

1

PACIFIC LEGAL FOUNDATION

December 9, 2010

Mr. Salud Carbajal
Ms. Janet Wolf
Ms. Doreen Farr
Ms. Joni Gray
Mr. Joseph Centeno
Santa Barbara County Board of Supervisors
105 East Anapamu Street, Suite 406
Santa Barbara, CA 93101-2074

VIA FEDERAL EXPRESS

Re: Proposed Santa Barbara County Local Coastal Program Amendments

Dear Supervisors:

Pacific Legal Foundation (PLF) writes to inform you of significant legal ramifications flowing from adoption of the California Coastal Commission's approval with modifications of the County of Santa Barbara's Land Use and Development Code. PLF believes that some of the Commission's modifications could be illegal under the United States and California Constitutions. In particular, PLF believes that Modification 21, amending Section 35.60.060(E) of the County Code categorically to forbid construction of new private beach stairwells, and to allow only minor repairs to existing private beach stairwells, violates constitutional protections against the taking of private property without just compensation.

Legal Background

In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the United State Supreme Court held that a condition on a landuse permit, in order to be constitutional, must bear an "essential nexus" to the effects of the proposed development. *Id.* at 836-37. The Court overturned the Commission's condition of a lateral beach easement because the proposed project—demolition of a beach bungelow and replacement with a home—would have had no direct effect on the public's existing beach access. *See id.* at 838-39. In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court

made clear that the government has the burden of specifically demonstrating the necessary connection—the “essential nexus”—between any permit condition and the impact of a proposed project.

At least one California court of appeal has refused to apply *Nollan* to legislatively imposed exactions, as some might argue Modification 21 to be. In *Action Apartment Association v. City of Santa Monica*, 166 Cal. App. 4th 456 (2008), the California Court of Appeal held that *Nollan*’s heightened scrutiny does not apply to legislatively imposed exactions. *See id.* at 470. Nevertheless, even in the absence of *Nollan*, real and substantial limitations on the power of a local legislative body to impose conditions on building development remain. In *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643 (2002), the California Supreme Court observed that even where the heightened scrutiny of *Nollan* does not apply, a legislatively imposed condition on development must still bear a “reasonable relationship” to the effects of the development and the policies underlying the government’s regulation of that development. *See id.* at 671.

In *Nollan* itself, the California Court of Appeal, in upholding the Commission’s easement condition, noted that a landuse authority must establish “an indirect relationship between an exaction and a need to which the project contributes,” and that, in proving the relationship, the government can rely on the project’s anticipated cumulative effects. 177 Cal. App. 3d 719, 723 (1986). In the United States Supreme Court, the Commission justified the easement condition on the grounds that the *Nollans*’ proposed development would negatively affect the public’s access to the beach, so that a condition expanding the public’s access on the beach would be “reasonably related” to the development’s impacts. *See* 483 U.S. at 838.

As the foregoing confirms and the following pre-*Nollan* case law illustrates, a development condition is illegal if it lacks any relationship to the effects of the proposed development, regardless of the manner of the condition’s imposition.

In *Grupe v. California Coastal Commission*, 166 Cal. App. 3d 148 (1985), the property owner challenged a public access easement condition on the grounds that the individual project did not create any real impacts on public access to the beach. The court rejected that argument.

Respondent’s beach front home is one more brick in the wall separating the People of California from the state’s tidelands. Although respondent’s home alone has not created the need for access to the tidelands fronting his property, it is one small project among a myriad of others which together do severely limit public access to the tidelands and beaches of this state, and therefore collectively create a need for public access. Thus, the condition exacted to facilitate access is related to a need to

which respondent's project contributes, even though, standing alone, it has not created the need for access.

Id. at 167 (footnote and citation omitted). The easement was permissible because the public-access-harming effects of the project, although *de minimis*, were cumulatively significant and would be remedied by the condition. But as the court cautioned, “[a]lthough a particular development need not create the need for a particular exaction, . . . the exaction [must] be designed to meet needs to which the project contributes, at least in an incidental manner.” *Id.* at 166 n.11.

The importance of *some* relationship between condition and development was central to the court of appeal's decision in *Remmenga v. California Coastal Commission*, 163 Cal. App. 3d 623 (1985). There, the court upheld a public access condition for new coastal development, reasoning that

even if an individual project does not create an immediate need for a compensating accessway, one may be required of it if its effect together with the cumulative impact of similar projects would in the future create or increase the need for a system of such compensating accessways.

Id. at 628. As the court explained, the

proposed improvement may constitute only a small impediment to public access, but when viewed as a part of the entire subdivision as it develops in the future the proposed improvement may well be a link in a chain barring access or making access more difficult and costly.

Id. at 630. Thus, although the nexus in *Remmenga* was not direct, at least an indirect relationship existed between the public access condition and the public-access-harming effects of the proposed development.

In *Georgia-Pacific Corp. v. California Coastal Commission*, 132 Cal. App. 3d 678 (1982), Georgia-Pacific challenged the Commission's requirement that the company dedicate several public access easements across its industrial and timberland property in exchange for its coastal development permit. The court noted that a “regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development,” and that the relationship of the dedication to the nature and impact of the proposed projects is irrelevant to the constitutional question. *See id.* at 699. Nevertheless, the court invalidated several lateral access easements on the grounds that they were required not because of any present impacts of the development, but rather based on what “*might* [happen] at some future time [if Georgia-Pacific were to] change its use of the land.” *Id.* at 700. The court warned that acceptance of the Commission's justification for the easements would mean that “[a]ccess conditions on the basis of such speculation

could be exacted of any applicant for a coastal development permit at any place and any time.” Many of the challenged easement conditions bore no relationship to Georgia-Pacific’s development. For example:

The Noyo Headlands parcel [for which public access easements were required] bears no such relationship with th[e] site [of development]. Section 30212 [of the Coastal Act] consequently did not authorize the Commission to require access easements on it as conditions of the permits for “new development projects” to be carried out elsewhere. Nothing in the Coastal Act authorized it to do this with the otherwise commendable intentions “to provide maximum feasible access” to the coastline or “to compensate the public for its present inability” to reach the coast elsewhere.

Id. at 701. Because the lateral access easements bore no relationship to the proposed development, they were illegal, notwithstanding the fact that such easements would have been consistent with the Coastal Act’s public access provisions.

Modification 21 Is Likely Unconstitutional

Modification 21 would be unconstitutional under either *Nollan* or the more relaxed scrutiny standard articulated in *San Remo*. First, there is no nexus or reasonable relationship between (1) building a new private stairwell or replacing an existing private stairwell, and (2) any effects on the public’s access to the beach. If the public never had coastal bluff beach access to begin with, then development that maintains the status quo has no effect on that access. Second, Modification 21 improperly presumes the requisite nexus relationship to exist in all cases, even though under *Nollan* and *Dolan* it is the *government’s* burden—here, the County’s—to show, for each project, that a stairwell prohibition is appropriate.

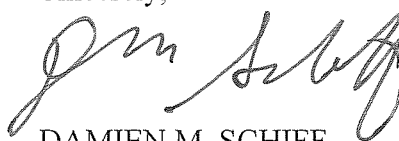
Thus, to impose Modification 21 constitutionally, the Board would have to establish at the very least that a reasonable relationship exists between the condition imposed—*i.e.*, the dedication of the stairwell to the public—and the effects of the project. No such relationship exists. To be sure, stairwell construction may have some aesthetic or environmental impacts on beach cliffs, but these impacts will exist as much with public as with private stairwells. Requiring that such stairwells be dedicated to public use is, in this context, simply irrational.

PLF understands that it was the Commission, not the Board, that proposed Modification 21. Nevertheless, it is the Board’s decision now whether to adopt Modification 21, along with the rest of the Commission’s amendments, to make the County’s new local coastal program effective. *See* Pub. Res. Code § 30600.5(b); Cal. Code Regs. tit. 14, § 13544(a)-(d). For the same reason, it is the Board who bears principal responsibility for adopting an ordinance that would violate the constitutionally protected rights of the County’s coastal zone property owners. PLF therefore urges

Santa Barbara County Board of Supervisors
December 9, 2010
Page 5

the Board carefully to consider the constitutional ramifications of its vote when it considers adoption of the new Land Use and Development Code with the Commission's modifications.

Sincerely,

A handwritten signature in black ink, appearing to read "D.M. Schiff", written in a cursive style.

DAMIEN M. SCHIFF
Attorney