No. 36-1 at 9.) Particularly of concern, the County Fire Authority ("County Fire") found that the addition of over 3,000 cars from the Project residents, plus additional vehicles from people traveling to and from the Project, would cause substantial traffic congestion on West Lilac during a wildfire evacuation, presenting a risk of people becoming entrapped in their vehicles during an evacuation. (*Id.* at 10.) Thus, Defendants allegedly required Village Communities to obtain these easements from the individual property owners as a condition for approving the development.

***2** Plaintiffs contend Defendants unconstitutionally required Plaintiffs to obtain the easements because (1) the County already had the legal authority the easements supposedly convey, (2) other similar projects have not been subject to the same requirement, and (3) Defendants' actions were arbitrary and capricious. Plaintiffs assert four claims for relief, each alleging violations of 42 U.S.C § 1983.

II. LEGAL STANDARD

A court may grant summary judgment when it is demonstrated that there exists no genuine dispute as to any material fact, and that the moving party is entitled to judgment as a matter of law. *See* Fed. R. Civ. P. 56(a); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). The party seeking summary judgment bears the initial burden of informing a court of the basis for its motion and of identifying the portions of the declarations, pleadings, and discovery that demonstrate an absence of a genuine dispute of material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A fact is "material" if it might affect the outcome of the suit under the governing law. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248–49 (1986). A dispute is "genuine" as to a material fact if there is sufficient evidence for a reasonable jury to return a verdict for the nonmoving party. *See Long v. Cty. of Los Angeles*, 442 F.3d 1178, 1185 (9th Cir. 2006).

Where the moving party will have the burden of proof on an issue at trial, the movant must affirmatively demonstrate that no reasonable trier of fact could find other than for the movant. *See Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). Where the non-moving party will have the burden of proof on an issue at trial, the movant may prevail by presenting evidence that negates an essential element of the non-moving party's claim or by merely pointing out that there is an absence of evidence to support an essential element of the non-moving party's claim. *See Nissan Fire & Marine Ins. Co. v. Fritz Cos.*, 210 F.3d 1099, 1102–03 (9th Cir. 2000). If a moving party fails to carry its burden of production, then "the non-moving party has no obligation to produce anything, even if the non-moving party would have the ultimate burden of persuasion." *Id.* If the moving party meets its initial burden, the burden then shifts to the opposing party to establish that a genuine dispute as to any material fact actually exists. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). The opposing party cannot "rest upon the mere allegations or denials of [its] pleading but must instead produce evidence that sets forth specific facts showing that there is a genuine issue for trial." *See Estate of Tucker*, 515 F.3d 1019, 1030 (9th Cir. 2008) (internal quotation marks and citation omitted).

Where cross-motions for summary judgment are at issue, the court "evaluate[s] each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." *A.C.L.U. of Nev. v. City of Las Vegas*, 466 F.3d 784, 790–91 (9th Cir. 2006) (internal quotation marks omitted). That said, "the court must consider each party's evidence, regardless under which motion the evidence is offered." *Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 532 (9th Cir. 2011). However, "[b]ald assertions that genuine issues of material fact exist are insufficient." *See Galen v. Cty. of Los Angeles*, 477 F.3d 652, 658 (9th Cir. 2007); *see also Day v. Sears Holdings Corp.*, No. 11–09068, 2013 WL 1010547, at *4 (C.D. Cal. Mar. 13, 2013) ("Conclusory, speculative testimony in affidavits and moving papers is insufficient to raise genuine issues of fact and defeat summary judgment."). "When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment." *Scott v. Harris*, 550 U.S. 372, 380 (2007).

III. REQUESTS FOR JUDICIAL NOTICE

***3** To begin, Defendants request judicial notice of five exhibits as part of their motion, (Doc. No. 36-2), and two exhibits in their reply in support of their motion, (Doc. No. 42-1). Under Federal Rule of Evidence 201, the court "may judicially notice a fact that is not subject to reasonable dispute" for the following two reasons: (1) "it is generally known within the trial court's territorial jurisdiction," or (2) it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b).

A. Defendants' Request for Judicial Notice: Exhibits 1–5

First, Defendants ask the Court to take judicial notice of (1) County of San Diego Resolution No. 17-001, dated January 10, 2017; (2) Statement of Proceedings for the June 24, 2020 County of San Diego Board of Supervisors Regular Meeting Planning and Land Use Matters; (3) Minute Order No. 3 for the County of San Diego Board of Supervisors Meeting of June 24, 2020; (4) County Board of Supervisors Resolution No. 20-078, dated June 24, 2020; and (5) Letter from Deputy Chief Administrative Office Sarah E. Aghassi to the San Diego County Board of Supervisors for its June 24, 2020 meeting. (Doc. No. 36-2 at 2; *see also* Doc. No. 40-2.) Plaintiffs did not oppose this request or dispute the authenticity of these documents. (*See generally* Doc. No. 41.)

Courts routinely grant judicial notice of public records. *Harris v. Cty. of Orange*, 682 F.3d 1126, 1132 (9th Cir. 2012) (noting that a court may take judicial notice of "undisputed matters of public record"). Accordingly, Defendants' request for judicial notice of Exhibits 1–5 is **GRANTED**.

B. Defendants' Request for Judicial Notice: Exhibits 34 & 39

Next, attached to Defendants' reply brief are additional requests for judicial notice of (1) portions of the Statement of Proceedings for the July 8, 2020 County of San Diego Board of Supervisors Regular Meeting Planning and Land Use Matters, and (2) California Fire Code § 1010.1.9. (Doc. No. 42-1 at 2.) The Court finds these two documents irrelevant to the present matter. Thus, at this stage of the proceedings, as the two exhibits are irrelevant to any controversy the Court must resolve and the documents cannot be incorporated by reference, judicial notice of Exhibits 34 and 39 is **DENIED**. *See Gerritsen v. Warner Bros. Entm't Inc.*, 112 F. Supp. 3d 1011, 1026 (C.D. Cal. 2015) (declining to take judicial notice of several exhibits finding they were irrelevant to the matter).

IV. EVIDENTIARY OBJECTIONS

Defendants lodge a separate statement of evidentiary objections to Plaintiffs' evidence submitted in support of Plaintiffs' motion for summary judgment. (Doc. No. 40-1.) However, Defendants' objections do not comply with the Civil Case Procedures of the Honorable Anthony J. Battaglia, U.S. District Judge, which requires objections relating to the motion to be set forth in the parties' opposition or reply. J. Battaglia Civ. Case Proc. § II.A. As such, the Court does not consider Defendants' objections.

V. DISCUSSION

Plaintiffs' four claims allege violations of 42 U.S.C. § 1983, which prohibits state actors from depriving a plaintiff of the "rights, privileges or immunities secured by the Constitution." To prevail on a Section 1983 claim, a plaintiff must show that "(1) acts by the defendants (2) under color of state law (3) depriv[ed] [it] of federal rights, privileges or immunities [and] (4) caus[ed] [it] damage." *Thornton v. City of St. Helens*, 425 F.3d 1158, 1164 (9th Cir. 2005) (quoting *Shoshone-Bannock Tribes v. Idaho Fish & Game Comm'n*, 42 F.3d 1278, 1284 (9th Cir. 1994)) (internal quotation marks omitted). Section 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred." *Id.* (internal quotation marks omitted).

***4** Defendants move for summary judgment on each of Plaintiffs' four claims for (1) inverse condemnation, (2) temporary taking, (3) equal protection violations, and (4) substantive due process violations. (Doc. No. 36.) Plaintiffs move for partial summary judgment to establish Defendants' liability under its four claims alleging violations of Section 1983. (Doc. No. 37.) The Court will address each basis for summary judgment below.

A. Plaintiffs' First and Second Takings Clause Claims

Plaintiffs' first and second claims, brought pursuant to Section 1983, allege violations of their rights under the Fifth Amendment's Takings Clause through (1) inverse condemnation and (2) a temporary taking, on the grounds that the County's request for offsite fuel modifications is an unconstitutional condition. (SAC ¶¶ 107–117.) Plaintiffs and Defendants both move for summary judgment on these claims. (Doc. Nos. 37-1 at 29–31, 36-1 at 14–25.) Specifically, Plaintiffs assert the County wrongfully

conditioned the Project on the purchase of fifty fuel modification easements from off-site landowners, which would only come at a "substantial cost" to Plaintiffs. (Doc. No. 37-1 at 31.) Plaintiffs further contend the County did not need those easements because the County Consolidated Fire Code already provided the County and/or fire authority with the legal authorization to clear vegetation near the public roadway—the same authority the easement would provide. (*Id.*) Defendants counter that (1) the County needed to undertake legislative acts to amend its General Plan and zoning ordinance to approve the Project; (2) the Board denied the Project for additional reasons independent of the easement condition; (3) there is no unconstitutional taking because the County did not require Plaintiffs to give up property; and (4) there is no unconstitutional taking because the easement condition satisfies the test set out in *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013), under *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). (Doc. No. 36-1 at 14–25.)

1. Generally Applicable Legislation

As an initial matter, Defendants assert that because the County could not approve the Project without amending its General Plan or zoning ordinance, the County's decision was a legislative one which does not give rise to a taking. (Doc. No. 36-1 at 17.) Although Defendants again raise this argument in their supplemental briefing, it is outside the scope of what the Court previously ordered and thus will disregard this argument. (*See* Doc. No. 52.) The Court ultimately finds this argument unavailing.

In *Dolan*, the Supreme Court highlighted that the "the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel," instead of imposing an "essentially legislative determination[ ] classifying entire areas of the city ...." 512 U.S. at 385; *see also Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546 (2005) ("Both *Nollan* and *Dolan* involved Fifth Amendment takings challenges to adjudicative land-use exactions."); *Better Housing for Long Beach v. Newsom*, 452 F. Supp. 3d 921, 932 (C.D. Cal. 2020) (same). Courts recognize that "adjudicative" zoning decisions are typically *ad hoc*, characterized by the exercise of discretion by the city or administrative body. Legislative actions, on the other hand, are characterized by "generally applicable legislation ... that [ ] applie[s], without discretion or discrimination," to every property within the purview of the legislation. *San Remo Hotel L.P. v. City of San Francisco*, 27 Cal. 4th 643, 645 (2002); *see also Ballinger v. City of Oakland*, 398 F. Supp. 3d 560, 570 (N.D. Cal. 2019) (holding the plaintiff's unconstitutional exaction claim failed as a matter of law because it was generally applicable legislation); *Better Housing for Long Beach*, 452 F. Supp. 3d at 933 (positing that for "general land use regulations," the appropriate test is a *Penn Central* regulatory takings analysis, rather than *Nollan*/*Dolan* scrutiny).

***5** Plaintiffs do not allege or argue that amending the County's General Plan or zoning ordinance is a regulatory taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978), or a facial challenge to either. (Doc. No. 41 at 9.) Rather, Plaintiffs assert its takings claims are adjudicative decisions based on Defendants' denial of the Project solely because Village Communities refused to secure fifty offsite roadway fuel modification easements. (*Id.* at 8.) The Court agrees.

Plaintiffs' takings claims are not predicated on legislative determinations classifying an entire area of the County or on the County's decision not to amend the General Plan or zoning ordinance. Rather, Defendants made an adjudicatory decision to condition only Plaintiffs' development application with an easement condition. Moreover, the proposed development application did not involve a countywide general plan amendment or a zoning ordinance generally applicable to the entire county area. As such, the Court finds there was no legislative act which would preclude a takings claim under *Nollan*/*Dolan*.

2. The Board's Denial of the Project

Defendants further argue that because the Board allegedly denied the Project for multiple reasons independent of the easement condition, no taking occurred. (Doc. No. 36-1 at 18–19.) Specifically, Defendants assert the Board denied the Project because the majority of the Supervisors (1) were not going to disregard the public vote to reject the proposed Project just four years prior, and (2) found the proposed Project inconsistent with General Plan Policy H-2.1. (*Id.* at 19.) After insufficient briefing by both parties, the Court ordered supplemental briefing and requested Defendants and Plaintiffs to address whether Defendants had the ability to exercise their police power to deny the Project altogether. (Doc. No. 52.)

In *Nollan*, the Supreme Court agreed with the Government's position that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." 483 U.S. at 836. Thus, the Court held, if the Government "could have exercised its police power ... to forbid construction of the house altogether, imposition of the condition would also be constitutional." *Id.* However, "unless the permit condition serves the same governmental purpose as the development ban, the [condition] is not a valid regulation of land use but 'an out-and-out plan of extortion.' " *Id.* at 837.

Defendants point to the June 24, 2020 County of San Diego Board of Supervisors meeting minutes, where Supervisor Dianne Jacob discussed these various concerns, including that the public vote "was soundly defeated by the public in 2016. Sixty-four percent of the voters rejected the project." (Doc. No. 36-4 at 241.) Supervisor Jacob went on further to state the "[c]urrent project still grossly violates the county general plan, 1,746 homes versus 110 that would be allowed to our general plan." (*Id.*) Defendants rely on *Nollan*, asserting "[a] refusal to approve the proposed Project for reasons independent of the easement condition is not a taking." (Doc. No. 36-1 at 19 (citing *Nollan*, 483 U.S. at 836).) However, Supervisor Jacob acknowledged the motion pending before the Board "was only on the easement issue and the fuel modification along West Lilac Road." (Doc. No. 36-4 at 239–40.) Additionally, Resolution No. 20-078 ("A Resolution of the San Diego County Board of Supervisors Denying General Plan Amendment (GPA)") specifically outlines Plaintiffs' failure to obtain offsite easements as the basis for the Board's denial of the Project. (Doc. No. 37-7 at 195–99.) As such, while the Supervisors of the Board may have had additional independent reasons for denying the Project, Plaintiffs' failure to acquire offsite easements was the basis for the motion denying Project approval.

***6** In their supplemental briefing, Defendants additionally contend they had the police power to deny the Project because (1) state planning and zoning laws expressly gave the Board the power to deny the Project; (2) the California Environmental Quality Act ("CEQA") gave Defendants the authority to deny the Project; and (3) they lawfully exercised their discretion to deny the Project for reasons other than the easement condition. (Doc. No. 52 at 2–10.) However, the Supreme Court has "repeatedly rejected the argument that if the government need not confer a benefit at all, it can withhold the benefit because someone refuses to give up constitutional rights." *Koontz*, 570 U.S. at 608. Although Defendants are correct they had the authority to deny the Project on grounds unrelated to the easement condition, the County explicitly conditioned approval of the Project on Plaintiffs' acquisition of offsite easements. As such, "[e]ven if [Defendants] would have been entirely within its rights in denying the permit for some other reason, that greater authority does not imply a lesser power to condition permit approval on petitioner's forfeiture of his constitutional rights." *Id.*

3. Transfer of Property Interest

Next, Defendants assert there is no unconstitutional taking because the County did not require Plaintiffs to give up any property, either in the form of an easement or money. (Doc. No. 36-1 at 19–21.) Specifically, Defendants argue County Fire did not demand Plaintiffs to set aside any portion of the Project site or otherwise give up any portion of the Project site to the County. (*Id.* at 20.) Moreover, despite Plaintiffs' speculation that they "would need to pay exorbitant amounts of money to obtain the easements," Defendants neither required this, nor did Plaintiffs ask a single West Lilac property owner for an easement. (*Id.*) Thus, no property owner demanded money in exchange for an easement. (*Id.*) Plaintiffs counter that some property owners would want money for an easement, and that the fifty property owners "could extract $50,000 for each easement, or $2.5 million total, or 'higher.' " (Doc. No. 43 at 10.)

The Fifth Amendment prohibits the government from taking private property for public use without just compensation. Additionally, "[u]nder the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right ... in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Dolan*, 512 U.S. at 385. "In evaluating [a plaintiff's claim, the Court] must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the [government entity]." *Id.* at 386 (quoting *Nollan*, 483 U.S. at 937). The Supreme Court described this "essential nexus" as a "rough proportionality" between the exaction demanded by the government entity and the "nature and extent to the impact of the proposed development." *Id.* at 391.

In the land-use context, "a special application of [the unconstitutional conditions] doctrine ... protects the Fifth Amendment right to just compensation for property the government takes when owners apply for land-use permits." *Koontz*, 570 U.S. at 604 (citations and internal quotation marks omitted). In *Nollan*, for example, the Supreme Court held that a state agency could not, without paying just compensation, require the owners of beachfront property to grant a public easement over their property as a condition for obtaining a building permit. 483 U.S. at 831–42; *see also Dolan*, 512 U.S. at 379–80, 394–95 (concluding that a taking occurred when a city required a landowner to dedicate a portion of her real property to a greenway that would include a bike and pedestrian path for public use). Because of the typically broad powers wielded by permitting officials, landowners who seek governmental authorization to develop their properties "are especially vulnerable to the type of coercion that the unconstitutional conditions doctrine prohibits." *Koontz*, 570 U.S. at 605. "Extortionate demands" made by permitting authorities can "frustrate the Fifth Amendment right to just compensation, and the unconstitutional conditions doctrine prohibits them." *Id.*; *see Dolan*, 512 U.S. at 396.

***7** Here, the Court finds neither party has adequately provided evidence of whether Plaintiffs were required to give up property in the form of money. Kenneth Keagy, a state-licensed and certified general real estate appraiser, estimated that an easement along West Lilac would cost $3,000 or less for twelve of the forty-eight parcels, while the remaining thirty-six parcels would likely range from about $4,000 to $65,000 per parcel, averaging about $22,000 per parcel. (Declaration of Kenneth Keagy, Doc. No. 37-9, ¶ 7.) However, despite this appraisal, Plaintiffs fail to offer evidence that any property owners along West Lilac would indeed demand money in exchange for an easement. Likewise, Defendants fail to offer any evidence that Plaintiffs would *not* be required to pay money in exchange for easements along West Lilac. As such, the Court **DENIES** both Plaintiffs' and Defendants' motions for summary judgment as to Plaintiffs' takings claims, and declines to engage in determining whether there was a nexus and rough proportionality.

B. Plaintiffs' Substantive Due Process Claim (Claim Four)

Plaintiffs next argue Defendants violated their rights under the Due Process Clause of the Fourteenth Amendment by arbitrarily and unreasonably denying their development application. (SAC ¶¶ 124–28.) Specifically, Plaintiffs assert the easement condition imposed by Defendants lacks any relationship to the public health, safety, or general welfare, and thus violated Plaintiffs' substantive due process rights. (Doc. No. 37-1 at 32.) Defendants respond that Plaintiffs' substantive due process claim fails because they do not have a protected property interest, and that even if they did, the easement condition had a rational relationship to the County's legitimate interest in ensuring the Project did not create an undue risk of entrapment to nearby residents during a wildfire evacuation. (Doc. No. 36-1 at 25–26.) Although the Parties again raise this argument in their supplemental briefings (*see* Doc. Nos. 53 at 18; 54 at 13), it is outside the scope of what the Court previously ordered. (*See* Doc. No. 52.) Thus, the Court does not consider these arguments.

"To state a substantive due process claim, the plaintiff must show as a threshold matter that a state actor deprived it of a constitutionally protected life, liberty or property interest." *Shanks v. Dressel*, 540 F.3d 1082, 1087 (9th Cir. 2008). However, "[t]he Supreme Court has 'long-eschewed ... heightened [means-ends] scrutiny when addressing substantive due process challenges to government regulation' that does not impinge on fundamental rights." *Id.* (quoting *Lingle*, 544 U.S. at 542). As such, "the irreducible minimum of a substantive due process claim challenging land use action is failure to advance any legitimate governmental purpose." *Id.* (internal quotation marks and citation omitted); *Matsuda v. City and Cty. of Honolulu*, 512 F.3d 1148, 1156 (9th Cir. 2008) ("[S]tate action which neither utilizes a suspect classification nor draws distinctions among individuals that implicate fundamental rights will violate substantive due process only if the action is not rationally related to a legitimate governmental purpose.") (internal quotation marks omitted). The Ninth Circuit has described a plaintiff's burden on such a claim as "exceedingly high." *Shanks*, 540 F.3d at 1088. Moreover, "there is a due process claim where a 'land use action lacks any substantial relation to the public health, safety, or general welfare.' " *N. Pacifica LLC v. City of Pacifica*, 526 F.3d 478, 484 (9th Cir. 2008) (quoting *Crown Point Dev., Inc. v. City of Sun Valley*, 506 F.3d 851, 856 (9th Cir. 2007)).

Here, Plaintiffs' substantive due process claim is not premised on an allegation that the County's actions impinged on their fundamental rights. Rather, Plaintiffs contend the County used its ability to impose a conditional use permit on the Project as a pretext to effectuate a private taking. As previously discussed above, to maintain a substantive due

process claim for a private taking, "a plaintiff must allege: (1) the government's action was "arbitrary, irrational, or lacking any reasonable justification in the service of a legitimate government interest"; and (2) the government's actions deprived them of a protected property interest. *Colony Cove Props., LLC v. City of Carson*, 640 F.3d 948, 962 (9th Cir. 2011) *overruled on other grounds by Knick v. Township of Scott*, 139 S. Ct. 2162 (2019).

***8** Next, "[i]f it is 'at least fairly debatable' that the decision to [require the acquisition of easements] was rationally related to legitimate government interests, the[n] [Defendants' action] 'must be upheld.' " *Christensen v. Yolo Cnty. Bd. of Sup'rs*, 995 F.2d 161, 165 (9th Cir. 1993) (quoting *Nelson v. City of Selma*, 881 F.2d 836, 839 (9th Cir. 1989)).

Defendants present extensive evidence indicating they acted in good faith in an effort to advance legitimate governmental interests—namely, that they were concerned with the safety of persons evacuating on West Lilac Road during a wildfire, and that they required the easement condition to address wildfire evacuation concerns. For example, Defendants have offered sufficient evidence that due to substantial fuel along West Lilac Road, a main area evacuation route, these areas would pose a significant risk of entrapping those in the area during a wildfire evacuation, were the Project to be implemented. (Doc. No. 36-1 at 22–23; Declaration of Anthony Mecham ("Mecham Decl."), Doc. No. 36-8, ¶¶ 12–15; Doc. No. 36-3 at 262, 265, 405–409.) Specifically, there are currently approximately eighty-one residences located along West Lilac Road. (Doc. Nos. 36-1 at 22–23, 36-3 at 265.) However, the Project proposes to add approximately 5,000 residents and over 3,000 vehicles to the area, not including those staying at the proposed hotel or senior care center, or visiting the retail and commercial area, which creates a risk of entrapment along West Lilac Road during a wildfire evacuation. (*Id.*) Moreover, County Fire determined that before supporting the Project, vegetation management on West Lilac Road was necessary to make the Project safe for current and future residents because the addition of over 3,000 cars to the area from the Project would cause substantial traffic congestion on West Lilac Road during a wildfire evacuation, which, coupled with the presence of brush along West Lilac, would present a risk of people becoming entrapped in their vehicles during an evacuation. (Doc. No. 36-1 at 10.)

Under *Koontz, Nollan*, and *Dolan*, "the government may choose whether and how a permit applicant is required to mitigate the impacts of a proposed development," so long as it does "not leverage its legitimate interest in mitigation to pursue governmental ends that lack an essential nexus and rough proportionality to those impacts." *Koontz*, 570 U.S. at 605.

Plaintiffs' contention that the County's fire risk concerns were not legitimate merely because the County's evacuation time analysis differed from that of Plaintiffs' and failed to consider Plaintiffs' alternative proposals to the easement condition do no more than present the type of " 'run of the mill dispute between a developer and a town planning agency' that fails to implicate concerns about due process deprivations." *Teresi Invs. III v. City of Mountain View*, 609 Fed. Appx. 928, 930 (9th Cir. 2015); *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir. 1982); *Stubblefield Constr. Co. v. City of San Bernardino*, 32 Cal. App. 4th 687, 711–12 (1995). Plaintiffs have not met the "exceedingly high burden" required to show the Board or the County behaved in a constitutionally arbitrary fashion, *Matsuda*, 512 F.3d at 1156, nor have they established that Defendants' easement requirement, or the denial of the Project, was arbitrary and capricious. Rather, Defendants' decision was rationally based on the perceived undue risk of entrapment to nearby residents during a wildfire evacuation. Plaintiffs have not presented evidence adequate to permit a reasonable fact finder to decide that the County's motivations for requiring the easement condition did not include any legitimate concern for public safety. Indeed, the evidence shows the County was motivated in substantial part by safety concerns. Accordingly, the decision to require Plaintiffs to acquire easements did not violate their due process rights. *See Teresi Invs. III*, 609 Fed. Appx. at 930.

***9** Accordingly, the Court **DENIES** Plaintiffs' motion for summary judgment and **GRANTS** summary judgment in favor of Defendants as to the fourth claim for relief in the SAC based upon Plaintiffs' assertion of violation of substantial due process under the Fourteenth Amendment.

C. Plaintiffs' Equal Protection Claim (Claim Three)

Plaintiffs further assert Defendants violated their rights under the Equal Protection Clause of the Fourteenth Amendment by imposing a condition for development on Plaintiffs that Defendants did not impose on other, similarly situated development proposals during the same period. (SAC ¶ 120.)

The Equal Protection Clause of the Fourteenth Amendment provides that "No State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "When an equal protection claim is

premised on unique treatment rather than on a classification, the Supreme Court has described it as a 'class of one' action." *N. Pacifica LLC*, 526 F.3d at 486 (citing *Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam)). To succeed on this kind of "class of one" equal protection claim, Plaintiffs must demonstrate that Defendants "(1) intentionally (2) treated [Plaintiffs] differently than other similarly situated property owners, (3) without a rational basis." *Gerhart v. Lake Cnty.*, 637 F.3d 1013, 1021–22 (9th Cir. 2011).

Defendants argue that class-of-one equal protection claims do not arise out of exercises of discretion based on subjective, individualized determinations. (Doc. No. 40 at 31.) In *Towery v. Brewer*, 672 F.3d 650, 660 (9th Cir. 2012), the Ninth Circuit stated "[t]he class-of-one doctrine does not apply to forms of state action that 'by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments.' " (quoting *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 603 (2008)). The Ninth Circuit further noted in *Towery* that the class-of-one theory is inapplicable only "[a]bsent any pattern of generally exercising the discretion in a particular manner while treating one individual differently *and* detrimentally." *Id.* at 660–61 (emphasis in original); *see Prime Healthcare Servs., Inc. v. Harris*, 216 F. Supp. 3d 1096, 1117 (S.D. Cal. 2016).

In *Las Lomas Land Co. v. City of Los Angeles*, 177 Cal. App. 4th 837 (2009), the California Court of Appeal held the class of one equal protection theory was inapplicable to the city's decision to deny approval of the plaintiff's proposed development project, which "presented complex urban planning and land use issues." *Id.* at 860. The California Court of Appeal explained: "The decision whether to approve a project of this sort ordinarily would involve numerous public policy considerations and the exercise of discretion based on a subjective, individualized determination." *Id.*

Here, like the city's decision in *Las Lomas Land Co.* to deny approval of the plaintiff's proposed development project, the County's decision on this case involved "numerous public policy considerations and the exercise of discretion based on [the] subjective, individualized determination[s]." 177 Cal. App. 4th at 860. The San Diego County Board of Supervisors based their decision on the Environmental Impact Report, reviewed and considered by the Planning Commission, and County Fire's recommendations. (Doc. No. 37-7 at 195.) Additionally, the Board noted the Project was inconsistent with the General Plan and would not minimize the population exposed to wildfire hazards. (*Id.* at 196.) The Board ultimately rejected Plaintiffs' project after it explicitly found "the Project has not implemented measures that reduce the risk of structural and human loss due to wildfire and is inconsistent with [the] General Plan Policy[.]" (*Id.* at 196–97.) As such, the Court finds the class-of-one doctrine is inapplicable here.

***10** Defendants further contend that even if a class-of-one equal protection claim did apply, Plaintiffs cannot prove the second and third elements of their claim. (*Id.*) Specifically, they argue Plaintiffs cannot prove the County treated Plaintiffs differently than other similarly situated property owners, or that the County lacked a rational basis for the easement condition. (*Id.*)

Here, there is a genuine issue as to a material fact regarding whether Plaintiffs were treated differently than other similarly situated developers. Plaintiffs have identified other allegedly similarly situated development projects (Valiano, Harmony Grove Village South, Newland Sierra, Village 14, and Village 13), to which Howard Windsor, Plaintiffs' fire protection consultant, opined the Project had a lesser proportion of their land in "County Fire Hazard Severity Zones" as compared to allegedly similar projects. (Doc. No. 41-3 at 38.) However, as noted by Defendants, Plaintiffs admit each GPA is unique, and that no two GPA project is the same. (Declaration of Mark Slovick, Doc. No. 36-6, ¶ 3; Deposition of Jon Rilling, Doc. No. 40-12 at 398–99.) Defendants contend the County analyzed the Project using the same process it uses on every General Plan Amendment ("GPA") project, and that because each GPA project is unique, there are no similarly situated property owners. (Doc. No. 40 at 31.) Additionally, Defendants assert there are no other GPA projects that have the same fire and evacuation issues, "such as a nearby canyon with substantial fuels and locations of uninterrupted fuels from that canyon to a main evacuation route." (*Id.*)

However, because Defendants have shown the easement condition is rationally related to the County's legitimate interest in wildfire evacuation safety, as discussed above, the Court **DENIES** Plaintiffs' motion for summary judgment and **GRANTS** Defendants' motion for summary judgment as to the third claim for relief in the SAC.

VI. CONCLUSION

For all the reasons stated, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' motion for summary

judgment and **DENIES** Plaintiffs' motion for summary judgment.

IT IS SO ORDERED.

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