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IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

BORDER BUSINESS PARK, INC., formerly known as DE LA FUENTE BUSINESS PARK, INC.,
Plaintiff, Respondent, and Cross-Appellant.
vs.

CITY OF SAN DIEGO, a California municipality,
Defendant, Appellant, and Cross-Respondent.

APPEAL FROM THE SUPERIOR COURT FOR SAN DIEGO COUNTY (692794)
RAYMOND J. IKOLA, JUDGE (PRESIDING BY SPECIAL ASSIGNMENT)

APPELLANT'S OPENING BRIEF

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INTRODUCTION

This action by Border Business Park, Inc. against the City of San Diego for breach of contract and inverse condemnation resulted in a $122.5 million judgment against the City. The trial court granted a new trial on the breach of contract portion of the judgment, but left intact the portion awarding $91.7 million for inverse condemnation. The City challenges that award on appeal.

The inverse condemnation award rests on two unprecedented theories of liability. The trial court ruled the City was liable for (1) publicly announcing that it was considering a proposal for an international airport, and (2) impairing access to Border's property by temporarily establishing a designated truck route on adjacent streets. As we explain below, no California case has ever imposed inverse condemnation liability on a public entity for announcing its study of a proposed public improvement or for routing traffic in a way that makes access to property more difficult or circuitous. Indeed, California law prohibits inverse condemnation liability in such situations. The City is therefore entitled to judgment as a matter of law.

At the least, the City is entitled to a new trial because Border's damages for a purported "temporary taking" of its property greatly exceeded its own expert's estimate of the property's value. Border's expert said its property was worth $51 million, but the jury's inverse condemnation award for temporary diminution in value exceeds $65 million. That award represents Border's damages for five years when the City was studying the airport proposal and six years when the City routed trucks past Border's property. Now that the City has abandoned the airport proposal and rerouted the trucks away from Border's property, Border and its successors are left with both the unimpaired property *and* a damages award exceeding the value of the property.

The City is also entitled to a new trial because the trial judge who

adopted the two unprecedented theories of liability was aware of grounds for his disqualification before he ruled. He knew he had been reprimanded by the Commission on Judicial Performance for receiving gifts from Border's attorney, he knew that he had an on-going social relationship with that attorney, and he knew he was "friend dating" that attorney's secretary. The judge should have recused himself or disclosed the facts to the City and obtained a waiver. Instead, he remained silent and remained in the case. He even took Border's attorney's secretary on a date during the trial. A person who learned these facts might reasonably doubt the judge's ability to remain impartial. Accordingly, the rulings the judge made after that attorney associated into the case should be set aside and a new trial should be ordered.

QUESTIONS PRESENTED AND SUMMARY OF ARGUMENT

1. Can a city be liable in inverse condemnation for openly announcing its plans to explore the possibility of building an airport?

The trial court said yes, holding the City liable for announcing that it was exploring plans for an airport along the United States-Mexico border. The court found the City effected a "taking" of Border's property by unreasonably airing its investigation of potential airport sites without first seeking or securing Mexico's commitment to a border airport project. The court ruled the taking began in 1988, when the City first announced that the airport proposal was under consideration.

The trial court's ruling was erroneous. It is well established that a city cannot be liable in inverse condemnation for studying a possible public improvement. Liability for unreasonable "precondemnation" conduct cannot exist until the city moves beyond planning and into acquisition. But the City never reached the acquisition phase here. The undisputed evidence shows the

City was only evaluating its options when it aired the status of the airport proposal in 1988. The City later abandoned the airport proposal mid-stream, before it completed many of the necessary steps in the planning process, and long before it got anywhere near acquiring Border's or anyone else's property. The City's conduct therefore cannot support liability for inverse condemnation as a matter of law.

2. Can a city be liable in inverse condemnation for establishing a designated route for trucks traveling to a federally-established border crossing, when the trucks back up periodically along that route and block the lane of traffic across the street from plaintiff's property?

The trial court said yes, holding the City liable for congested traffic that occurred after the City established a truck route on public streets to accommodate a federal border crossing. For several years, until a new road closer to the border could be built, traffic along the interim route adjacent to Border's property backed up during certain afternoon hours in one direction of travel, on the far side of two abutting streets. Access from other abutting streets was unaffected, and even during hours of congestion, the lanes immediately adjacent to Border along the truck route remained accessible.

California courts have routinely held that public improvements that permanently convert two-way traffic into one-way traffic, or otherwise partially hinder access while retaining reasonable means of traveling on the general system of streets, are not a compensable taking of property rights. In light of decades of authority on this subject, the trial court's finding of a taking based on inconveniences created by traffic congestion is such a dramatic departure from precedent that it should be reversed as a matter of law.

3. When a jury is instructed to measure damages for a temporary taking by the decline in the fair market value of property, and

the jury awards damages that exceed the property's total fair market value absent a taking, is the verdict excessive?

The trial court said no. The court sidestepped the inconsistency between the instructions and the verdict by assuming the jury applied an alternate measure of damages not addressed in the instructions. The alternate theory was raised in closing arguments, in which Border's counsel claimed the City effectively took an easement over Border's property and should pay an annual rent for that easement. Border argued the rental value of the easement was 10 percent of the property's value for each year the City was studying the airport proposal and each year the City routed trucks past Border's property.

The trial court's ruling was erroneous. A verdict cannot be upheld on a theory that the jury was never instructed to consider. Moreover, the hypothetical rental value of an easement is not a proper measure of damages in an inverse condemnation case. Case law specifically prohibits awards based on a rental value that is nothing more than an arbitrary percentage of fair market value, such as the 10 percent value advocated by Border. Finally, even if Border's easement theory were a proper measure of damages, and even if the jury had been instructed on that theory, the verdict would still be excessive. The jury's award of almost $40 million for the six years of truck traffic exceeds even the 10 percent annual figure. Because the $65 million inverse condemnation verdict exceeds the maximum damages possible under the instructions and the evidence, the verdict must be reversed for a new trial.

4. When a judge has been reprimanded by the Commission on Judicial Performance for accepting gifts from an attorney, has maintained an ongoing social relationship with that attorney, and is "friend dating"

that attorney's secretary, can the judge continue to hear cases involving that attorney without disclosing these facts to the opposing party?

The trial court said yes, and ruled that Judge Di Figlia, who presided over the trial and ruled against the City on the two liability issues raised in this appeal, was not disqualified by his relationship with plaintiff's counsel. The facts relating to Judge Di Figlia's disqualification are not disputed. He admitted he had been reprimanded by the Commission on Judicial Performance for accepting gifts from Border's attorney, Vincent Bartolotta, that he continues to see Bartolotta socially, and that he has "friend dated" Bartolotta's secretary for years. He even admitted that he paid for Bartolotta's secretary to accompany him to a Christmas dinner-dance *during the trial in this case*. But he admitted these facts only after the verdict, when a newspaper article revealed the history between Bartolotta and Judge Di Figlia.

The City immediately filed a statement of disqualification, and Judge Di Figlia recused himself without filing a verified answer. The City then moved to set aside the rulings Judge Di Figlia made during the time when he was aware of grounds for his disqualification. The case was reassigned to Judge Ikola in Orange County, who ruled that Judge Di Figlia was not disqualified. Judge Ikola found there was no basis for disqualification based on appearance of impropriety because a reasonable person familiar with the professional obligations of judges and lawyers would assume that Judge Di Figlia could remain impartial despite his relationship with Bartolotta and his secretary.

Judge Ikola's ruling was erroneous for several reasons. First, because Judge Di Figlia failed to answer the City's statement of disqualification, he is deemed to have consented to the statement and is disqualified as a matter of law. That should be the end of the matter. There is no reason to reopen the disqualification issue and examine the underlying facts.

Second, even if Judge Di Figlia was not *deemed* disqualified, he was disqualified because the undisputed facts establish an appearance of partiality. A person who learned the facts in this case "might reasonably entertain a doubt" about Judge Di Figlia's ability to remain impartial. (See Code Civ. Proc., § 170.1, subd. (a)(6)(c).)

Third, Judge Ikola applied the wrong standard. Instead of applying the "average person on the street" standard, Judge Ikola applied a subjective standard, based on his presumption that a reasonable person would share his perception of "the professional obligations that virtually all the legal community observe" and "the respective parties' recognition of their professional responsibilities and obligations." Such a person, the judge said, would assume Judge Di Figlia could be impartial. Under this test, almost no set of facts could establish an appearance of partiality, because a person who assumes judges always adhere to their professional responsibilities would not doubt a judge's ability to be impartial. This is not the test, nor should it be.

A judge is disqualified if the average person on the street might reasonably question the judge's ability to be impartial. Here, the Commission of Judicial Performance has previously determined that the relationship between Judge Di Figlia and Bartolotta gave rise to an appearance of partiality. That finding, coupled with Judge Di Figlia's failure to disclose the finding and his dating of Bartolotta's secretary during the trial, could certainly raise reasonable doubts in the mind of the average reasonable person. Accordingly, Judge Di Figlia was disqualified when Bartolotta entered the case. The rulings he made after that time are voidable and should be set aside.

STATEMENT OF THE CASE

A. In 1981, the City of San Diego develops a community plan for unincorporated Otay Mesa. The plan notes that Otay Mesa could provide the site of a new international airport.

In the 1980's, the City of San Diego became interested in annexing an unincorporated portion of south San Diego County known as Otay Mesa. (22 AA 5767, 5797; see also 22 AA 5773 [map of Otay Mesa vicinity].) Otay Mesa was primarily agricultural, but it also contained a small general-purpose airport (Brown Field), junk yards, and a recycling center. (RT 2501.)

Anticipating annexation, the City created a community plan in 1981, setting forth proposed uses for Otay Mesa. (22 AA 5764-5945.) The plan did not have the force of law; it merely stated the City council's policy without establishing specific rules or zoning restrictions. (RT 2490; 22 AA 5775.)

The plan stated that a study by the San Diego Association of Governments (SANDAG), an association of area governments that includes representatives from seventeen different cities including the City, had identified Otay Mesa as "the most likely site" for relocating San Diego's municipal/international airport, currently located at Lindbergh Field. (22 AA 5809.) The plan nonetheless adopted a development scheme that did not include the airport, but said the status of the proposal to relocate Lindbergh Field to Otay Mesa was "unclear," and could have a major impact on Otay Mesa. (*Ibid*.) The plan included a map showing the possible location for the proposed airport in Otay Mesa. (22 AA 5810.)

B. In 1983, the De La Fuente family invests in land in Otay Mesa through their corporation, Border Business Park.

Plaintiff Border Business Park, Inc. is one of over sixty different entities (corporations, partnerships, trusts, etc.) owned by the De La Fuente family. (RT 1122, 3057, 3063-3064, 3133; 21 AA 5706 [chart of De La Fuente family entities].)[1/] The family has developed a business of buying large parcels of land at a low price during times of economic hardship, getting the necessary permits for development, and then selling the property. (RT 1114.) The family business was founded by Roque De La Fuente, Sr. and his wife, Bertha Guerra De La Fuente, but is now controlled by their son Roque De La Fuente II.[2/] (See RT 3357-3361, 3548; 63 AA 17145 [trial court's finding that Roque De La Fuente II is the alter ego of Border Business Park and other corporations nominally owned by other family members].)

In the early 1980's – the same time the City was creating the Otay Mesa community plan – the De La Fuentes became interested in investing in land in Otay Mesa. (RT 1105-1112.) They were interested in Otay Mesa in part because they knew the federal government was planning on opening a new border crossing there. (RT 1014, 1112.) They determined that any land within a mile of the border crossing would be more valuable than other land in the area. (RT 1117.)

In 1983 they paid $12 million to purchase 312 acres of land in Otay Mesa, 260 of which were usable for development. (RT 1122, 1150-1151.)

1/ An administrative law judge who presided over a FDIC enforcement action against Roque De La Fuente II described the relationships between the De La Fuente entities as a "'spider web'" or a "'bowl of spaghetti.'" (See 16 AA 3841, 3843.)

2/ All subsequent references to "Mr. De La Fuente" refer to Roque De La Fuente II.

They purchased the property through a newly formed corporation called Border Business Park, Inc. (Border).[3/] (RT 1122.) At the time of Border's incorporation, Mr. De La Fuente's mother was Border's sole shareholder, director, president and CEO. (RT 1122.) Although his mother owned Border, Mr. De La Fuente managed the company through a corporation he owned, American International Enterprises. (RT 1127-1130, 3063, 3133; see also RT 3357-3361, 3548; 63 AA 17145 [trial court's alter ego findings].)

C. The City annexes Otay Mesa in 1985 and enters into a development agreement and bond financing arrangement with Border.

In 1985, the City formally annexed Otay Mesa. (RT 1139.) In November 1986, the City entered into a development agreement with Border. (1 AA 16-43.) Border agreed to pay "facilities benefit assessment fees" to finance public improvements in the Otay Mesa community, such as police stations, major streets, water mains, and other projects to benefit the community as a whole. (RT 2506-2507; 1 AA 24-25; see also RT 2845-2853 [describing the nature and purpose of facilities benefit assessment fees].) Border agreed to pay these fees in addition to the cost of building roads, traffic lights, sewer lines, and other improvements for its own property that it would normally have to pay for as part of the development process. (RT 1152, 2505-2506; 1 AA 24-25.)

In exchange, the City promised not to apply later-enacted rules or regulations to Border if they conflicted with laws in effect on the date of the

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3/ Border Business Park changed its name to De La Fuente Business Park in 1987 and then changed back to Border Business Park in 1997. (3 AA 636.) We refer to it consistently as "Border."

agreement. (1 AA 22-23.) The City also promised not to hold Border responsible for revisions in certain types of fees or development standards unless the revisions were (1) City-wide, (2) prospective only, and (3) would not prevent development in accordance with the permitted uses set forth in the agreement. (1 AA 23.)

To finance the improvements needed for Border's development, the City provided Border with proceeds from tax-free municipal bonds, requiring Border to repay the bonds through periodic assessments over 20 years. (RT 1763-1765, 2402-2404.)

D. In 1988, the City announces its study of a possible new international airport in Miramar or Otay Mesa, but ultimately abandons the idea.

Following up on the earlier report that identified Otay Mesa as a possible site for a new airport (as recited in the 1981 community plan), SANDAG undertook an update of its regional airport plan in 1988. (48 AA 13265.) As part of the update, SANDAG revisited the idea of locating an airport in Otay Mesa, which was still largely undeveloped. (*Ibid*.)

To preserve the status quo in Otay Mesa and avoid frustrating SANDAG's efforts to update the airport plan, in 1988 the City issued the first of a series of one-year moratoria on certain types of development in Otay Mesa. (48 AA 13265-13269; see also 31 AA 8361-8365, 8367-8372.) These moratoria did not affect development on Border's property. The first moratorium exempted portions of Otay Mesa for which the City had already granted development permits, which included the Border property. (48 AA 13266-13268.) Subsequent moratoria were expressly limited to residential development. (See 31 AA 8361-8363, 8367-8371.)

In 1989, SANDAG issued an updated report identifying Miramar and Otay Mesa as two potential alternative sites for a new airport. (RT 1251; 48 AA 13273, 13275, 13278-13280.) In the early 1990's, the City decided the Otay Mesa site was more viable than the Miramar site and determined the Otay Mesa site would probably require use of Mexican airspace. (RT 2825-2826.) Accordingly, the City began discussions with the Mexican government as to whether Mexico would allow use of their airspace. (RT 2826.)

In 1991, the City council passed a resolution stating that an international airport in Otay Mesa – referred to as the "TwinPort" concept – was the preferred option for a new airport. (RT 2823; 31 AA 8357-8358.) Two years later, however, the City Council voted to abandon the TwinPort proposal due to lack of cooperation from Mexico. (11 AA 3095.)

The facts surrounding the City's study of a possible new airport are set forth in more detail in the argument section of this brief. (See *post* pp. 31-52 [arguing against liability for publicizing a possible public improvement].)

E . A nationwide recession begins in the late 1980's and early 1990's, affecting all of San Diego County and Otay Mesa.

While the City was studying options for a new airport, Border had divided the lots in its business park into six units. (See RT 1222-1223; 49 AA 13575A [tentative map].) In the late 1980's, Border began to sell units 1 and 2, which constituted about 20 percent of the park. (RT 1220-1221.) Border sold 75 to 80 percent of units 1 and 2 for a total of about $22 million – almost twice the purchase price for the entire property. (RT 1220-1221.)

Shortly thereafter, Border's fortunes took a turn for the worse. The entire country fell into a recession. (RT 1047, 1359-1360, 2015.) The first

signs of the recession appeared in the late 1980's. (RT 2777, 2927.) California began to experience the recession in 1990. (RT 2016, 2089.)

In 1991, there was a significant price decrease for industrial lots in San Diego County. (RT 2018.) Business parks and development parks were hit particularly hard. (RT 2897.) The recession affected Otay Mesa – including Border – the same way as the rest of San Diego County. (RT 1047, 1688, 2018, 2897, 2901; see also RT 3439 [Border's counsel stating "no one is suggesting the recession wasn't an important, powerful factor"].)

Coinciding with the timing of recessionary pressures in California, Border's property values dropped significantly between 1991 and 1993. (RT 2022-2023.) Throughout Otay Mesa, the value of industrial properties dropped 28% between 1986 and 2000. (RT 2035.) In comparison, Border's property values dropped only 25%, which was remarkable considering that Border ranked eighth out of the eight business parks in Otay Mesa in terms of location, lot configuration, marketing, management, aesthetic quality, architecture, design, and other features, according to a survey of real estate brokers working in Otay Mesa. (RT 2035, 2234-2235, 2360-2362.)

F. In 1992, Border defaults on bond assessments owed to the City. The City begins foreclosure proceedings but Border staves off foreclosure by borrowing additional funds.

The De La Fuentes' real estate development companies struggled to survive in the wake of the recession. In 1993 one of the De La Fuentes' companies, International Industrial Park, Inc., declared bankruptcy. (RT 3267; see also 21 AA 5706.) In 1995 another De La Fuente company, Rancho Vista Del Mar, Inc. declared bankruptcy. (RT 3267; see also 21 AA 5706.)

At the same time, Border Business Park had severe financial difficulties. It was heavily in debt. It had borrowed at least $48 million, a substantial amount of debt for a business park of Border's size. (RT 2355-2357.) Banque Nationale de Paris (BNP) alone loaned Border at least $18 million. (RT 1520.)

In addition, Border owed the City on overdue assessments to repay the bonds that financed the project. (See RT 1792, 2401.) By 1992, Border was routinely in default on every assessment payment. (RT 2432-2434.) Eventually it owed $440,000 in overdue assessments. (RT 1812.) The terms of the City's bonds required the City to bring foreclosure actions within 150 days of delinquency. (RT 2404-2405, 2409-2411.) In 1993, the City brought a foreclosure action against 35 of Border's parcels and Border filed a cross-complaint for breach of the development agreement. (See 11 AA 2997.)

BNP loaned Border additional money so it could cure its delinquency and avoid foreclosure. (RT 2434-2435.) BNP had an incentive to prevent foreclosure; its security interest had a lower priority than the City's security interest, and would have been wiped out if the City foreclosed. (RT 2412.)

After the delinquent assessments were repaid, Border still owed penalties. (RT 2434.) To resolve the outstanding penalties, Border signed a promissory note agreeing to timely pay future assessments on the 35 parcels that were subject to foreclosure, and to pay the City an additional $44,400 within a year. (6 AA 1656-1658; RT 1173.) Border also agreed to dismiss its cross-complaint and any other litigation against the City relating to the 35 parcels. (6 AA 1656.)

Border failed to pay the $44,400 as promised, and Mr. De La Fuente asked the City for forgiveness. (RT 1799.) The city manager agreed to forgive penalties and interest for late payment of the note, but the City did not forgive the note itself, which remained unpaid. (RT 1799-1800.)

G. In 1994, due to Border's continued default on its bond assessments, the City again begins foreclosure proceedings.

In 1994, the City determined it would not have enough money to make the next payment to the bondholders if Border did not pay the overdue assessments. (RT 1792, 1809.) Border's delinquency had caused the City's bond reserves to become very low. (RT 1792.) Although the City was not legally responsible for paying the bondholders to make up for Border's default, the City was concerned that its reputation in the bond market would suffer if the bondholders were not paid. (RT 1794.) Moreover, drawing from reserve funds to pay the bondholders was an unattractive option because any unscheduled withdrawal would have to be reported to outside agencies that controlled bond trading in the secondary market, who would likely treat the City's bonds as troubled debt and discount them heavily. (RT 2390-2392, 2426, 2434-2438.) The City was already receiving bad publicity simply because of the *potential* default on the bonds. (RT 1794; see also RT 2405 [many bondholders contacted the City to make sure it would protect them].)

The City designated an employee, Paul Whitaker, to work full time on resolving unpaid assessments for Border and another assessment district. (RT 1795, 1800, 1805, 2389-2393.) Whitaker met with Mr. De La Fuente six or seven times to resolve Border's delinquencies. (RT 2424-2425.) The City's accounting staff spent a few years and a few hundred thousand dollars trying to get Border to pay the assessments, to no avail. (RT 1800.)

H. In 1995, the federal government sends all commercial trucks to the Otay Mesa border crossing, causing truck traffic in Otay Mesa to increase dramatically. The City establishes a designated truck route to deal with the truck traffic.

In January 1995, the federal government opened a new gate at the Otay Mesa border crossing for commercial truck traffic, which had previously been directed to the San Ysidro border crossing. (5 AA 1177-1178.) This was no surprise to Mr. De La Fuente. He admitted at trial that he expected border-bound trucks to come through Otay Mesa. (RT 1315 ["Everybody knew that we were going to have truck traffic"], 3277 ["I knew the trucks were going to be there. Everybody knew the trucks were going to be there"]; see also RT 4139 [Border conceding that Mr. De La Fuente "projected, anticipated, indeed banked on, heavy border truck traffic"].)

The influx of trucks to Otay Mesa presented a problem for the City. (RT 2789.) There was no designated route for trucks to get to the new commercial gate. If the trucks followed the same route as the automobile traffic – Otay Mesa Road/State Route 905 – the combined auto and truck traffic would have created a standing queue to the border. (RT 2789-2790.)

Accordingly, the City established a separate route for trucks to get to the commercial gate. (RT 1380-1381, 2791.) Border agreed the City had "good reason" to establish a truck route. (RT 4177.) The City had two primary options for separating southbound truck traffic from auto traffic. The City could either (1) divert the trucks to La Media Road, or (2) divert the trucks to Airway Road, build an extension connecting Airway to Harvest Road, and then divert the trucks from Airway south onto Harvest. (See illustration on following page.)

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The City decided the Harvest Road alternative would be more problematic than the La Media alternative because the former would require the City to extend Harvest Road, would require trucks to make a difficult turning maneuver (a right turn onto Airway followed immediately by a left turn onto Harvest), and would either create traffic blocking the driveways on the south side of Customhouse Plaza, or would require a second problematic left turn from Siempre Viva onto Drucker Lane. (RT 2791-2799, 2812.)

After the City determined the La Media alternative was preferable, the City decided to build an access road from La Media to the border crossing. (RT 2799; 5 AA 1179.) First, however, the City had to acquire the right-of-way and build the road. (RT 2800.) In the meantime, the City established an interim route from La Media to eastbound Siempre Viva. (RT 1565-1567, 1644, 2798-2799.) An all-way stop at the intersection of La Media and Siempre Viva made it possible for trucks to turn on to this route even in heavy traffic. (RT 2805.) Once the trucks were heading east on Siempre Viva, they turned right onto Drucker Lane and headed south to a road that connected to the border crossing. (RT 2798-2799.)

Because the trucks on Siempre Viva were heading east, during times of congestion they blocked the eastbound lanes (across the street from Border's property) but did not affect the westbound lane immediately adjacent to Border's property. (RT 1979.)

Before the new road between La Media and the gate was completed, trucks following the temporary La Media/Siempre Viva route would back up "from time to time" (RT 1374), and would back up regularly after 4:00 or 4:30 p.m., before the border crossing closed at 5:30 p.m. (RT 1380-1381, 1869). The back-up created fumes, dust, noise, and delay, and caused people to engage in "circuity of travel" to get in and out of the business park. (RT 1648.) In addition, Mr. De La Fuente thought emergency vehicles might have

encountered difficulties getting to the business park if their drivers were not familiar with the alternate routes for avoiding the traffic. (RT 1382.) There is no evidence, however, that such confusion ever actually occurred.

Some truck drivers ignored the interim route, and instead of using La Media, they used Otay Mesa/905, turned right (west) on Siempre Viva, and then tried to cut in line by turning left (south) at Drucker. (RT 1383-1384.) This resulted in fistfights and accidents at the intersection of Siempre Viva and Drucker until the City erected a barrier to prevent shortcuts. (RT 1383-1384, 2801.) The City placed concrete barriers called "k-rails" at the intersection, so that westbound drivers on Siempre Viva could not turn left onto Drucker. (RT 1384, 1574, 1974, 2801, 2807.) After the City placed the barriers, westbound trucks on Siempre Viva no longer could cut in line, and some drove through the public streets within the business park to get back in line for the approved route to the gate. (RT 1385.)

Shortly after trial in this case, the City completed construction of the road – parallel to and south of Siempre Viva – connecting La Media with the commercial gate, at which time the traffic flow was "much, much improved." (See RT 4141.)

I. In 1995, Border sues the City for breach of the development agreement, but the action is delayed when Border declares bankruptcy.

In 1995, Border filed this action against the City, claiming the decline in Border's sales in the 1990s was not caused by the recession or Mr. De La Fuente's inexperience as a developer, but by the City's breach of the 1986 development agreement. (See 1 AA 1, 7.) Border asserted a long list of the City's supposed breaches, attacking virtually every action by the City that

affected Otay Mesa between 1986 and 1995. (AA 5-7.) For example, Border claimed the City breached the development agreement by changing the standards for the construction of roadways and sidewalks, by issuing parking tickets to Border's tenants and by applying new fees to Border's parcels. (1 AA 5-6.) Border claimed these City actions and countless others breached the development agreement because the agreement prohibited the City from applying any new or modified rules or regulations to Border. (1 AA 4.)

In 1996, Border declared bankruptcy, and the trial court stayed Border's contract action pending the resolution of the bankruptcy. (See 6 AA 1696; 16 AA 4623 [minute order extending stay until June 12, 1998]; see also RT 160-167.)

J. In 1997, Mr. De La Fuente attends the foreclosure sales for Border's property and repurchases nearly all of it under the names of different De La Fuente family entities.

The City's foreclosure actions against Border culminated in two foreclosure sales in 1997. (RT 1802, 2406, 2429, 3280-3281.) An additional part of Border's property was sold in a third foreclosure sale initiated by Border's lender, BNP. (RT 1526, 2024, 3280-3281)

Mr. De La Fuente attended all three sales. (RT 2430, 3281.) He redeemed a few of the properties by paying the unpaid assessments. (RT 2430-2431, 3282.) He let the rest proceed through foreclosure and then repurchased them under the names of different entities owned by his family. (RT 3282.) At the two City foreclosure sales, Mr. De La Fuente was the successful bidder on every single property. (RT 2430.) At the BNP foreclosure sale, he bought one property and BNP bought the remaining two.

(RT 3286.) Thus, all but two of the properties sold in foreclosure remained in the De La Fuente family's control.

Not only did Mr. De La Fuente repurchase Border's properties, but he bought them at below market prices (RT 2079, 2129, 2131) for a total price of $17,203,087 (RT 3191). By allowing the properties to pass through foreclosure, he obtained a financial benefit he could not have obtained by simply using the $17.2 million to repay the delinquencies owed to the City. Foreclosure extinguished the bank loans on the property. (RT 2079, 2136, 2412, 3236.) The loans from BNP alone significantly exceeded the value of the properties associated with those loans. (RT 2134-2135.) Thus, there was an enormous financial benefit from allowing the properties to go through foreclosure and then repurchasing them at bargain prices. (RT 2134.) For example, in one transaction Mr. De La Fuente spent $4 million to purchase a property that was encumbered by $8 million in debt. (RT 3288.)[4/]

K. In 1998, Border adds inverse condemnation claims to its contract action.

In 1998, Border's bankruptcy case was dismissed and trial proceedings resumed in its contract action against the City. (1 AA 227.) Border then sought and received leave to amend its complaint to include a cause of action

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4/ Border's counsel implied at trial that Mr. De La Fuente's gain from extinguishing the loans was offset by the fact that his mother had personally guaranteed some of the loans. (RT 2175-2178, 2282-2283.) But Border produced no evidence that any bank ever sought recourse against his mother, much less any evidence about what percentage of the loans they could have recovered if they did seek recourse against her. (See, e.g., RT 3329 [in response to question from court, Border's expert states that he does not know whether the banks pursued the guarantees].)

for inverse condemnation, based on the City's pre-1993 airport planning and its truck routing. (1 AA 234-242.)

L. The case is transferred to Judge Di Figlia.

The case was assigned to Judge Anthony Joseph until his retirement in 1999, when it was reassigned to Judge Vincent P. Di Figlia. (3 AA 614.) Shortly after the reassignment, one of Border's lawyers, David B. Casselman, brought an ex parte application to elicit information from Judge Di Figlia regarding his past employment with the City Attorney's office. (15 AA 4252.) A hearing was held in chambers without a court reporter. (*Ibid*.) Judge Di Figlia disclosed he had previously worked for the City Attorney's office. (*Ibid*.) He also mentioned he recognized the name De La Fuente because a friend of Judge Di Figlia's, Vincent Bartolotta, had represented De la Fuente in another lawsuit. (*Ibid*.)

Judge Di Figlia asked if the information he disclosed presented a problem for the parties. (15 AA 4252.) The parties responded that it did not. (*Ibid*.) According to the City, Judge Di Figlia made no further disclosures about the nature of his relationship with Bartolotta. (*Ibid.*) Nor would it have been logical for him to do so, since Bartolotta was not involved in the case at that time. According to Judge Di Figlia's recollection, however, he also disclosed that he had known Bartolotta for a long time, that they had played golf together, and that they see each other at bench-bar events. (RT 3689-3690.) A few months later, Border associated Bartolotta as its trial counsel for this case. (5 AA 1463.)

M. Judge Di Figlia finds the City liable in inverse condemnation for announcing proposed plans for an airport and for routing trucks near Border's property.

At trial, Border presented evidence to show that the City committed numerous breaches of the development agreement. (See, e.g., RT 1230-1318.) Near the end of trial, Judge Di Figlia ruled on the City's liability for inverse condemnation. (RT 3380-3392.) First, he found the City liable for openly discussing the possibility of a new airport when it had not yet obtained an agreement in principle from the Mexican government. (RT 3380 ["the whole issue of the airport in San Diego has been a Keystone Cops situation since about 1972 from my personal knowledge. But the evidence has come in that announcements are made, resolutions are put out, and nobody bothers to check with the Mexican government to see if they are interested in doing this thing. So I think that a case has been made for inverse with respect to the airport issue"], 3557 ["The first taking involved unreasonable announcements of proposed plans for the TwinPorts in Otay Mesa, impacting Border Business Park"].) He found the City's actions began to harm Border in November, 1988, when the City first announced its consideration of an airport in Otay Mesa. (RT 3557.)

Second, he found that the City's routing of truck traffic caused a compensable impairment of Border's access to its property. (RT 3392; see also RT 3561 ["The court has determined that plaintiff's right of access has been impaired by reason of defendant's actions in routing traffic to the border crossing"].) He found that the City's truck routing constituted a "taking" of Border's property as of January 1, 1995. (RT 3558.)

N. The jury finds the City liable for breach of contract and awards Border $94.5 million on the contract and inverse condemnation theories.

Judge Di Figlia submitted the case to the jury to determine Border's damages for the two inverse condemnation claims, and to determine whether, in addition, the City had breached the development agreement. (See 64 AA 17300-17301.)

On the question of how to measure the inverse condemnation damages, the jury was confronted with a last-minute change in Border's theory. Throughout trial, Border had claimed damages for having "lost" the property through foreclosure. (See, e.g., RT 128 ["the only damage we are seeking is damage that was incurred in 1997, years later, when the property was lost"], 3374 ["we are only looking for the loss of the property itself"].) That theory fell apart at the end of trial, when Judge Di Figlia found that Mr. De La Fuente was the alter ego of Border and various other businesses nominally owned by different De La Fuente family members or related trusts. (RT 3357-3361, 3548; 63 AA 17145.) As a result of that finding, Border could not claim damages for "losing" the property through foreclosure, since Border's alter egos had reacquired the property in the foreclosure sale. (See RT 3431 [Border's counsel telling the jury in closing statements to disregard the theory that the property was lost], 3825 [Border's counsel stating "the alter ego findings of Judge Di Figlia gutted the major damage theory of the plaintiff"].)

Moreover, had Border sought recovery based on costs incurred to reacquire the property, any recovery would have been offset by the benefit Border gained in extinguishing the debts on the property. So instead of asking the jury to award damages for loss of the property, Border requested (and obtained) a jury instruction that told the jury to measure the inverse

condemnation damages by the *decline in fair market value* of the property during the years when the alleged takings occurred. (63 AA 17169.)

On January 2, 2001, the jury rendered its verdict. (RT 3661; 64 AA 17304.) The jury awarded $25.5 million for the five years of airport planning and $39.8 million for the six years of truck routing. (RT 3661-3662; 64 AA 17301-17302.) Thus, the jury awarded a total of $65.3 million for a temporary "taking" of land that, according to Border's expert, was worth $51 million. (See RT 1610.) The jury also found the City breached the development agreement, and awarded an additional $29.2 million in damages on that claim. (RT 3661; 64 AA 17300-17301.)

O. After the verdict, the City discovers previously undisclosed facts about Judge Di Figlia's relationship with Border's counsel and asks the judge to make full disclosure.

After the verdict, a January 11 article in the San Diego Union Tribune reported that the Commission on Judicial Performance had previously issued a private reprimand to Judge Di Figlia for accepting gifts from Bartolotta. (14 AA 4124-4125.) Prior to the article, the City was unaware that Judge Di Figlia had accepted gifts from Bartolotta, or that he had been reprimanded for his relationship with Bartolotta. (14 AA 4122; 15 AA 4253.) When the City learned these facts, it filed a Request for Disclosure under Canon 3E of the California Code of Judicial Ethics, asking the court to fully disclose all information relevant to the issue of disqualification. (14 AA 4118-4120.)

In response, Judge Di Figlia ordered a hearing to be held in his chambers. (See RT 3692.) In anticipation of that hearing, the City submitted a formal request that the Court disclose specific information on the record,

either orally or in writing, as required by the canons of the California Code of Judicial Ethics. (15 AA 4168-4172.)

At the hearing, Judge Di Figlia disclosed several previously undisclosed facts: (1) he had accepted gifts (tickets to play in pro-am golf tournaments) from Bartolotta; (2) he had received a private reprimand from the Commission on Judicial Performance for accepting Bartolotta's gifts, which, in the Commission's view, "gave an appearance of impropriety;" (3) he had attended a Christmas Eve party at Bartolotta's home; (4) he had for many years "friend dated" Bartolotta's secretary, to whom he had given valuable gifts, including diamond earrings; and (5) he had gone on a date with Bartolotta's secretary during the trial in this case. (RT 3692-3695, 3700; see also AA 17 4734 [invitation to Christmas party attended by Judge Di Figlia and Bartolotta's secretary, dated December 2, 2000, during the period when Bartolotta was presenting Border's case-in-chief].) Judge Di Figlia also confirmed that his relationship with Bartolotta had not ended after the Commission's reprimand, but that the two continued to play golf together and meet occasionally for drinks "to find out what's going on." (RT 3694, 3700.)

Judge Di Figlia declined to answer the specific questions in the City's ex parte application, saying he was unaware of any authority compelling him to do so. (RT 3697.) He refused to provide more details about the frequency and occasions of his contacts with Bartolotta and his secretary, stating: "I have given you my best recollection. I think at this point the best thing to do would be to bring closure to these proceedings." (RT 3700.)

P. Judge Di Figlia recuses himself without filing an answer to the City's statement of disqualification.

The City filed a statement of disqualification on January 31, 2001, the day after Judge Di Figlia's disclosures. (15 AA 4181.) On February 2, 2001, Judge Di Figlia chose not to contest the disqualification statement, and instead filed an unsworn statement vaguely accusing the City of making false allegations that rendered him unable to preside over the case. (15 AA 4281 ["The inaccurate and incomplete assertions and arguments raised by the City have placed this Court in an untenable and potentially adversarial position making recusal appropriate"].)

Q. The City moves to set aside Judge Di Figlia's rulings. The case is reassigned and the new trial judge denies the motion.

Following Judge Di Figlia's recusal, the City moved to set aside his rulings and the resulting special verdict, on the ground that facts supporting his disqualification existed from the moment Bartolotta associated into the case, and therefore all of Judge Di Figlia's rulings after that point were voidable at the City's urging. (15 AA 4317-4340; see also 15 AA 4341 to 19 AA 5319 [related pleadings by both parties].)

While the parties awaited assignment of a new judge to hear the City's motion, Border sent a letter to Judge Di Figlia, asking him to file a verified answer to the City's statement of disqualification. (16 AA 4509A-4509B.) Border urged Judge Di Figlia to file a verified answer to clarify that he was not admitting that grounds for his disqualification existed. (*Ibid*.) Judge Di Figlia declined to file a verified answer.

The case was reassigned to the Honorable Raymond J. Ikola of the Orange County Superior Court, on special assignment to the San Diego Superior Court. (16 AA 4511.) Judge Ikola heard and denied the City's motion to set aside Judge Di Figlia's rulings. (19 AA 5320, 5343-5351; RT 3721-3794.) Judge Ikola disagreed with the City's argument that Judge Di Figlia's failure to file a verified answer established his disqualification as set forth in the City's verified statement. Judge Ikola reopened the issue of disqualification and examined the facts to determine whether, in his view, there was an appearance of partiality. (RT 3786 [Judge Ikola undertook to analyze "whether, as a matter of fact, Judge Di Figlia was disqualified in this case after Mr. Bartolotta became counsel of record"].)

Judge Ikola agreed that Judge Di Figlia made a lapse of judgment (RT 3791), and that he failed to fully disclose his relationship with Bartolotta and his secretary (RT 3787). Nevertheless, Judge Ikola ruled there was no appearance of impropriety. He stated that a reasonable person viewing the facts would take into account the professional obligations that apply to members of the legal profession, and would assume that neither a judge, an attorney, or a legal secretary would violate those obligations. (RT 3791 ["a reasonable person, aware of all these facts . . . [including] facts concerning the respective parties' recognition of their professional responsibilities and obligations . . . would not entertain [a] doubt [about Judge Di Figlia's ability to be impartial]"].)

R. The City petitions for writ review and this court defers consideration of the issue pending appeal.

The City petitioned this court for a writ of mandate directing Judge Ikola to vacate his order and enter a new order granting the motion to set aside

Judge Di Figlia's rulings. (20 AA 5352.) This court invited informal briefing from both parties on three issues: (1) whether Judge Di Figlia's response to the statement of disqualification resulted in his disqualification under Code of Civil Procedure section 170.3(c)(4) or another statute; (2) assuming Judge Di Figlia was disqualified, what is the effect of his disqualification on his rulings and orders; and (3) whether the effect of the disqualification would be more appropriately considered in post-trial motions. (20 AA 5396-5397.)

Both parties submitted letter-briefs addressing these questions. (20 AA 5398-5430.) After receiving the letter-briefs, this court deferred its ruling pending resolution of the post-trial motions. (20 AA 5431.) When the post-trial motions were resolved, this court denied the writ petition on the ground that the City "has an adequate remedy by way of appeal." (20 AA 5437.)

S. The new trial judge grants a partial new trial on Border's breach of contract claim but denies the City's other post-trial motions. The City appeals and Border cross-appeals.

The City moved for a new trial, for judgment notwithstanding the verdict, and to vacate the judgment under Code of Civil Procedure section 663. (21 AA 5564, 5566; 63 AA 17125, 17127, 17129.)

The City also moved to set aside the judgment on the ground that it was procured by fraud. (See 21 AA 5628 to 48 AA 13205; 52 AA 14151 to 59 AA 16069; 63 AA 17132; see also 60 AA 16373-16432 [summary of misrepresentations].) The City's fraud motion and supporting documents demonstrated numerous instances in which Border withheld information during discovery or presented evidence and testimony directly contrary to testimony its witnesses gave in other cases. For example, Border presented testimony in this case that the De La Fuentes had an impeccable record and

that none of their businesses had previously filed for bankruptcy. (See RT 1171, 1519.) In truth, the De La Fuentes had anything but an impeccable record. Mr. De La Fuente had been targeted in an FDIC proceeding for financial self-dealing, illegal loans, and sham transactions he conducted through his bank, First Interstate Bank. (See 13 AA 3808 to 14 AA 3957.) That proceeding resulted in a finding that he was "not fit to participate in the banking industry." (14 AA 3878.) Moreover, there were many De La Fuente family businesses that had declared bankruptcy, including two filings found to be in bad faith. (See 26 AA 7067, 7069; 45 AA 12481; see generally 60 AA 16406 [listing 12 different bankruptcy filings by De La Fuente entities].)

Judge Ikola granted the City's motion for a new trial on Border's breach of contract claim. (64 AA 17338-17339.) He ruled that many of Border's contract claims were barred by the one-year statute of limitations of the Government Code Claims Act because they were based on actions the City took more than a year before Border filed a claim against the City. (64 AA 17314-17319, 17338-17339.) Because it was impossible to determine whether the jury based its verdict on this time-barred evidence, Judge Ikola ordered a new trial on Border's contract claims. (64 AA 17339.)

He denied the City's other post-trial motions. (64 AA 17346-17347; RT 4305-4306.) On the question of the City's inverse condemnation liability, he said he would defer to Judge Di Figlia and not overturn his rulings unless they were "clearly" wrong. (64 AA 17333-17334.) He then concluded that Judge Di Figlia's finding of liability for the airport planning was supported by sufficient evidence (64 AA 17334), but he did not identify any evidence supporting Judge Di Figlia's finding that the City substantially impaired Border's access. Instead, he affirmed the truck routing award on a different theory, namely, that the traffic was "not far removed" from a physical invasion of Border's property and therefore amounted to a nuisance. (64 AA 17334.)

Judge Di Figlia, however, had never found a nuisance, nor did he instruct the jury to award damages on such a theory. Finally, Judge Ikola awarded prejudgment interest on the inverse condemnation awards. (63 AA 17117-17124; RT 3587, 4022). He awarded $10.3 million in prejudgment interest for the airport planning and $16.1 million for the truck routing. (63 AA 17120; RT 4023.)

The City appealed and Border cross-appealed. (64 AA 17350, 17373.)

STATEMENT OF APPEALABILITY

The City of San Diego appeals from the denial of its motion for judgment notwithstanding the verdict (appealable under Code of Civil Procedure section 629), from the partial grant and partial denial of its motion for a new trial (appealable under Code of Civil Procedure section 904.1, subd. (a)(4)), from the denial of its motions for relief under Code of Civil Procedure sections 473, subdivision (b), and 663 (appealable under Code of Civil Procedure section 904.1, subdivision (a)(2)), and from the judgment, to the extent it may be reinstated (appealable under Code of Civil Procedure section 904.1, subdivision (a)(1)).

LEGAL ARGUMENT

I.

THE CITY IS ENTITLED TO JUDGMENT AS A MATTER OF LAW ON BORDER'S INVERSE CONDEMNATION CLAIMS.

A. No evidence supports the inverse condemnation award based on the City's announcements about the possibility of building an airport in Otay Mesa.

1. A government entity cannot be liable for merely exploring a *possible* taking of a landowner's property.

The California Constitution prohibits government entities from taking private property for public use without paying just compensation. (Cal. Const., art. I, § 19.) That provision authorizes eminent domain proceedings instituted by public entities, as well as "inverse condemnation" proceedings initiated by landowners. (*Klopping v. City of Whittier* (1972) 8 Cal.3d 39, 43.) In either type of action, landowners can recover damages for the lost fair market value of their property at the time of the taking. (See *id*.)

Landowners can sometimes recover additional damages for harm they suffered *before* the taking, if they prove such harm resulted from unreasonable government conduct. The right to seek such "precondemnation" damages was first established in *Klopping v. City of Whittier*, *supra*, 8 Cal.3d 39. There, the City of Whittier filed an eminent domain action to condemn the plaintiffs' property for a parking district, but later dismissed the action after someone sued to block the project. (*Id.* at p. 42.) When the City dismissed the action,

it declared its intent to acquire the property at an unspecified later date. (*Id.* at p. 43.) Three years later, the city finally condemned the property. (*Id.* at pp. 45-46, fn. 2.) Plaintiffs sued for inverse condemnation, seeking damages for rental income they lost during the three year period after the city announced its intent to condemn. (*Id.* at p. 53.) The Supreme Court held that plaintiffs could recover precondemnation damages if they could prove the city unreasonably delayed after announcing its intent to acquire the property:

> [A] condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by unreasonably delaying eminent domain action *following an announcement of intent to condemn* or by other unreasonable conduct *prior to condemnation* . . . .

(*Id.* at p. 52, emphasis added.)

The Court recognized that a certain amount of delay is inherent in condemnation decisions, and that landowners must bear the ordinary degree of incidental loss that occurs between an announcement of condemnation and the actual taking of the property. (*Klopping v. City of Whittier*, *supra*, 8 Cal.3d at p. 51.) But the Court held that a landowner could obtain damages for *unreasonable* delay, or other *unreasonable* precondemnation conduct. (*Id.* at pp. 51-52.) The Court noted that broader liability for precondemnation damages "might deter public agencies from announcing sufficiently in advance their intention to condemn." (*Id.* at p. 51.)

Soon after *Klopping*, landowners began to sue public entities for any announcement of a planned public improvement that might affect their property. For example, in *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, decided one year after *Klopping*, a private landowner tried to recover in inverse condemnation for a decline in the value of its property that occurred when a city and county adopted a regional development plan that showed proposed roads extending over plaintiff's property. (*Id.* at

pp. 115, 118-119.) The Supreme Court rejected plaintiff's attempt to expand *Klopping*-type damages to situations where a public entity merely proposes a public work on plaintiff's land, but never makes a final decision to condemn plaintiff's property:

> The adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property. . . . [T]he plan is subject to alteration, modification, or ultimate abandonment, so that there is no assurance that any public use will eventually be made of plaintiff's property.

(*Id.* at pp. 119-120.)

The Supreme Court recognized that public entities could not fulfill their duty to plan for the public good if merely proposing a public improvement could subject them to inverse condemnation liability:

> If a governmental entity and its responsible officials were held subject to a claim for inverse condemnation merely because a parcel of land was designated for *potential* public use . . . the process of community planning would either grind to a halt, or deteriorate to publication of vacuous generalizations regarding the future use of land.

(*Id.* at p. 120, emphasis added.)

Since *Selby,* numerous appellate courts (including this one) have rejected landowners' attempts to obtain *Klopping* damages for proposed public improvements, where a public entity had no present intent to acquire the landowner's property, and had only a *tentative* intent to *possibly* acquire the property in the future. See, e.g.:

• *Navajo Terminals, Inc. v. San Francisco Bay Conservation etc. Com.* (1975) 46 Cal.App.3d 1, 3-5 [affirming the sustaining of a demurrer to a claim for *Klopping* damages where public agency passed a resolution establishing part of plaintiff's land as a waterfront park; *Klopping* not applicable because resolution was only tentative and could be altered or abandoned];

• *Smith v. State of California* (1975) 50 Cal.App.3d 529, 531, 535-536 [affirming the sustaining of a demurrer to a claim for *Klopping* damages where state passed resolution and publicly announced intent to construct freeway across plaintiffs' property; announcement was only an expression of tentative intent "subject to many conditions and contingencies"];

• *Friedman v. City of Fairfax* (1978) 81 Cal.App.3d 667, 671, 676-677 [reversing award of *Klopping* damages; city did not demonstrate intent to condemn plaintiff's property when it expressed interest in acquiring plaintiff's property for a park and investigated possible methods of funding acquisition];

• *Helix Land Co. v. City of San Diego* (1978) 82 Cal.App.3d 932, 937-938, 946-949 [4th Dist., Div. One] [affirming the sustaining of a demurrer to a claim for *Klopping* damages where city passed resolution recommending acquisition of plaintiff's land and published report stating that city would purchase plaintiff's land with proceeds of proposed bond act; proposal fell "'several leagues short'" of an expressed intent to condemn];

• *Johnson v. State of California* (1979) 90 Cal.App.3d 195, 197-199 [affirming denial of *Klopping* damages where state adopted a freeway plan showing freeway across landowner's property; "*Klopping* was not intended to inhibit long-range planning of public projects or to require that property for proposed public improvements be purchased before it may be needed"];

• *Briggs v. State of California ex rel. Dept. Parks & Recreation* (1979) 98 Cal.App.3d 190, 195-197, 204-205 [reversing award of *Klopping* damages where state informed plaintiffs it would acquire their land for a park if it could obtain funds; state's tentative interest in property could not be equated with an actionable intent to condemn];

• *Rancho La Costa v. County of San Diego* (1980) 111 Cal.App.3d 54, 58-59, 61 [4th Dist., Div. One] [reversing award of *Klopping* damages where county accepted a general plan that proposed landowner's property as a park,

ordered its staff to prepare physical and financial feasibility studies, and entered into negotiations to acquire neighboring land; county's conduct was "no more than planning"];

• *Guinnane v. City and County of San Francisco* (1987) 197 Cal.App.3d 862, 864-867 [affirming denial of *Klopping* damages on the ground that city did not demonstrate intent to condemn when it designated plaintiff's land to be studied for possible acquisition for a proposed park];

• *Cambria Spring Co. v. City of Pico Rivera* (1985) 171 Cal.App.3d 1080, 1090-1099 [affirming denial of *Klopping* damages on the ground that city did not demonstrate intent to condemn plaintiff's property by announcing that properties in certain area might be condemned, by issuing bonds to fund acquisition, by applying for additional federal funds, by widely publicizing the project, or by appraising plaintiff's property];

• *Terminals Equipment Co. v. City and County of San Francisco* (1990) 221 Cal.App.3d 234, 239-240, 245-246 [affirming the sustaining of a demurrer to a claim for *Klopping* damages where city passed resolution calling for creation of park on plaintiffs' land and informally told them their land would be acquired; city did not show intent to condemn because it took no official action towards condemnation and had only indicated its intent to study plaintiff's land for possible acquisition];

• *Smith v. City and County of San Francisco* (1990) 225 Cal.App.3d 38, 42-44, 47 [affirming the sustaining of a demurrer to a claim for *Klopping* damages where city adopted scheme to preserve plaintiff's land for open space and impeded plaintiff's development efforts; "[b]y definition, damages for improper precondemnation conduct require that the property be condemned"];

• *Contra Costa Water Dist. v. Vaquero Farms, Inc.* (1997) 58 Cal.App.4th 883, 895-900 [affirming denial of *Klopping* damages where water district adopted environmental report for proposed reservoir on

plaintiff's land, publicly announced its intent to destroy access to and flood plaintiff's land, and acquired property of neighboring landowners];

• *Barthelemy v. Orange County Flood Control Dist.* (1998) 65 Cal.App.4th 558, 562, 570-571 [affirming judgment on the pleadings in *Klopping* case where flood control district publicly announced a proposed dam that would flood plaintiffs' land, advised plaintiffs their land was targeted for acquisition, and made numerous public statements showing effect of dam on plaintiffs' property].

In light of the numerous cases rejecting liability for announcements of plans or proposals, it is now an established principal of black-letter law that inverse condemnation liability cannot exist for merely planning a possible public improvement.[5/] Thus, "'[t]he pivotal issue in every [*Klopping*] case is whether the public agency's activities have gone beyond the planning stage to reach the "acquiring stage."'" (*Contra Costa Water Dist. v. Vaquero Farms, Inc.*, *supra*, 58 Cal.App.4th at p. 898.)

In order to determine whether a public entity's proposal for a future public improvement went beyond the planning stage and into the acquiring stage, courts look to see whether the public entity adopted a formal resolution

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5/ See, e.g.,11 Miller & Starr, California Real Estate (3d ed. 2001) Inverse Condemnation, § 30:18, p. 92 ["The owner has no recourse while the activities remain in the planning phase because the final decision to proceed with the project is still in doubt and may be modified or abandoned by the agency"]; Annotation, Plotting or Planning in Anticipation of Improvement as Taking or Damaging of Property Affected (1971) 37 A.L.R.3d 127, 131, § 2 ["[I]t would appear to be well settled, as a general rule of law, that mere plotting or planning in anticipation of a public improvement does not constitute a taking or damaging of the property affected"]; 2A Nichols on Eminent Domain (3d ed. 2001) § 6.05[4] ["[T]he designation of a particular property or area as a potential or future site for a public program or project does not constitute a taking"].

of condemnation or took some other act demonstrating an intent to acquire plaintiff's property:

> *While an absence of a formal resolution of condemnation is not crucial, there must be some official act or official expression of intent to acquire.* In the case at bench there were public meetings, negotiations, planning, debates and an advisory ballot proposition calling for acquisition but there was no official act done by the city towards acquiring the property. We have no more than general planning that is noncompensable. *Absent either a formal resolution of condemnation or some other official action towards the acquisition of plaintiff's property, there can be no cause of action in inverse condemnation.*

(*Toso v. City of Santa Barbara* (1980) 101 Cal.App.3d 934, 957, emphasis added, original emphasis omitted.)

In distinguishing between planning and acquisition, courts have identified the same public policy relied on by the Supreme Court in *Selby*, namely, that imposing inverse condemnation liability for the discussion of a proposed public improvement would have an adverse impact on public planning:

> Without question, when the state embarks on a plan to develop a freeway, because of the public airing which is legally attendant to such a project, marketability of property in the affected area is adversely impacted. On the other hand, *invocation of the doctrine of inverse condemnation or the assessment of damages against the state upon the public announcement of the state's plan . . . would be a severe hampering of the state's ability to undertake necessary and worthwhile achievements . . .*

(*Smith v. State of California*, *supra*, 50 Cal.App.3d at p. 536, emphasis added; see also *Rancho La Costa v. County of San Diego*, *supra*, 111 Cal.App.3d at p. 61 [4th Dist., Div. One] ["to hold the announcement of the plan or the initiation of the feasibility studies results in inverse condemnation of

properties designated for ultimate acquisition would result in forced purchase of property before it was determined to be economically feasible; it would severely hamper government's ability to provide any such programs"].)

The United States Supreme Court recently echoed these same sentiments in an inverse condemnation suit under the federal constitution: "A rule that required compensation for every delay in the use of property would render routine government processes prohibitively expensive or encourage hasty decision making." (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency* (April 23, 2002, 00-1167) ___ U.S. ___ [122 S.Ct. 1465, 1485, ___ L.Ed.2d ___].)

The only decisions we have found that affirmed an award of damages under *Klopping* are cases in which the public entity had filed an eminent domain action to acquire the plaintiff's property. (See *Tilem v. City of Los Angeles* (1983) 142 Cal.App.3d 694, 698; *Taper v. City of Long Beach* (1982) 129 Cal.App.3d 590, 595; *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.* (1979) 91 Cal.App.3d 332, 339; *Stone v. City of Los Angeles* (1975) 51 Cal.App.3d 987, 990.)[6/]

In each of these cases, there was absolutely no doubt the public entity had made a final decision to condemn the plaintiff's property – otherwise the public entity would not have filed an eminent domain action. The only real question was *when* that decision had occurred. In some cases the court found the final decision did not occur until the eminent domain action was filed. (E.g., *Tilem v. City of Los Angeles*, *supra*, 142 Cal.App.3d at p. 704

6/ In *Jones v. People ex rel. Dept. of Transportation* (1978) 22 Cal.3d 144, the Supreme Court expressly declined to decide whether *Klopping* damages were properly awarded in a case where there was no formal resolution of condemnation. (*Id.* at p. 151.) Instead, the court affirmed plaintiffs' inverse condemnation award on an alternate theory that they were deprived of access to their property. (*Ibid.*, citing *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 387-388.)

[concluding that city went beyond tentative general planning when it filed eminent domain action and began to remove trees from plaintiff's land].) In other cases, the court found the planning stage ended some time before the eminent domain action was filed. (E.g., *People ex rel. Dept. Pub. Wks. v. Peninsula Enterprises, Inc.*, *supra*, 91 Cal.App.3d at p. 356 [planning stage ended when public entity informed landowner that it would take property within one year and made a firm offer to purchase].) But it was beyond dispute that the public entity had ended the planning stage at some point, by virtue of the fact that an eminent domain action was filed.

In sum, courts have not interpreted *Klopping* as authorizing an independent cause of action for any harm caused by unreasonable government conduct. They have interpreted *Klopping* as authorizing precondemnation damages only when unreasonable conduct is *ancillary* to a government decision to take property. Moreover, courts have allowed *Klopping* damages only in cases where there was unequivocal evidence that the government entity had completed its planning process and formed a present intent to acquire plaintiff's land. No court has ever upheld an award of *Klopping* damages in a case like the one at bar – where the public entity discussed the possible acquisition of plaintiff's property, but never passed a formal resolution of intent to condemn, never announced its intent to condemn the property, and never filed an eminent domain action against the landowner.

2. Judge Di Figlia erred by imposing *Klopping* damages on the City for publicly exploring the possibility of a new airport.

Judge Di Figlia found the City liable for inverse condemnation – starting from the first step in its airport planning process – because he thought

the steps in the City's planning process were out of order. Specifically, he thought the City should have consulted with Mexico before it passed any resolutions or made any announcements:

> [T]he whole issue of the airport in San Diego has been a Keystone Cops situation since about 1972 from my personal knowledge.
>
> But the evidence has come in that announcements are made, resolutions are put out, and nobody bothers to check with the Mexican government to see if they are interested in doing this thing. So I think that a case has been made for inverse with respect to the airport issue.

(RT 3380.)[7/]

He instructed the jury that the City was liable in inverse condemnation for announcing "proposed plans," and that the City's conduct constituted a taking from the date of the first announcement:

> The first taking involved unreasonable announcements of proposed plans for the TwinPorts in Otay Mesa, impacting Border Business Park. The date of value is November 21, 1988, *when the airport announcements began.*

(RT 3557.)

As all of the cases above demonstrate, however, a public entity cannot be liable for announcing proposals or plans – it can be liable only if it moves from the planning stage into the acquiring stage. (See, e.g., *Rancho La Costa v. County of San Diego*, *supra*, 111 Cal.App.3d at p. 61 [4th Dist., Div. One] ["to hold *the announcement of a plan* . . . results in inverse condemnation of properties designated for ultimate acquisition would result in forced purchase

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7/ Border's counsel encouraged this approach, arguing that the key issue in this case is whether the City made public announcements before it was ready to take official action. (RT 3379 ["[City Planner] Goldberg is correct that they didn't get to condemnation, but what she was incorrect about is that *they shouldn't have been publicly announcing until they were ready to get to some kind of official action. That's the key.*" (emphasis added)].)

of property before it was determined to be economically feasible; it would severely hamper government's ability to provide any such programs"].)

Judge Di Figlia found the City liable for a taking in 1988 by criticizing the reasonableness of the City's announcement. But reasonableness does not even become an issue until the City moves beyond planning and into acquisition. In other words, unreasonableness is necessary, but not sufficient, to establish entitlement to *Klopping* damages. If the rule were otherwise, a public entity's planning decisions would be open to second-guessing by any landowner who might be affected by a possible future public improvement.

Had Judge Di Figlia properly inquired into whether the City had completed its airport planning and entered into the phase of acquiring property, he could not have found a taking, much less a taking beginning in 1988. In November 1988, the City was only beginning the long process of studying the feasibility of a new international airport. The City declared a moratorium for the express purpose of preserving the status quo in Otay Mesa while SANDAG was updating the regional airport plan. (48 AA 13265.) The resolution imposing the moratorium stated that a new airport in Otay Mesa was only a *possibility*, not a certainty. (See 48 AA 13265-13266 [stating that Otay Mesa is being evaluated as a "potential future site"]; see also 31 AA 8361-8362 [1991 resolution extending moratorium and stating "it is now *proposed* that *additional studies* be conducted to determine *whether* in fact a major new airport should be constructed in Otay Mesa" (emphasis added)], AA 8369 [1993 resolution extending moratorium because the community plan would have to be revised "*if* it is determined that a new airport is to be constructed in Otay Mesa" (emphasis added)].) Moreover, the resolution imposing the moratorium estimated that it would take 12 months for SANDAG to complete its study. (48 AA 13265.) Thus, the 1988 resolution made clear on its face that the City had made no final decision on the airport

project – it was merely preserving the status quo pending further studies.

Border's own witness, Jose Luis Andreu, former vice-president of one of Mr. De La Fuente's corporations in Otay Mesa, testified that when the moratorium was announced, the airport proposal was far from a certainty:

> [W]e didn't even know, when the announcement came, whether Otay Mesa was going to be the final location because, initially, they were talking about alternative sites, and Otay Mesa was one of the areas that had been designated as an alternative site.

(RT 1456.)

The following chronology of the City's airport planning after the November 1988 moratorium confirms that the City studied and investigated the possibility of building an airport in Otay Mesa, but *never* made a final decision to do so, much less a final decision to condemn any specific property:

• May 1989: SANDAG issues an updated report regarding its study of the options for expanding or relocating Lindbergh Field. (48 AA 13272-13321.) SANDAG's report identifies Miramar and Otay Mesa as two potential alternative sites for a new airport. (48 AA 13272, 13275.) For both alternatives, the report shows a choice of possible flight patterns and noise contours, with varying impacts on the surrounding area. (48 AA 13311-13321.) The report also indicates further studies will be necessary to confirm the feasibility of either site. (See, e.g., 48 AA 13278 ["In subsequent studies, additional wind data for the East NAS Miramar or the Otay Mesa sites (if selected) would be collected and analyzed to confirm the feasibility of the orientations"].)

• Early 1990's: The City decides the Otay Mesa site is more viable than the Miramar site and determines that the Otay Mesa site would probably involve the use of Mexican airspace. (RT 2825-2826.) The City begins discussions with the Mexican government as to whether Mexico would allow use of their airspace. (RT 2826.)

• May 2, 1991: The City conducts a joint workshop with the planning commission and discusses "what would be the result if we had to place or if we elected to place a commercial airport in Otay Mesa." (RT 2823.)

• May 25, 1991: The City Council hears public testimony on the possibility of a new airport and passes a resolution stating "[t]he City of San Diego's preferred option for a new airport is embodied in the TwinPort Concept . . . [¶] . . . [¶] . . . insofar as the concept pursued is an airport designed to complement Lindbergh field, not replace it." (31 AA 8357.) The resolution states the City will encourage Mexico to participate in the planning process, and will ask the federal government to consult with Mexico. (31 AA 8357-8358.) It also states that the City will ask the federal government to fund "studies necessary to develop an airport master plan based on the TwinPort concept." (*Ibid*.)

• 1991-1992: At the request of industrial developers in Otay Mesa, including Mr. De La Fuente, City officials hold a series of meetings with them to discuss how property might be acquired and how the benefits of the airport could be fairly distributed among the developers. (RT 2833-2836; 8 AA 2128-2144 [meeting notes].)

• September 1992: The City authorizes the expenditure of $500,000 to develop a plan for the airport. (RT 1683.)

• May 1993: The City Council passes a resolution that identifies Otay Mesa as "the area of study" for a possible airport and continues a moratorium on residential development "pending a determination of whether or not to proceed with development of a new airport in Otay Mesa . . . ." (31 AA 8367, 8369.) The resolution directs the mayor to conduct discussions with other government officials in the U.S. and Mexico to secure an agreement for an international airport. (31 AA 8370.) The resolution also authorizes the city manager to begin discussions with affected property owners concerning "the

possible purchase and/or trade of City properties . . . ." (31 AA 8370, emphasis added.)

• November 1993: The City Council votes to abandon the TwinPort proposal due to lack of cooperation from Mexico. (11 AA 3095.)

The chronology shows that, at all times, the City was merely evaluating and investigating the possibility of building a new airport. As late as May 1993, the City postponed residential development "*pending a determination of whether or not to proceed*" with the TwinPort concept if the City had already made that determination. (See 31 AA 8369, emphasis added.) The City never made a decision on whether to build an airport in Otay Mesa, let alone a decision to condemn Border's property. As city planner Gail Goldberg put it, "[w]e never got anywhere near" condemnation. (RT 2836.)

The City would have needed to take numerous steps before it could get to the acquisition stage. Planning a major project like an airport takes 15-20 years. (RT 2889.) As a leading treatise has observed, many steps must be completed before the planning phase of a public improvement can be completed:

> Future planning often involves the identification of property or general areas for potential future public uses, but any serious consideration requires the agency to satisfy a series of requirements over a long period of time before it can make a final determination to acquire a parcel of private property for a public use, and often the agency's plans are modified or abandoned during this process.
>
> The agency must conduct preliminary studies that analyze alternatives and feasibility of the proposed project and predict its future requirements, and when the facility will be needed. It must make an environmental analysis of the effects of the proposed project and conduct preliminary cost studies. If the project survives these preliminary processes, the agency must appraise the property to be acquired and determine the ability to

> fund the project. Funding itself may require a long process of bonding, seeking federal or state assistance, or otherwise seeking funds through the political process. *A final official resolution to condemn the property cannot be made until the agency has successfully completed each step in this preliminary process, and until this time the project, and the need to condemn private property, is merely prospective and tentative.*

(11 Miller & Starr, California Real Estate, *supra*, Inverse Condemnation, § 30:18, pp. 87-88, emphasis added.)

Here, the City had not taken many of the steps that necessarily precede a final decision on whether to build an airport. For example, the City could not make a final decision without first preparing environmental assessments required by the National Environmental Policy Act (42 U.S.C.A. § 4321 et seq.) and the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.), including environmental impact reports that would have to be subjected to public hearings. (See *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 591-596.) No environmental impact report was ever prepared. (RT 2889.) This fact alone compels the conclusion that the City had not yet completed the planning stage. (See *Johnson v. State of California*, *supra*, 90 Cal.App.3d at p. 199 ["Until . . . environmental considerations have been accounted for . . . it cannot be said with any certainty what property will be required for a project"]; *Smith v. State of California*, *supra*, 50 Cal.App.3d at p. 535 [state could not be liable for *Klopping* damages for adopting proposed freeway route where state had not yet prepared environmental impact statements required by NEPA and CEQA].)

The City also would have needed to pass a resolution of necessity, which is required by state law before a public agency can condemn private property. (Code Civ. Proc., §§ 1240.040, 1245.220, 1245.230.) The City could not have adopted such a resolution without notifying affected property

owners and giving them an opportunity to appear and be heard concerning the necessity of the acquisition. (Code Civ. Proc., § 1245.235.) The City never held such a hearing or passed any such resolution.

Nor did the City obtain approval from the Federal Aviation Administration (FAA), the California Department of Transportation (Caltrans) or the relevant airport land use commission, all of which were required by statute before the airport could be constructed. (See RT 2825-2826; 49 U.S.C., §§ 47101-47131; Code Civ. Proc., §§ 21661.5, 21664, 21666, 21675, 21675.1.)

The City also would have needed to revise the Otay Mesa community plan before it could proceed with the proposed airport. (31 AA 8369 [May 1993 resolution stating "if it is determined that a new airport is to be constructed on Otay Mesa it would be necessary to substantially revise the 1981 community plan"].) There is no evidence the City ever began that process. Similarly, there is no evidence the City ever began the process of seeking or allocating funds for the acquisition of property for the proposed airport.

Suffice it to say that the City was many years and several steps away from a final decision to build an airport in Otay Mesa. Under these circumstances, a public entity cannot be held liable for *Klopping* damages. (See, e.g., *Contra Costa Water Dist. v. Vaquero Farms, Inc.*, *supra*, 58 Cal.App.4th at p. 900 [trial court properly concluded that public entity had not reached the acquiring stage with respect to a proposed reservoir district because "'the entire project had still not received all of the final permits and approvals necessary from all of the various agencies involved'"].)

Border suggested in its post-trial motions that the City completed the planning stage and moved into the acquisition stage in July 1991, when the city authorized and conducted meetings with developers in Otay Mesa. (50

AA 13634-13635.) Border's attempt to justify Judge Di Figlia's ruling on this alternate ground does not withstand scrutiny. Mr. De La Fuente himself conceded at trial that, during the meetings between the City and the Otay Mesa developers, the City never made an offer to Border or any other property owner. (RT 1262.) The purpose of the meetings was simply to discuss how property "*might* be acquired." (RT 2833-2836, emphasis added.) They were insufficient as a matter of law to show the City had completed the planning phase and moved into the acquisition phase. (See *Taper v. City of Long Beach*, *supra*, 129 Cal.App.3d at p. 612 [stating that good faith negotiation for the purchase of private property over a reasonable period of time does not give rise to a cause of action for inverse condemnation].) Even where a public entity goes beyond preliminary negotiations and conducts an *appraisal* of plaintiff's land, courts have found such conduct does not amount to an expressed intent to acquire that land. (See *Helix Land Co. v. City of San Diego*, *supra*, 82 Cal.App.3d at p. 938, 948 [Fourth Dist., Div. One].)

Finally, even if this court were to accept Border's post-trial argument that the City reached the acquiring stage in 1991, a new trial would be required. The jury's award of damages is based on Judge Di Figlia's ruling and instruction that the airport planning constituted a "taking" from November 1988 to November 1993. (See RT 3557 [jury instruction].) If this court were to find a taking began in 1991, it would have to order a new trial to redetermine damages starting from that date.

3. The City cannot be liable for the independent reason that Border suffered no distinct or unique injury apart from the other landowners within the boundaries of the proposed airport.

"[A]bsent a formal resolution of condemnation, recovery under *Klopping* requires that the public entity's conduct 'directly and specially affect the landowner to his injury.'" (*Barthelemy v. Orange County Flood Control Dist.*, *supra*, 65 Cal.App.4th at p. 570; see also *San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.* (1999) 73 Cal.App.3d 517, 530 [4th Dist., Div. One] [""'there must be an invasion or an appropriation of some valuable property right which the landowner possesses and the invasion or appropriation *must directly and specially affect the landowner to his injury*'"" (emphasis added)]. In other words, a landowner cannot recover *Klopping* damages unless the landowner's property was "singled out for singular and unique treatment" in contrast to numerous other landowners who could be affected by a proposed public work. (*Smith v. State of California*, *supra*, 50 Cal.App.3d at p. 537.)

In *Cambria Spring Co. v. City of Pico Rivera*, *supra*, 171 Cal.App.3d 1080, a city had adopted a redevelopment plan stating that properties within a certain area, including plaintiff's property, might be condemned. The Court of Appeal affirmed a finding that *Klopping* damages could not be awarded because the city "took no official action showing an intent to acquire [plaintiff's] property in particular," and engaged only in general planning "not particularly focused on [plaintiff's] property." (*Id.* at p. 1096; see also *Selby Realty Co. v. City of San Buenaventura*, *supra*, 10 Cal.3d at p. 120 [holding *Klopping* inapplicable where plaintiffs situation was "no different than that of any other landowner along the streets" proposed in general plan].)

Here, Border was not singled out for singular and unique treatment by the City's airport planning. The November 1988 moratorium – the basis for Judge Di Figlia's finding of *Klopping* liability – referred generally to Otay Mesa and did not single out property owned by Border or anyone else. (See 48 AA 13265-13269.) The 1989 SANDAG study was even less specific, identifying both Miramar and Otay Mesa as potential alternatives for a new airport. (RT 1251; 48 AA 13272, 13275.) Even within Otay Mesa, the report showed a choice of possible flight patterns and noise contours, with varying impacts on the surrounding area. (48 AA 13311-13321.) Border's own expert admitted that the airport proposal would have taken 4,000 to 6,000 acres of industrial property in Otay Mesa, of which Border owned only about 300 acres. (RT 1678.)

If Border were able to state a valid inverse condemnation action against the City for announcing the proposed airport plans in 1988, then *every* landowner who would have been affected by the various possible airport sites in Otay Mesa and Miramar could have stated a cause of action against the City. If this were the law, public entities could be exposed to astronomical liability for any announcement of a proposal for a major public improvement such as an airport, a school, a hospital, or a sports stadium. Liability of this nature would make major public improvements too costly to undertake.

4. The City cannot be liable for announcing its proposed plans because the City's conduct was not unreasonable.

Even if this court concludes that the City moved past the planning stage and into the acquiring stage, *and* that the City singled out Border for unique

treatment, reversal is still required because there is no evidence the City acted unreasonably in publicizing its study of a possible new airport.

Klopping liability cannot exist unless a public entity's precondemnation conduct is unreasonable. (*Klopping v. City of Whittier*, *supra*, 8 Cal.3d at p. 52.) Moreover, in cases where there is no actual announcement of intent to condemn, the requirement of unreasonableness is heightened and liability can be found only for "*the most egregious examples of official overreaching.*" (*San Diego Metropolitan Transit Development Bd. v. Handlery Hotel, Inc.*, *supra*, 73 Cal.App.4th at p. 536 [4th Dist., Div. One], emphasis added.) As a matter of law, no such "overreaching" has occurred here.

Judge Di Figlia found the City acted unreasonably by announcing its proposed plans for the airport in November 1988 without first obtaining the consent of the Mexican government. (RT 3557.) In other words, he found the City should have concealed its study of the airport proposal from the public until it had resolved one of the many possible obstacles to the implementation of the project.

Requiring the City to conceal its study of the airport proposal is contrary to the public policy of this state. (See generally Gov. Code, § 54950 et seq. [Brown Act]; Gov. Code, § 54953(a) ["All meetings of the legislative body of a local agency shall be open to the public . . ."].) Indeed, this court recently criticized the City for *not* disclosing its consideration of various issues surrounding a proposed public improvement. (See *Shapiro v. San Diego City Council* (2002) 96 Cal.App.4th 904, 924.) The City will face an impossible situation if this court now holds the City liable for disclosing its consideration of a different proposed public improvement.

Moreover, all the City did in 1988 was adopt a resolution that imposed a temporary development moratorium pending further study of the airport proposal. As the United States Supreme Court recently observed, "moratoria

. . . are widely used among land-use planners to preserve the status quo while formulating a more permanent development strategy." (*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, *supra*, 122 S.Ct. at p. 1487.) This widely-used practice will become pointless if public entities must rule out possible development hurdles *before* they can issue a moratorium.

In any event, Judge Di Figlia's finding that the City unreasonably failed to consult with Mexico before issuing the 1988 resolution cannot be reconciled with the evidence. The undisputed evidence shows that, when the City adopted the 1988 resolution, SANDAG was considering different options for the site of a new airport in the San Diego area, including a site nowhere near the Mexican border. (See 48 AA 13272, 13275 [1989 SANDAG study proposing airport in Miramar or Otay Mesa].) The City could not have obtained Mexico's consent at that time, when the impact of the airport on Mexico was unknown and unknowable.

Moreover, when the City began to focus on Otay Mesa over Miramar, it *did have discussions with Mexico*. Gail Goldberg, the city planner, testified that the City decided in the early 1990's that the Otay Mesa site was more viable than the Miramar site and that it would probably involve the use of Mexican airspace, so the City began discussions with Mexico as to whether Mexico would allow the use of its airspace. (RT 2825-2826.)

Evidence presented by the City in post-trial proceedings further confirms that the City had an ongoing dialogue with Mexico. (See 62 AA 16818-16819, 16833-16834, 16856, 16859, 16881-16941, 16948, 16969-17003.) These documents showed the City had a series of meetings and correspondence with Mexican officials regarding the TwinPort proposal.

In response to this evidence, Border's post-trial pleadings redirected its attack to argue the City acted unreasonably by announcing the airport proposal

when it knew that Mexican officials had refused to even consider it. (See 60 AA 16461-16462.) Border's fallback argument is contrary to the facts. The record shows that Mexican officials expressed continued interest in the TwinPort proposal well into 1992. (See, e.g., 62 AA 16948 [May 6, 1992 City manager report stating that "[r]ecent discussions and correspondence from Mexican officials indicate a continued interest in the TwinPorts proposal"].) Thus, Border's post-trial justification of Judge Di Figlia's ruling enjoys no more evidentiary support than the original ruling.

5. If Border's *Klopping* claim were cognizable, it would be barred by the statute of limitations.

If an inverse condemnation claim does not involve a direct physical invasion of land, the statute of limitations begins to run when the harm to the plaintiff's land first becomes appreciable to a reasonable person. (*Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1049.) A three-year limitations period applies to inverse condemnation actions based on "damage" to private property. (*Patrick Media Group v. California Coastal Com.* (1992) 9 Cal.App.4th 592, 607; Code Civ. Proc., § 338, subd. (j).) A five-year period applies to inverse actions based on an actual "taking" of property. (*Otay Water Dist. v. Beckwith*, *supra*, 1 Cal.App.4th at p. 1049; Code Civ. Proc., §§ 318, 319.)

Border's action is untimely under either the three-year or the five-year statute. Border supposedly began to suffer harm in November 1988, when the City first announced it was exploring the airport proposal. (See RT 3557.) If such harm actually occurred and was compensable, Border's action accrued in November 1988. But Border did not file its complaint until September 1995. (1 AA 1.) Thus, Border filed its complaint nearly seven years after its

supposed damages began (and did not add the inverse claims until three years after that), and its action is untimely by a long shot.

In the trial court, Border avoided the statute of limitations by relying on *Pierpont Inn*, *Inc. v. State of California* (1969) 70 Cal.2d 282, overruled on other grounds by *Los Angeles County Metropolitan Transportation Authority v. Continental Development Corp.* (1997) 16 Cal.4th 694. (See 50 AA 13654 [Border's reliance on *Pierpont*]; 64 AA 17319-17320 [trial court's acceptance of Border's argument].) In *Pierpont*, the Supreme Court held that a claim for inverse condemnation was timely where the claimant waited to file its action until the completion of a freeway project on part of its land, in order to determine more accurately the extent to which its remaining land would be damaged. (*Pierpont*, *supra*, 70 Cal.2d at p. 293.) The Court rejected the state's claim that the applicable limitations period began to run when the state began preliminary work on the project. The Court held that, when the government chooses not to condemn land, but to bring about a taking "*by a continuing process of physical events*," the owner is not required to resort to piecemeal or premature litigation. (*Ibid.*, emphasis added.) Thus, the wait-and-see approach of *Pierpont* was expressly limited to cases involving a taking by a continuing process of physical events.

Pierpont has been held inapplicable where, as here, the plaintiff's damages begin at the same time as the purported "taking" and continue steadily thereafter. In *Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, plaintiff leased a hotel near Los Angeles International Airport (LAX). (*Id.* at p. 13.) In 1967, LAX opened a new runway complex that resulted in substantial noise affecting plaintiff's property. (*Id.* at p. 14.) In 1970, the noise level decreased when the city opened another additional runway. (*Ibid.*) In 1973, plaintiff sued for inverse condemnation. (*Ibid.*) The trial court found plaintiff's action was barred by the statute of limitations. (*Id.* at p. 15.)

Plaintiff appealed, arguing that, under *Pierpont,* his cause of action did not accrue until the airport noise dropped off, because his damages prior to that date were continuing and the total extent of his damages were uncertain. (*Id.* at pp. 17-18.) The Court of Appeal disagreed, holding that his damages were appreciable when the noise began in 1967, and therefore his cause of action accrued when the noise began, not when it dropped off. (*Ibid.*)

Here, unlike *Pierpont*, Border's award was not based on "a continuing process of *physical* events." Border recovered damages for *publicity* about a proposed public improvement. If the publicity itself damaged Border, that damage was appreciable when the proposal was publicized, not when it was abandoned. Judge Di Figlia found as much when he ruled that Border's damages began with the City's first public announcement regarding the airport proposal.

Further, unlike *Pierpont*, Border did not need to wait to determine the extent of its damages. According to Border, it suffered damages at a constant annual rate – equal to 10% of its total property value – beginning in 1988. (See, e.g., RT 3526-3527.) If Border's claim is correct, then Border's situation is identical to the plaintiff's situation in *Insititoris.* There, as here, the plaintiff suffered a constant level of damages every year after the taking began. Accordingly, as in *Institoris*, the cause of action accrued when the damages began, not when they stopped.

The bottom line is that Border's cause of action for the airport announcements accrued (if at all) in 1988. Its 1995 complaint was therefore untimely by any measure and is barred by the statute of limitations.

B. No evidence supports the inverse condemnation award based on the City's diversion of truck traffic generated by a federally-established border crossing.

1. Inverse condemnation may not be based on diminished convenience in the use of abutting streets, but only on proof of a "substantial impairment" of access beyond a change in traffic flow or increased circuity of travel.

California law has long recognized that, under carefully circumscribed conditions, a compensable "taking" may occur when a landowner's *access* to property is sufficiently impaired by government improvements on abutting streets and highways. Not all access difficulties are compensable, however, and courts must engage in a case-by-case analysis based on the factual situations in prior decisions to determine whether a claimed impairment rises to the level of a "taking." (*San Diego Metropolitan Transit Development Bd. v. Price Co.* (1995) 37 Cal.App.4th 1541, 1546.)

A chronological review of California's access cases demonstrates that, over and over, the courts have rejected claims based on conversion of abutting highways to one-way roads, or other improvements that diminish access by making it more circuitous, but still allow reasonable means to travel to and from the general system of streets.

In the landmark case of *Rose v. State of California* (1942) 19 Cal.2d 713, the Supreme Court surveyed the early opinions describing the nature of a landowner's access rights and concluded an inverse condemnation award was appropriate when access to private property was substantially impaired by the state's construction of an underpass in front of plaintiffs' property. Before

construction of the underpass, plaintiffs' commercially zoned property lay on the east side of a 66-foot wide thoroughfare with four lanes of traffic and 12-foot wide sidewalks. (*Id.* at pp. 718, 735.) Railroad tracks along the south side of plaintiffs' property crossed the four-lane road. (*Id.* at p. 718.) The State modified the road so that it became an underpass (or "subway") in front of plaintiff's property, allowing traffic to pass beneath the railroad tracks rather than crossing them. (*Ibid.*) After construction, plaintiffs no longer had direct access to the previously abutting road, and could reach their property only by a 14-foot-wide "blind" alley that ended at the railroad tracks. This alley "was not capable of supplying the necessary ingress and egress for this type of industrial property," which "could not be put to some uses after the construction that it could have been put to before." (*Id.* at pp. 729, 735.)

The *Rose* court noted that, on different facts, compensation has been refused where reasonable access remains available, "although not the quickest and closest route to traveled thoroughfares." (*Rose v. State of California*, *supra*, at p. 731; see also p. 732 [court further explained that its opinion did not address the situation where property retains direct access to formerly "through" street that is turned into a cul de sac].) Thus, *Rose* left open the question of compensation where access was, unlike in *Rose*, still "capable of supplying the necessary ingress and egress" to affected property (*id.* at p. 729), even if the access was rendered somewhat more difficult or circuitous.

Similarly, in *People v. Ricciardi* (1943) 23 Cal.2d 390, 399, the majority recognized that landowners "have no property right in any particular flow of traffic over the highway adjacent to their property." But the court approved compensation where the landowner's direct access to a previously abutting highway was entirely cut off by construction of an underpass, leaving only a service road for ingress and egress: "here we do not have a mere re-routing or diversion of traffic from the highway; we have, instead, a substantial

change in the highway itself" in relation to the property. (See also *Bacich v. Board of Control* (1943) 23 Cal.2d 343, 351 [majority approved claim for public improvement that converted formerly through street abutting plaintiff's property into a cul de sac].)

The foregoing cases reflect the outer limits of liability for impairment of access. The subsequent cases demonstrate that a landowner may not obtain recovery for loss of access to two-way through-traffic where, after a public improvement, the landowner still has direct access at least to *one-way* through-traffic, but with only "circuitous" access to traffic in the opposite direction:

• *Beckham v. City of Stockton* (1944) 64 Cal.App.2d 487, 494, 496 [reversing award where construction of a nearby underpass effectively cut off plaintiff's access to the main traffic artery for the general system of streets, except by what the trial court found was "a narrow, unsafe, personally hazardous, torturous, and inadequate detour or bypass" (p. 493); imposing liability would create an unwarranted "extension of the abutting owner's right of access" (p. 496) and availability of alternative routes for ingress and egress rendered the change in access "one of mere circuity and inconvenience of travel," which are not compensable (pp. 500-501); "Regulations such as the prescribing of one-way traffic or the prohibiting of left-hand turns may interfere to some extent with the right of access without furnishing a basis for recovery of damages by an abutting owner" (p. 502)];

• *Holman v. State of California* (1950) 97 Cal.App.2d 237, 241 [denying recovery to landowner who had two-way access to abutting highway traffic until highway was divided; observing that prior cases allowed recovery for "a physical impairment of access from the property to the street" such as "by change of grade" or by "construction of a physical barrier" or "by removing the property from the through highway and placing it on a side or service road," but not where access to an abutting highway remains, but is

more circuitous than before: "[t]he damage of which plaintiffs complain would be the same [i.e., uncompensable,] . . . if the entire highway had been designated as a one-way street" (p. 244); and see p. 243:

> [T]he traveling of additional distances occasioned by modern traffic engineering to make travel more safe and to adapt the highway system to the adequate disposal of the increasingly heavy burden of automobile traffic – as, for example, by the construction of [a] divided highway for various types of traffic, or the re-routing of traffic by one-way regulations or the prohibition of left-hand turns – is an element of damage for which the property owner may not complain in the absence of arbitrary action. . . And, therefore, in testing the merits of the majority rule, *mere 'circuity of travel*,' in the sense that it refers to the additional distance required to be traversed because of a proper highway construction, *should not be used to justify the allowance of compensation to the owner abutting upon the street in the block where the obstruction exists* (emphasis added)];

• *People v. Sayig* (1951) 101 Cal.App.2d 890 [recovery not permitted for "diversion of traffic or mere circuity of travel, even where they result in impairment of value" (p. 902), including where public improvement "relocates the highway in certain respects, and in front of [landowner's property] makes the highway a divided highway, so that such lots have direct access only to a one-way highway in front of their properties" (p. 893)];

• *McDonald v. State of California* (1955) 130 Cal.App.2d 793, 799 [affirming sustaining of demurrer where erection of wall impaired direct access to adjacent highway];

• *Blumenstein v. City of Long Beach* (1956) 143 Cal.App.2d 264 [noting oft-stated observation that liability for access impairment "is a problem to be solved by an analysis of the decisions since no statutory or constitutional authority affords an adequate definition"; holding precedent allowed recovery where landowner originally had access to through traffic on adjacent street but,

after bridge construction, property no longer abutted on any through traffic street but rather was placed in "blind alley" (p. 268), but reversing award because it included "damages resulting from mere diversion of traffic or inconvenience resulting from circuity of travel in reaching the subject property" (p. 270)];

• *People v. Russell* (1957) 48 Cal.2d 189, 196-197 [reversing impairment-of-access award where changes to nearby highway to adapt to "changing conditions of travel" diminished value of commercial property: in regulating traffic, a public entity "may do many things which are not compensable to an abutting property owner, such as constructing a traffic island, placing permanent dividing strips which deprive an abutter of direct access to the opposite side of the highway . . . or designating the entire street as a one-way street (p. 197)].

The California Supreme Court revisited the impairment of access issue, examining the precedents cited above, in *People v. Ayon* (1960) 54 Cal.2d 217. There, a commercial landowner sought redress for placement of a divider in the adjacent highway, which converted traffic to one-way travel in the vicinity of the property, and impaired the ability of customers to enter and leave as they had before. Addressing this contention, the court first reaffirmed property owners' "right of *direct access*" to abutting streets, which cannot be substantially impaired without compensation, but summarized the limitations on that right as follows:

> [I]t is equally true that the right of a property owner to ingress and egress is not absolute. He cannot demand that the adjacent street be left in its original condition for all time to insure his ability to continue to enter and leave his property *in the same manner* as that to which he has become accustomed. Modern transportation requirements necessitate continual improvements of streets and relocation of traffic. *The property owner has no constitutional right to compensation simply because the streets*

> *upon which his property abuts are improved so as to affect the traffic flow on such streets*. If loss of business or of value of the property results, that is noncompensable. *It is simply a risk the property owner assumes when he lives in modern society under modern traffic conditions.*

(*Id.* at pp. 223-224, emphasis added.)

The Supreme Court further explained that a public agency may, without providing compensation, enact regulations that "impede the convenience with which ingress and egress may thereafter be accomplished, and may necessitate circuity of travel to reach a given destination." (*People v. Ayon*, *supra*, 54 Cal.2d at p. 224.) Where, as in *Ayon*, "direct access to through traffic in one direction still exists" (*ibid.*), "the right of direct access [to the abutting street] has not been substantially impaired" (*id.* at pp. 226-227).[8/]

The Supreme Court found "irrelevant" the evidence that "the improvement could be constructed in a manner which would be more convenient for [plaintiffs] and which would cause less loss to their business." (*People v. Ayon*, *supra*, 54 Cal.2d. at p. 227.) A reasonable plan to facilitate traffic flow will not give rise to compensation merely because an alternative that would be less injurious to a complaining landowner exists. (*Ibid.*)

Similarly, in *People v. Symons* (1960) 54 Cal.2d 855, the Supreme Court rejected an impaired access claim by a landowner whose property

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8/ The court distinguished its earlier opinion in *People v. Ricciardi, supra,* as allowing compensation for a "street improvement which results in rerouting the highway itself in relation to the property which originally abutted upon it, rather than merely rerouting traffic from the highway, thus destroying any direct access to through traffic." (*People v. Ayon*, *supra*, 54 Cal.2d at p. 225.) The court distinguished *Blumenstein v. City of Long Beach, supra,* 143 Cal.App.2d 264, as an example of a case where, "after construction of the improvement the properties involved no longer abutted on any through traffic street," but rather "were separated from through traffic by a new street which did not carry through traffic in either direction." (*Id.* at p. 226.)

previously abutted a through street, but was converted into a cul de sac after a freeway was built next to the property. (See *id*. at pp.857-858.) The court explained that, despite the alteration of available access to the property, the owner was entitled to no more than the value of the small portion of land actually condemned to create space for the cul-de-sac turn-around area:

> It is established that when a public improvement is made on property adjoining that of one who claims to be damaged by such general factors as change of neighborhood, noise, dust, change of view, *diminished access* and other factors similar to the damages claimed in the instant case, there can be no recovery where there has been no actual taking or severance of the claimant's property. . . . [H]ad the parcel for the cul-de-sac not been taken, the defendant would not be entitled to recovery based on the general diminished property values due to the construction of the freeway on adjoining property.

(*Id*. at p. 860, emphasis added.)[9/]

9/ See also:

• *Rosenthal v. City of Los Angeles* (1961) 193 Cal.App.2d 29, 34 [affirming sustaining of a demurrer to inverse condemnation claim where city had allegedly redirected the street on which landowners' property abutted, leaving only a one-block-long segment of the previously existing road, bounded by two dead ends, accessible only from two other perpendicular streets that ended at the frontage road; unlike cases with "properties that were separated from the streets on which they formerly abutted," landowner's retained at least limited access to the adjacent street and alternate access];

compare:

• *People ex rel. Dept. of Public Works v. Logan* (1961) 198 Cal.App.2d 581, 584-585 [allowing compensation for closure of the only freeway access point in a 2.25-mile stretch such that, "after completion of the proposed improvement [owner's] property would not have direct access to the freeway"];

• *Goycoolea v. City of Los Angeles* (1962) 207 Cal.App.2d 729 [compensation allowed where street in front of plaintiff's property was formerly 80-feet wide, with 6.5% grade, but construction of overpass, embankment, and "fill" covering half the street left plaintiff with one-way

(continued...)

In the companion cases of *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659 and *Valenta v. County of Los Angeles* (1964) 61 Cal.2d 669, the Supreme Court addressed the topic of access damages yet again:

> This easement [of access] consists of the right to get into the street upon which the landowner's property abuts and from there, in a reasonable manner, to the general system of public streets. [Citations.] [¶] To designate the right, however, is not to delineate its precise scope. Not every interference with the property owner's access to the street upon which his property abuts and not every impairment of access, as such, to the general system of public streets constitutes a taking which entitles him to compensation. Such compensation must rest upon the property owner's showing of a *substantial impairment* of his right of access to the general system of public streets.

(*Breidert, supra,* 61 Cal.2d at pp. 663-664.) The *Breidert* court concluded that destruction of access to the next intersecting street, creating a cul de sac where plaintiff's property previously abutted a through street, could be a factor in finding a taking, but cannot alone justify recovery in the absence of other facts disclosing a substantial impairment. (*Id.* at pp. 661, 666-667; see also *id*. at p. 668 [holding landowner's concern about impairment of access by fire, police and other public services was "too speculative to produce a compensable loss"].)

9/ (...continued)
fronting street of only 29 feet in width, at an 8.14% grade, such that "ingress, egress and access to plaintiff's property . . . by large vehicles of the type that would be used in its commercial development is substantially hindered and impaired," and the change in grade cut off visibility from ground level, depriving the property of light and air (pp. 731-733); court noted award was *not* based on increased circuity of travel and restriction of traffic on the fronting road: "a street may be designated as a one-way street without giving rise to an obligation to pay compensation" (pp. 736-737)].

Applying these principles, the court in *Valenta v. County of Los Angeles*, *supra*, 61 Cal.2d at p. 672, held no action would lie on a complaint that alleged an abutting street had been turned into a cul de sac, but that failed to demonstrate, among other things, a lack of reasonable alternative access routes after one means of access was closed.[10/]

These authorities show that, after decades of refinement, the law on inverse condemnation plainly bars recovery for public improvements that make access to property more difficult by, for example, permanently converting an abutting two-way street into a one-way street, or otherwise changing the

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10/ See also:

• *People ex rel. Dept. of Public Works v. Wasserman* (1966) 240 Cal.App.2d 716 [analyzing the interplay among the Supreme Court's access decisions in *Ayon*, *Symons, Breidert* and *Valenta*, and holding there could be no recovery where construction of freeway and corresponding closure of three approaches to landowner's property left owner with only one remaining route to general system of streets and highways, which route was "longer and difficult to traverse, particularly during peak traffic hours" (p. 730). Where business consisted of deliveries by large trucks and trailers, which were forced to travel an extra one-third of a mile through heavy traffic and make difficult left-hand turns to access the property (pp. 720-721), landowner could not recover, especially "when it is considered that 'the tremendous growth of population of this state compels rerouting and rearrangement of streets and highways' . . . ." (p. 730)];

compare:

• *City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385 [awarding nominal damages for two-year loss of access to property when a public improvement destroyed a bridge that provided *sole* legal access to property];

• *People ex rel. Dept. of Pub. Wks. v. Ramos* (1969) 1 Cal.3d 261 [where part of landowner's property was condemned for freeway, eliminating a street that formerly bordered property, owner could claim severance damages for lost access];

• *People ex rel. Dept. of Pub. Wks. v. Volunteers of America* (1971) 21 Cal.App.3d 111 [allowing claim for severance damages based on access impairment where part of landowner's property was condemned for public improvement].

character of an adjacent roadway in a way that does not defeat reasonable access from the existing roadway to the general system of streets.

The dearth of published impairment-of-access decisions after the 1960's and early 1970's suggests that a degree of certainty had been established by the cases discussed above, which addressed myriad factual scenarios in which access was allegedly hindered by conditions on public roadways. In 1993, however, the Court of Appeal in *Friends of H Street v. City of Sacramento* (1993) 20 Cal.App.4th 152 was called upon to address a variation on the earlier attempts to recover for traffic-related diminution in property values. The plaintiffs in *Friends of H Street* did not allege that the city had improperly altered their neighborhood street, but rather that the city operated H Street in such a way that excessive traffic interfered with ingress from and egress to the roadway. The plaintiffs complained of great volumes of noisy, noxious and dangerous traffic, and alleged the city was liable because "abutting residents' ability to enter and exit their driveways is substantially impaired." (*Id.* at p. 158.) The court held plaintiffs could not state a claim for inverse condemnation based on impairment of access. Quoting at length from *People v. Ayon*, *supra*, 54 Cal.2d 217, the court reiterated that loss of business or value from traffic flow is "'simply a risk the property owner assumes when he lives in modern society under modern traffic conditions.'" (*Friends of H Street v. City of Sacramento*, *supra*, 20 Cal.App.4th at p. 167.) The court concluded:

> Plaintiffs in this case allege the access to and from H Street is "substantially impaired," presumably by the "excessive, freeway-level volumes of traffic." We conclude these allegations simply involve ordinary changes in traffic flow and are insufficient to state a cause of action for inverse condemnation.

(*Ibid.*) [11/]

Finally, and consistent with California precedent, at least one out-of-state court has squarely held there can be no recovery on facts closely analogous to the present case. In *City of Laredo v. R. Vela Exxon, Inc.* (Tex.App. 1998) 966 S.W.2d 673, a commercial landowner complained that, for approximately one year, access was blocked by increased border-bound truck traffic that passed the landowner's property after the city eliminated an

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11/ See also:

• *Brumer v. Los Angeles County Metropolitan Transportation Authority* (1995) 36 Cal.App.4th 1738 [restating rule against recovery for making access more difficult by, for example, converting an abutting two-way street into a one-way street, and precluding all parking rights on that street (pp. 1748-1749); emphasizing that protected access right consists only of "the right to get into the street upon which the landowners' property abuts and from there, in a reasonable manner, to the general system of public streets" (p. 1745); rejecting claim for compensation where construction of a light rail line in the middle of an abutting street resulted in "designating an entire street one-way," and placement of pedestrian guard rails and a concrete island traffic separator, which hindered access to plaintiff's property, but did not "substantially impair" access within the meaning of inverse condemnation law (pp. 1748-1749), despite "some inconvenience" to plaintiffs (pp. 1751-1752)];

• *San Diego Metropolitan Transit Development Bd. v. Price Co.*, *supra*, 37 Cal.App.4th at p. 1545 [where construction and use of "berms" in an abutting street eliminated direct access between landowner's property and southbound lanes on an abutting street, no constitutionally cognizable taking had occurred where berms increased distance needed to reach southbound travel, but property could be used for the same purposes before and after construction (p. 1548)];

• *Perrin v. Los Angeles County Transportation Com.* (1996) 42 Cal.App.4th 1807 [denying compensation for trolley construction that divided a formerly through street (rendering it a one-way thoroughfare), and caused *20 trains per hour during morning and evening peak periods* (8 trains per hour during other periods) *to pass by the property* (pp. 1810-1811); see also p. 1813, citing *People v. Ayon, supra,* 54 Cal.2d 217, for proposition that "[t]he property owner has no constitutional right to compensation simply because the streets upon which his property abuts are improved so as to affect the traffic flow on such streets"].

alternate route to the border. (*Id.* at pp. 676-677.) Traffic came to a standstill for twelve hours a day, during the hours that the landowner operated a services station on the property. (*Id.* at p. 677.) Customers would have to wait at least 15 minutes to enter the property at times, would have difficulty leaving, and suffered from smoke and noise. (*Ibid.*) The problem was unique to this property. (*Ibid.*) Nonetheless, the partial and temporary condition caused by the city's redirection of traffic did not give rise to a compensable taking or damaging of property rights. (*Id.* at p. 680; see also *State v. Heal* (Tex. 1996) 917 S.W.2d 6, 7, 11-12 [no recovery for alleged access impairment by 60% traffic increase and bottleneck congestion caused by street reconfiguration in front of property: "damages for *diminishment* of the means of access is not compensable provided suitable access remains" (original emphasis)].)

As we now explain, applying the above principles to the facts of this case demonstrates that Border suffered no compensable impairment of access.

2. The award for truck routing must be reversed because the jury was instructed to award damages for "impairment of access" to Border's property, but Border suffered no compensable impairment.

Judge Di Figlia found and instructed the jury that truck traffic traveling for several years on two of the streets abutting Border's property effected a "temporary taking" (RT 3558), and further instructed the jury to assess damages under the "impairment of access" theory described above:

> The second taking involved diversion of truck traffic through and around Border Business Park. The date of value is January 1, 1995, when trucks were first diverted through and around Border Business Park.

(RT 3558.)

> Plaintiff has a right of access or a right to go to and from its property, but it is not entitled to access to such land at all points on the boundary. The extent of this right of access is that which is reasonably required considering all the uses for which the property is adapted and available.
>
> The court has determined that plaintiff's right of access has been impaired by reason of defendant's actions in routing traffic to the border crossing. You must determine the extent, if any, to which [plaintiff's] remaining property has been decreased in market value by reason of this impairment of access.

(RT 3561.)

Based on these instructions, the jury awarded $39 million in damages. This verdict must be reversed because there was no evidence that Border's right of access was substantially impaired within the meaning of that phrase in inverse condemnation law.

First, by identifying January 1, 1995 as the first date on which compensable damages for impairment of access might begin, Judge Di Figlia must have found that construction on Siempre Viva Road in 1994 did not give rise to inverse condemnation liability. This finding of fact is consistent with the law on temporary impairment of access during roadway improvement. (See *People v. Ayon, supra,* 54 Cal.2d at p. 228 ["Temporary injury resulting from actual construction of public improvements is generally noncompensable"; owner could not recover for "temporary interference with their right of access" that was "occasioned by actual construction work"].)

Focusing, then, on truck routing after January 1, 1995, there is no evidence of the kind of impaired access that gives rise to an inverse condemnation claim. For a period of about six years,[12/] Border tenants and

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12/ The traffic routing problem of which Border complained was the result (continued...)

others conducting business within the business park suffered an inconvenience during several afternoon hours on most days when, due to truck traffic, it was impractical to travel on the far side of two streets (La Media and Siempre Viva) abutting Border's property. (See RT 1374, 1380.) Thus, during most traditional business hours, *all access on all abutting streets was unimpeded*. And, even during hours of traffic congestion, Border could be readily accessed from both directions of traffic on other streets running through the property and at the northern and eastern edges of the property, as well as from the southbound and westbound lanes, respectively, of La Media and Siempre Viva.

California courts have routinely held that public improvements and regulations that *permanently* deny direct access at *all hours* to through traffic in one direction, while retaining access to traffic in the opposite direction on lanes immediately adjacent to affected property, do not give rise to a compensable claim. (See, e.g., *People v. Symons, supra,* 54 Cal.2d 855; *People v. Ayon, supra*, 54 Cal.2d 217; *Perrin v. Los Angeles Transportation Com., supra,* 42 Cal.App.4th 1807; *People v. Sayig, supra,* 101 Cal.App.2d 890; *Holman v. State of California, supra,* 97 Cal.App.2d 237.)

Moreover, we are aware of no case finding that *congested traffic* alone created a substantial impairment of the constitutionally protected right of access, i.e., the right to use abutting roadways for travel, in a reasonable manner, to the general system of public streets. Indeed, if liability were imposed on such grounds, compensation would have to be made wherever a public school, hospital, courthouse or other such facility generates significant traffic problems for neighboring properties.

12/ (...continued)
of using neighboring streets on an *interim* basis for border-bound vehicles. A permanent border access road that does not abut Border's property was completed in 2001, shortly after trial ended. (RT 4141.)

Finally, we are aware of no case that has found compensable impairment of access from any transient road condition existing for up to a few hours each day, such as by imposition of commonly used "rush hour" restrictions prohibiting turns or directing that certain lanes be traveled only in specified directions or by specified types of traffic.

In appropriate cases, the question of "substantial impairment" may be decided as a matter of law. (See, e.g., *People v. Russell*, *supra*, 48 Cal.2d at p. 195 [reversing award to extent it was based on impairment of access]; *Rosenthal v. City of Los Angeles*, *supra*, 193 Cal.App.2d at p. 34 [affirming order sustaining demurrer in access case where abutting street was closed at both ends of plaintiff's property but access via perpendicular streets remained]; *Beckham v. City of Stockton*, *supra*, 64 Cal.App.2d at pp. 500-501 [reversing award based on increased circuity and inconvenience of travel].) This is such a case. The trial court's extension of municipal liability is such a dramatic departure from precedent that the judgment must be reversed with directions to enter judgment in favor of the City.

3. The award for truck routing cannot be sustained on any nuisance or nuisance-like theory, which was not the theory of liability found by Judge Di Figlia.

After trial, Border contended that, even if there was no compensable access impairment, the jury's award could still be upheld because the truck traffic was akin to a nuisance. (50 AA 13660-13668.) But impairment of access was the sole theory presented in the instructions to the jury. A verdict cannot be supported by a theory that was never properly presented to the jury. (See *McLaughlin v. National Union Fire Ins. Co.* (1994) 23 Cal.App.4th 1132, 1146; *Skarbrevik v. Cohen, England & Whitfield* (1991) 231

Cal.App.3d 692, 711; see also *Null v. City of Los Angeles* (1988) 206 Cal.App.3d 1528, 1534-1535 [adequacy of the evidence must be measured against instructions given to the jury]; *Richmond v. Dart Industries, Inc.* (1987) 196 Cal.App.3d 869, 877 [it is the jury's duty to "determine the true facts from the evidence and to apply the rules of law set forth in the instructions to the true facts to arrive at a verdict"].)

In any event, Border's attempt to justify the verdict on a nuisance-like theory is legally unsound. Recovery on such a theory has routinely been denied for increased traffic resulting from improvements to or regulation of existing roadways. For example, as noted above, the Supreme Court in *People v. Symons, supra,* 54 Cal.2d 855 held that alleged traffic-related damage in the form of "change of neighborhood, noise, dust, change of view, diminished access" and the like warrant no recovery. (*Id.* at p. 860-862.)

Following this directive from the Supreme Court, the court in *City of Berkeley v. Von Adelung* (1963) 214 Cal.App.2d 791, 792-793, held there could be no recovery where a city project would "triple traffic past defendant's lot, with resultant increase in fumes and traffic noises." This holding was in turn followed in *People ex rel. Dept. of Pub. Wks. v. Presley* (1966) 239 Cal.App.2d 309, 316-317, where the court rejected a claim that construction of a freeway on property taken from the landowner for that purpose would generate an increase in "noise, fumes and annoyances" with respect to the remaining, abutting property.

The same rule was stated yet again in *Lombardy v. Peter Kiewit Sons' Co.* (1968) 266 Cal.App.2d 599, where plaintiffs complained that construction of a freeway abutting their property severely injured their mental and physical health. The court characterized the plaintiffs' inverse condemnation claim as seeking "an extravagant extension" of property rights, and explained that "[t]he mental, physical and emotional distress allegedly suffered by plaintiffs

by reason of the fumes, noise, dust, shocks and vibrations incident to the construction and operation of the freeway does not constitute the deprivation of or damage to the property or property rights of plaintiffs for which they are entitled to be compensated." (*Id.* at p. 603.) Further rejecting plaintiffs' attempt to plead their claim under a "nuisance" theory, the court held the "roar of automobiles and trucks, the shock of hearing screeching brakes and collisions, and the smoke and fumes which are in proportion to the density of the motor vehicle traffic" are all conditions that "do not constitute a nuisance in a legal sense." (*Id.* at p. 605.) The court noted that highways are constructed under the authority of the state Constitution, Government Code, and Streets and Highways Code, and such authority creates an immunity under Civil Code section 3482 for any nuisance claim. (*Ibid.*)

In *Harding v. State of California ex rel. Dept. of Transportation* (1984) 159 Cal.App.3d 359, the court reiterated that, whatever inverse condemnation damages may be available in other contexts, "nuisance" claims based on annoyances caused by *traffic diversion* are *not* compensable. The plaintiff in *Harding* relied on *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, in which residents vexed by odors from a nearby municipal sewage plant successfully proved the elements of a nuisance claim at trial, and were found on appeal to be entitled to pursue an inverse condemnation theory in order to obtain statutory interest and litigation expenses.[13/] Distinguishing

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13/ In so holding, the *Varjabedian* court noted that the recurring invasion of property by a "gaseous effluent" was an injury that was "not far removed from those core cases of *direct physical invasion*" which give rise to awards for a taking. (20 Cal.3d at p. 297, emphasis added.) The plaintiffs in that case had sufficiently alleged that the odors rendered the property "'untenantable for residential purposes,'" thus depicting "a permanent and 'substantial impairment' in their use of the land." (*Ibid.*; see also *Greater Westchester Homeowners Assn. v. City of Los Angeles* (1979) 26 Cal.3d 86, 102 [*Lombardy* analysis of highway noise did not preclude recovery on nuisance theory for (continued...)

Varjabedian, the court in *Harding* explained that, with respect to highways, dust, noise and fumes are authorized by highway schemes, and thus give rise to no nuisance liability under Civil Code section 3482. (*Harding*, *supra*, 159 Cal.App.3d at pp. 362-363 [following *Lombardy, supra,* 266 Cal.App.2d 599].) [14/]

Similarly, in *Friends of H Street v. City of Sacramento, supra,* 20 Cal.App.4th 152, the court rejected plaintiffs' claim for nuisance damages based on allegations that the city operated H Street in such as way as to expose abutting landowners to noise at double the level allowed under city standards, "high concentrations of carbon monoxide and other hazardous vehicle emissions," high "injury and fatality accident rates," "noxious and malodorous fumes and soot," "excessive glare from headlights," "excessive litter from passing cars," and substantially impaired access to their driveways. (*Id.* at pp. 157-158.) The court held no liability for nuisance could be imposed based on such allegations. After examining in detail the statutes governing municipal control over highway conditions, the court explained, "the City's authority to act – or not act – in the manner complained of is established 'by the plainest and most necessary implication from the powers expressly conferred' by the legislative scheme." (*Id.* at p. 162.) The court continued, "Although the relevant statutes do not expressly authorize the City to operate its streets in a manner which generates traffic, noise, fumes, litter, and headlight glare . . . such loss of peace and quiet is a fact of urban life which must be

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13/ (...continued)
airport noise].)

14/ The *Harding* court held an inverse condemnation action could nonetheless be pursued where a new highway included a 23-foot dirt embankment and noise barrier directly in front of the plaintiff's house, blocking access to views and depositing dust and debris on plaintiffs' property.

endured by all who live in the vicinity of freeways, highways, and city streets." (*Id*. at p. 163.)

As the foregoing cases show, even if Judge Di Figlia had found liability on a nuisance theory, and had instructed the jury accordingly, no substantial evidence existed to support an award on such a theory because the conditions created by vehicular traffic in the present case are not compensable.

II.

IN THE ALTERNATIVE, A NEW TRIAL IS REQUIRED BECAUSE THE INVERSE CONDEMNATION DAMAGES ARE EXCESSIVE.

A. The jury was instructed to award damages for loss of fair market value, but the verdict greatly exceeds the total fair market value of Border's property.

The standard measure of damages in inverse condemnation cases is loss of fair market value. (See, e.g., *Tilem v. City of Los Angeles*, *supra*, 142 Cal.App.3d at p. 707 ["The basic measure of damages in inverse condemnation actions, as in all eminent domain proceedings, is 'market value'"].) Various other measures are also available, depending on the circumstances of a particular case. (See, e.g., 4 Matthew Bender, Cal. Forms of Jury Instruction (2002) Inverse Condemnation, § 66.14, p. 66-19 [setting forth jury instructions for alternate measures of damages, for use "whenever the other instructions . . . do not provide a logical or equitable measure of damages"].)

Here, Border requested a jury instruction that measured its damages only by a decline in fair market value:

> This case involves a partial taking of or damaging to property. *The just compensation to which plaintiff is entitled in such a case is the difference between the fair market value of the property immediately before the damage occurred and the fair market value of the property immediately after the damage occurred.*

(RT 3558; see also RT 4223-4224 [Borders' counsel indicating that they prepared damages instruction according to case law].)

This instruction is the standard instruction for cases in which the plaintiff does not claim a complete taking of his property, but only a partial taking or a damaging of that property. (See 4 Matthew Bender, Cal. Forms of Jury Instruction, *supra*, Inverse Condemnation, § 66.11, p. 66-14 [instruction entitled "Basic Measure – Partial Taking or Damaging"; cautioning that counsel "should not assume that diminution of market value will be the measure of damages in all circumstances"].)

Under this instruction, the most the jury could award would be the maximum fair market value of the property. As a matter of logic, the *decline* in fair market value of Border's property cannot exceed the *total* preexisting fair market value of Border's property, even if the City's actions damaged Border's property so severely that it became worthless.

Border offered no evidence of the fair market value of its unsold property in November 1988, when the airport taking supposedly began. Instead, Border offered expert testimony that its property was unmarketable during the time of the taking (RT 1614-1616), but would have been worth $50,981,753 million in 1992 if not for the taking (RT 1609-1610, 1614-1616). Thus, the most the jury could have properly awarded under the instructions was $51 million – accepting Border's damages figure *and* assuming the jury could infer the property's 1988 value from the 1992 value *and* assuming that the City's conduct damaged the property so severely that it lost all market value.

The jury awarded a total of $65.3 million on Border's inverse condemnation claims. (See 51AA 17301-17302.) This award greatly exceeds the maximum amount possibly supportable under the evidence and should be reversed. (See 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 754, pp. 780-781 [reviewing court may reverse a judgment, as unsupported by the evidence, for excessive damages]; *Ventura County Flood Control Dist. v. Security First Nat. Bank* (1971) 15 Cal.App.3d 996, 1002 [reversing eminent domain judgment where damages exceeded maximum amount supported by the evidence].)

Border argued in post-trial motions that there was sufficient evidence its property would have been worth as much as $60.8 million if not for the airport taking. (51 AA 13948.) Border relied on a December 1991 report prepared by the City's valuation expert, Randi Rosen, stating that Border's property was worth $6.50 per square foot, yielding a total value of $60.8 million. (See 51 AA 13948.) Border failed to mention, however, Rosen's testimony that $60.8 million was *not* the fair market value of the entire business park, but only the total "gross retail value" of the individual lots. (RT 2336; see also RT 2334 ["That summarizes the first step in order to reach my market value, which is to estimate what the gross retail value is"], 2335 ["this is not my market value, this is the first step"].) Border also failed to mention Rosen's opinion that the fair market value of the entire park was in the range of $2.13 to $2.84 per square foot. (RT 2208-2209.) That price would yield a total value well under $30 million, which clearly does not support the jury's award of $65.3 million.

In short, there is no evidence to support the jury's finding that Border's property declined $65.3 million in value.

B. The verdict cannot be affirmed on a theory that the jury awarded damages for the rental value of an easement.

1. The jury was not instructed on Border's "easement rental" theory.

As noted above, a verdict cannot be supported by a theory that was never properly presented to the jury. (See *McLaughlin v. National Union Fire Ins. Co., supra,* 23 Cal.App.4th at p. 1146; *Skarbrevik v. Cohen, England & Whitfield*, *supra*, 231 Cal.App.3d at p. 711.)

Here, the jury was instructed only to find the diminution of Border's property's fair market value. (RT 3558.) Border argued a different theory in closing arguments, namely, that the City effectively took a temporary easement over Border's property and therefore should pay the fair rental value of that easement. (See 51 AA 13949.) But "[t]he arguments of counsel are not a substitute for instructions by the court." (*Parker v. Atchison, T. & S. F. Ry. Co.* (1968) 263 Cal.App.2d 675, 680, cited with approval in *People v. Vann* (1974) 12 Cal.3d 220, 227, fn. 6; see also *Barouh v. Haberman* (1994) 26 Cal.App.4th 40, 47 ["Without the requested instruction, counsel lacked support for his argument in the instructions on the law"].)

Rental value can be a proper measure of damages in inverse condemnation cases. Indeed, loss of rental value is the logical measure of damages when the alleged "taking" was only temporary. Decline in fair market value is a poor measure of damages in such cases because the fair market value of the property is likely to recover as soon as the impairment is lifted. (See *City of Los Angeles v. Ricards*, *supra*, 10 Cal.3d 385, 389, fn. 3 ["Where it is clear . . . that a taking or damaging is merely temporary . . . the market value of the property would not decline beyond an amount attributable

to loss of use or rental income during the interim period"]; *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, *supra*, 122 S.Ct. 1465, 1484 ["Logically, a fee simple estate cannot be rendered valueless by a temporary prohibition on economic use, because the property will recover value as soon as the prohibition is lifted"].)

But Border elected not to propose an instruction on lost rental values, and the City had no duty to offer an instruction on Border's alternate theory. (See *Agarwal v. Johnson* (1979) 25 Cal.3d 932, 949 [""'To hold that it is the duty of a party to correct the errors of his adversary's instructions . . . would be in contravention of [Code of Civil Procedure] section 647"'"]; *Hensley v. Harris* (1957) 151 Cal.App.2d 821, 825-826 ["[e]ach party has a duty to propose instructions in the law applicable to his own theory of the case. He has no duty to propose instructions which relate only to the opposing theories of his adversary, and having no duty respecting them he has no responsibility for the latter's mistakes" or to "offer corrections of the instructions of his adversary pertinent only to the latter's theory of the case"].)

Judge Ikola nonetheless relied on an easement rental theory to uphold the verdict. He determined that recovery on such a theory was supported by the evidence and the law, notwithstanding the absence of any instruction on that theory. (64 AA 17337-17338; RT 4186.) He based his reasoning on 7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 366, p. 416, which states that a verdict contrary to an erroneous instruction will not be disregarded. (64 AA 17337; RT 4186.)

Judge Ikola's reasoning is flawed for two reasons. First, as we explain in the next section, Border's easement theory was *not* supported by the law or the evidence. This court need not even reach that issue, however, because the second flaw in Judge Ikola's analysis is his misreading of Witkin. The Witkin section he cited discusses a situation in which a trial court gives a legally

erroneous instruction favorable to the appellant, but the jury renders a verdict contrary to that instruction. (See 7 Witkin, California Procedure, *supra*, Trial § 366, p. 416, quoting *O'Neill v. Thomas Day Co.* (1907) 152 Cal. 357, 360-361 [court gave erroneous instruction that required jury to find in favor of defendant, but jury ignored instruction and found for plaintiff] and citing *Blair v. Guarantee Title Co., Inc.* (1930) 103 Cal.App. 260, 270-271 ["we fail to see how these instructions could have operated injuriously against the appellants. The instructions tended to prejudice the rights of respondents, rather than those of appellants"].) In that situation, the appellant may not obtain reversal based on the harmless instructional error. (*O'Neill*, *supra*, 152 Cal. at p. 361.)

Here, the fair market value instructions were a correct statement of the law, but the jury's verdict is not consistent with the evidence viewed in light of those instructions. Thus, this case does not fall within the rule discussed in Witkin, but is subject instead to the general rule that a verdict cannot be upheld based on a theory not covered by the instructions. (See, e.g., *McLaughlin v. National Union Fire Ins. Co.*, *supra*, 23 Cal.App.4th at p. 1146; *Skarbrevik v. Cohen, England & Whitfield*, *supra*, 231 Cal.App.3d at p. 711.)

2. The hypothetical rental value of an easement is not a proper measure of inverse condemnation damages.

Even if the jury had been instructed on a "rental value of an easement" theory, the evidence would not support an award on that theory. Border relied on testimony by its valuation witness, Albert Schlarmann, who testified that when a government agency takes a temporary easement over a piece of property, it usually pays a yearly rental price equal to 10% of the value of the

land. (RT 1619-1620.) Border's expert on appraisals, John Mawhinney, also testified that the "ten percent rental factor" is fairly typical for a construction easement. (RT 1649-1650.)

Compensatory damages for lost rents, however, cannot be based on an arbitrary percentage of the total value of the property – *they must be based on competent evidence of actual lost rents.* This principle is illustrated by *City of Los Angeles v. Lowensohn* (1976) 54 Cal.App.3d 625, a case very similar to the case at bar. In *Lowensohn*, an expert witness calculated a landowner's *Klopping* damages using "*a rental analysis analogous to that used for 'construction easements*.'" (*Id*. at p. 630, emphasis added.) Using this easement theory, the expert concluded that the landowner's damages were equal to a set percentage of the value of the property – eight percent per year. (*Ibid*.) The trial court found this evidence was insufficient as a matter of law to establish actual damages (*id.* at p. 631) and the Court of Appeal affirmed. It held the trial court properly rejected the damages evidence because it was not based on actual lost rents, and therefore was nothing more than "pure fiction." (*Id.* at p. 636; see also *City of Fresno v. Shewmake* (1982) 129 Cal.App.3d 907, 911-912 [reversing inverse condemnation award equal to 10 percent of fair market value and stating that award could not be upheld based on expert's testimony about hypothetical rental income loss, because that testimony did not coincide with any evidence of actual lost rents].)

Here, as in *Lowensohn*, Border attempted to justify the jury's verdict based on a hypothetical rental value of an easement over its land. Border did not introduce any evidence that it had ever rented its land for 10 percent of the property's fair market value, that it had plans to rent the property at that rate in the future, or that anyone would have been willing to pay that rate if the City had not publicized the possibility of a new airport. Thus, like the evidence in *Lowensohn*, Border's rental theory is "pure fiction."

This analysis is not limited to Border's claim for *Klopping* damages. In *City of Los Angeles v. Ricards*, *supra*, 10 Cal.3d 385, the Supreme Court applied the same rule to damages for impairment of access. The landowner in *Ricards* sought redress for a two-year loss of access that occurred when a public improvement redirected a waterway, destroying a bridge that was the sole access to her property. (*Id.* at p. 387.) The trial court awarded damages based on the unimpaired value of the property, multiplied by seven percent for each year in which the access was destroyed and the land was temporarily unmarketable. (*Id.* at p. 388.) The Supreme Court reversed, ruling the award was based on an unfounded measure of damages. The Court held plaintiff could not justify the award as representing a reduction in market value during the two-year taking because the plaintiff did not, in fact, sell the property during that period. Moreover, she produced no evidence of actual lost rents during the two-year period. Consequently, she was entitled only to nominal damages. (*Id.* at pp. 388-389.) "To afford her substantial compensation under such circumstances would place her in a better financial position than she would have been in had the bridge remained intact," and her access not temporarily destroyed. (*Id.* at pp.389-390.)

Here, the truck routing caused at most a temporary inconvenience in access rather than a temporary total loss of access. Border is otherwise in the same position as the plaintiff in *Ricards*. Like that plaintiff, Border claimed damages equal to a set percentage of its property value, but offered no proof that it actually lost rents in that amount due to traffic congestion. Rather, Border offered only a forumulaic 10 percent "guesstimate" of lost value that parallels the seven percent measure used, improperly, by the trial court in *Ricards*. Under any rate, this method of valuation is improper.

In essence, Border is claiming damages based on the asserted value of a benefit conferred on the City in the form of an "easement" the City did not

have to pay for. But it is well-established that an inverse condemnation plaintiff is entitled only to damages for losses it actually incurred, not for the value of benefits conferred on the condemner. (See *Klopping v. City of Whitter*, *supra*, 8 Cal.3d at p. 48.) Because Border failed to introduce evidence that it actually lost rents equal to 10 percent of the total value of its property per year, the verdict cannot be upheld on that theory.

3. Even under an "easement rental" theory, the damages are excessive.

Reversal would be required even if Border's easement rental theory were valid and Border had requested an instruction on that theory. By Border's own calculations, the damages for the truck routing would be 10% of the pre-taking value of the property ($50.9 million according to Border) per year for six years. (See RT 3541.) That would support a maximum award of $30.6 million. (See *ibid*. [Border's counsel stating that the damages for the truck routing ranged from $30 million to $36 million].) The jury's award of $39.8 million for the truck routing greatly exceeds the maximum award under the easement theory. The verdict cannot be reconciled with the evidence, the law, or the jury instructions, and a new trial is therefore required.

III.

IN THE ALTERNATIVE, A NEW TRIAL IS REQUIRED BECAUSE JUDGE DI FIGLIA WAS DISQUALIFIED AT THE TIME HE RULED AGAINST THE CITY, AND HIS RULINGS ARE THEREFORE VOIDABLE.

A. Judge Di Figlia was disqualified as a matter of law because he failed to file a verified answer to the City's statement of disqualification.

Once a party files a valid statement of disqualification, as the City did here, the challenged judge has three options: (1) concede disqualification by filing a consent to disqualification; (2) without conceding disqualification, request that the parties agree on another judge to preside over further proceedings; or (3) file a written *verified* answer to the statement of disqualification within 10 days. (See Code Civ. Proc., § 170.3, subd. (c); see also *Urias v. Harris Farms, Inc.* (1991) 234 Cal.App.3d 415, 420 [describing three options].)

When a challenged judge fails to file a verified answer within 10 days, "the facts set out in the statement are taken as true." (*Urias v. Harris Farms, Inc.*, *supra*, 234 Cal.App.3d at p. 424; see also *Oak Grove School Dist. v. City Title Ins. Co.* (1963) 217 Cal.App.2d 678, 702.) A judge who fails to file a verified answer is deemed to have admitted not only the facts in the statement, but also the fact of his or her disqualification. (Code Civ. Proc., § 170.3, subd. (c)(4) ["A judge who fails to file a consent or answer within the time allowed shall be deemed to have consented to his or her disqualification"]; see also *Urias v. Harris Farms, Inc.*, *supra*, 234 Cal.App.3d at p. 421 ["If the judge does not strike the statement and wants to contest his disqualification,

he must file an answer . . . *If he fails to do so, he is deemed to have consented to the disqualification and he is disqualified*" (emphasis added)].)

In this case, Judge Di Figlia tried to invent a fourth option. He purported to contest the grounds for disqualification without filing a verified answer. He entered an Order of Recusal, attacking the City's statement of disqualification as "inaccurate and incomplete," but declining to explain exactly *how* the statement was inaccurate or incomplete. The full text of the order is as follows:

> Although the City knows appropriate disclosures were made to both parties in this case from the outset, it has nevertheless chosen to request recusal or disqualification predicated on an alleged failure to disclose. The inaccurate and incomplete assertions and arguments raised by the City have placed this Court in an untenable and potentially adversarial position making recusal appropriate. Accordingly, this Court recuses itself and transfers this file and all pending matters related thereto to the Presiding Judge for reassignment.

(15 AA 4281.)

Judge Di Figlia's vague denial, not under oath, cannot substitute for a *verified* answer to the facts in the statement of disqualification. Code of Civil Procedure section 170.3, subdivision (c)(3), provides only one mechanism for a judge to contest a statement of disqualification: "the judge may file a written *verified* answer admitting or denying any or all of the allegations contained in the [] statement and setting forth any additional facts material or relevant to the question of disqualification" (emphasis added).

Judge Di Figlia was well aware of this requirement. Border wrote him after his recusal and asked him to file a verified answer before the 10-day period expired. (16 AA 4509A-4509B.) He declined to do so. Accordingly, he is deemed to have consented to all the facts in the statement of disqualification, *including the fact of his disqualification*. (See Code of Civ.

Proc., § 170.3, subd. (c)(4); *Urias v. Harris Farms, Inc.*, *supra*, 234 Cal.App.3d at pp. 421, 424.)

If Judge Di Figlia had filed a verified answer, the matter would have been referred to another judge for decision, and the City would have had the opportunity to develop a more complete record, to file further written arguments, and to participate in a hearing set by the new judge. (See Code Civ. Proc., § 170.3, subd. (c)(6).) Instead, Judge Ikola decided the issue of disqualification based on an incomplete record. This is not the procedure contemplated by the Code.

Judge Di Figlia resolved the issue of disqualification when he failed to file a verified answer within 10 days, as prescribed by statute. He is therefore deemed to have consented to his disqualification, and he is disqualified.

B. Aside from his failure to file a verified answer, Judge Di Figlia was disqualified because the facts demonstrate an appearance of partiality.

1. The Commission on Judicial Performance's reprimand of Judge Di Figlia conclusively demonstrates an appearance of partiality.

If this court finds that Judge Di Figlia was not *deemed* disqualified based on the uncontested facts in the City's statement of disqualification, this court should nonetheless conclude that he was disqualified because the facts demonstrate that a reasonable person might doubt Judge Di Figlia's impartiality.

A judge is disqualified when "a person aware of the facts might reasonably entertain a doubt that the judge would be able to be impartial."

(Code Civ. Proc., 170.1, subd. (a)(6)(C).) This includes situations involving a judge's "[b]ias or prejudice towards a lawyer in the proceeding." (*Ibid.*)

Appearance of partiality is measured by an objective test, which considers how the "'average person on the street'" would view the facts. (See, e.g., *United Farm Workers of America v. Superior Court* (1985) 170 Cal.App.3d 97, 104.) A party seeking disqualification need not show actual bias; section 170.1 "provides for disqualification whenever a judge's impartiality might reasonably be questioned." (*Id.* at p. 103.)

In this case, the appearance of partiality is unmistakable. By Judge Di Figlia's own admission, the Commission on Judicial Performance has already ruled that the relationship between Judge Di Figlia and Bartolotta involved gift-giving that "gave the appearance of impropriety." (RT 3692.) Because the Commission's reprimand was private, and because Judge Di Figlia failed to provide specific information about his relationship with Bartolotta, we cannot know the full extent of their relationship. But the issuance of a private reprimand is a very serious matter, which the Commission presumably would not undertake lightly. The fact that the Commission studied the matter and found an appearance of impropriety leaves little doubt that "the average person on the street," once apprised of the facts, would agree.

It makes no difference that the reprimand occurred over seven years before Bartolotta associated into this case. Any reasonable litigant would want to know that the judge presiding over his or her case was admonished at one time for an improper relationship with opposing counsel, no matter how long ago the improprieties occurred. (*Cf. Sincavage v. Superior Court* (1996) 42 Cal.App.4th 224, 230-232 [judge disqualified under section 170.1(a)(6)(C) on the ground she was prosecutor in a related matter *14 years prior*, even though she could not remember handling the prior matter].)

Even without the Commission's reprimand, the gift-giving relationship would have created an appearance of partiality. California courts have found that even very minor gifts from an attorney can create an appearance of partiality if the judge hears matters involving that attorney without disclosing the gifts and obtaining a written waiver of disqualification.

For example, in *Adams v. Commission on Judicial Performance* (1995) 10 Cal.4th 866, the Supreme Court applied the "average person on the street" test and concluded that Judge Dennis Adams violated section 170.1(a)(6) by hearing cases involving attorneys and law firms from whom he had accepted various gifts, without disclosing the gift-giving relationship and obtaining a waiver. (*Id.* at pp. 903-906.) The court found that Judge Adams' acceptance of the use of an attorney's condominium for a weekend disqualified him from hearing further cases involving the attorney or his firm. (*Id.* at p. 904.) As to another attorney, the Court found that Judge Adams failed to disclose that he: (1) developed a personal relationship with an attorney and collaborated on a novel with him; (2) accepted a dinner paid for by the attorney; and (3) accepted the loan of a laptop computer he used to work on the novel. (*Ibid*.)

The *Adams* Court stated that "a judge's acceptance of gifts from those whose interests appear before the court *bears an obvious appearance of impropriety*, '"*is inherently wrong*,"' and '"*has a subtle, corruptive effect, no matter how much a particular judge may feel that he is above improper influence*."'" (*Adams*, *supra*, 10 Cal.4th at p. 879, emphasis added.) Similarly, Judge Di Figlia created "an obvious appearance of impropriety" by accepting gifts from Bartolotta and continuing to hear cases involving Bartolotta without disclosing the gifts (and any other information that may have led to the Commission's reprimand) and obtaining a written waiver.

Finally, the fact that the Commission's reprimand was private does not immunize Judge Di Figlia from his duty to disclose information that would

otherwise be relevant. To the contrary, Judge Di Figlia's failure to disclose the facts surrounding the private reprimand only raises further questions about his impartiality. While disclosure itself might ameliorate any appearance of impropriety, hiding the reprimand can only, in retrospect, heighten a litigant's concern once the facts come to light. If Judge Di Figlia wished not to disclose the private reprimand and surrounding facts, he should have recused himself – *before* hearing and ruling on disputed matters.

The bottom line is that the average person on the street, if informed that a judge (1) had received gifts from an attorney, (2) was censured by an official regulatory body for an appearance of impropriety involving that attorney, and (3) continued to hear cases involving that same attorney without disclosing the gifts or the official reprimand, would reasonably doubt that judge's ability to be impartial. Accordingly, Judge Di Figlia was disqualified within the meaning of section 170.1(a)(6)(C).

2. Judge Di Figlia's continuing relationship with Bartolotta, and his dating relationship with Bartolotta's secretary, exacerbate the appearance of partiality.

The relationship between Judge Di Figlia and Bartolotta did not end after the reprimand from the Commission on Judicial Performance. By Judge Di Figlia's own admission, the two continued to play golf together, Judge Di Figlia attended a Christmas Eve party at Bartolotta's home, and they meet occasionally for drinks "to find out what's going on." (RT 3694, 3700.).

Judge Di Figlia also disclosed that he had a close relationship with Bartolotta's secretary for many years, that he had "friend dated" her since 1983, that he gave her a pair of diamond earrings, and that *he took her to a*

Christmas party during the trial in this case, while Bartolotta was presenting Border's case-in-chief. (RT 3695, 3699; see also 17 AA 4734 [invitation to Christmas party attended by Judge Di Figlia and Bartolotta's secretary, dated December 2, 2000].)

The California Code of Judicial Ethics Canon 4D(6)(d) allows a judge to engage in "ordinary social hospitality" with members of the bar, but it cautions that "a judge should carefully weigh acceptance of such hospitality to avoid any appearance of bias." Similarly, Canon 2B warns that a judge should not "convey or permit others to convey the impression that any individual is in a special position to influence the judge."

The California Judicial Conduct Handbook squarely addresses the situation in which a judge is dating an employee of an attorney who appears before the judge, and makes clear that the judge must disclose the relationship:

> The judge who is dating has a number of difficult problems, including disclosure, disqualification, gifts, and limits as to whom it is appropriate to date. Here, we will deal only with issues of disqualification and disclosure. The issue can come up regarding relationships with witnesses, parties, attorneys, members of the attorneys' firms, *employees in the firms*, and so forth.
>
> Every date need not generate disqualification. It is a question of the degree of the relationship. Has the relationship moved from that of an "acquaintance" into that of a person who is within the inner circle of the judge's intimate friends? However, *any dating relationship would necessarily require disclosure for a reasonable period of time following the "date."*
>
> . . .
>
> *Problems occur in regard to dating relationships when the person the judge is dating is involved in the case pending before the court in some capacity, and the facts are not disclosed. In such a situation, a headline is sure to result, and the explanation for failing to disclose will sound preposterous.*

(Rothman, California Judicial Conduct Handbook (1999) pp. 202-203, § 7.50 (emphasis added).)

Without question, Judge Di Figlia should have disclosed his dating of Bartolotta's secretary when Bartolotta first became involved in the case. (See exh. 43, pp. 2389, 2438 [statements of Judge Ikola that information should have been disclosed].) But Judge Di Figlia disclosed this information only after the trial was complete and the City had directly inquired about the relationship. This failure to disclose, combined with the prior gift-giving, the reprimand by the Commission on Judicial Performance, the failure to disclose both the gifts and the reprimand, and the on-going relationship between Judge Di Figlia and Bartolotta, all combine to "convey the impression that [Bartolotta] is in a special position to influence the judge." (Cal. Code of Jud. Ethics, Canon 2B.) Under these circumstances, any reasonable person would conclude there was an appearance of partiality.

3. Judge Ikola wrongly resolved all doubts against the appearance of partiality.

In denying the City's motion to vacate Judge Di Figlia's rulings, Judge Ikola evaluated the appearance of partiality created by the above facts through the eyes of a person who assumes that judges, lawyers, and secretaries virtually always act ethically:

> The Court has concluded that a reasonable person, aware of all these facts, and I emphasize all of these facts together, I should add, *with facts concerning the respective parties' recognition of their professional responsibilities and obligations* . . . would not entertain that doubt.

(RT 3791.)

> [T]he Court just simply is not going to assume that a reasonable person in the community will assume the worst to be true of every judge who knows every lawyer, or that the worst will be true of a secretary who has worked in a law firm for some 23 years . . . [¶] . . . *[B]ased on my perception of the legal community, the professional obligations that virtually all the legal community observe*, a reasonable person, knowing all of those facts, I think, would very much more likely conclude that there would be no communication between [Bartolotta's secretary] and Mr. Bartolotta concerning the case in which he's in trial.

(RT 3792-3793.) In other words, the court reasoned there was no appearance of partiality because anyone who understands the judicial system would give judges, lawyers, and secretaries the benefit of the doubt when it comes to questions about ethical breaches.

If this were the standard, establishing an appearance of partiality would be nearly impossible. A person with unhesitating faith in the judiciary would always assume an innocent explanation for even the most suspicious circumstances. Judge Ikola's confidence in the public perception of the judiciary is admirable, but the unfortunate reality is that "the average person on the street" does not treat judges, or any public officials, with such unwaivering trust. This is precisely why courts must carefully guard against even the *appearance* of bias or prejudice.

Stated differently, Judge Ikola's order here suggests a standard requiring proof of actual bias, rather than proof of an appearance of bias. But this standard has been rejected by the Legislature. In enacting Code of Civil Procedure section 170.1, the Legislature expressly stated its intent to overrule former law under which disqualification required proof of actual bias. (See 15 AA 4400, 4402.) The Legislature stated "Existing law has been interpreted by the California Supreme Court to require that a judge be biased in fact

before he can be disqualified. [¶] This bill [subsequently numbered as section 170.1, *et seq*.] would provide for the disqualification of a judge whenever his impartiality might reasonably be questioned because of an *appearance* of bias or prejudice. The reason for the change is that it is almost impossible to prove bias in the absence of an admission by the judge, and that *the cause of justice is not furthered by having a judge who is reasonably thought to be biased or prejudiced hear a case.*" (15 AA 4402, emphases added).

Under the objective test, properly applied, there can be no doubt that an appearance of partiality existed in this case. Given the numerous facts that Judge Di Figlia failed to disclose about his relationship with Bartolotta, it strains credulity to say that the average person on the street would simply assume the best. At the least, a reasonable person would have doubts about Judge Di Figlia's ability to remain impartial after Bartolotta associated into the case.

C. All the rulings Judge Di Figlia made after Bartolotta associated into the case are voidable.

Judge Di Figlia's disqualification dates back to the time when grounds for disqualification arose, not when the City discovered and complained about them. (See *Adams v. Commission on Judicial Performance*, *supra*, 10 Cal.4th at p. 904 [a judge who had accepted a write-off of legal fees by a law firm was disqualified with respect to any matter involving that firm "*as of the date of the write-off*"' and, where judge accepted a "rain check" dinner from another lawyer and borrowed the lawyer's laptop computer, the judge "*thereafter* was disqualified with respect to any matter involving [the lawyer] or his law firm" (emphasis added)].) Thus, when Bartolotta associated into this case, Judge Di Figlia was disqualified at that time.

Because Judge Di Figlia was disqualified when Bartolotta entered the case, Judge Di Figlia had no further power to act and his rulings after that point are voidable. (See Code Civ. Proc., § 170.4, subd. (d) ["a disqualified judge shall have no power to act in any proceeding after his or her disqualification . . . ."]; *Urias v. Harris Farms, Inc.*, *supra*, 234 Cal.App.3d at p. 426 ["Because the summary judgment was rendered by a disqualified judge, the judgment was voidable at the plaintiff's objection"]; see also 15 AA 4421 [Assembly Committee on Judiciary's analysis of Senate Bill No. 1633, subsequently enacted as Code of Civil Procedure sections 170.1 et seq., stating that "*if the grounds for disqualification are found to exist, the acts of a disqualified judge in the case are void whenever brought into question*" (emphasis added)].)

In the previous writ proceedings on this issue, this court issued an order inviting the parties to comment on whether the validity of Judge Di Figlia's rulings is affected by Code of Civil Procedure sections 170.3, subdivision (b)(4), and 170.4, subdivision (c)(1). (26 AA 5398-5409.) As we explained in our response to that order (see 20 AA 5418-5419), both statutes are inapplicable here.

Section 170.3, subdivision (b)(4), provides that a party must show good cause to set aside rulings that a judge made *before* grounds for disqualification arose or were first discovered:

> In the event that grounds for disqualification are first learned of or arise after the judge has made one or more rulings in a proceeding but before the judge has completed judicial action in a proceeding, the judge shall, unless the disqualification be waived, disqualify himself or herself, but in the absence of good cause the rulings he or she has made *up to that time* shall not be set aside by the judge who replaces the disqualified judge.

The statute speaks to those situations in which a judge is presiding over a case without any knowledge of potential grounds for disqualification. In

such cases, there would be no reason to question the impartiality of the judge's rulings. Accordingly, the Legislature provided that rulings made under these circumstances cannot be set aside absent a showing of good cause, even if grounds for disqualification arise or are discovered later in the case. Here, the grounds for disqualifying Judge Di Figlia arose and were first learned of (by Judge Di Figlia and Bartolotta) when Bartolotta entered the case, *before* Judge Di Figlia ruled. Border nonetheless argued that the statute applies and requires the City to establish "good cause" to set aside the rulings Judge Di Figlia made after Bartolotta entered the case. (20 AA 5404-5406.)

Border's interpretation ignores the plain language of the statute, and would permit a judge who is disqualified – and who is aware of the grounds for disqualification – to keep those facts secret and make presumptively binding rulings until the adversely affected party discovers the grounds for disqualification. The aggrieved party would then be saddled with the burden of showing good cause before the judge's rulings could be set aside. This reading of the statute would be manifestly unfair to the aggrieved party, and would undermine public confidence in the judiciary.

Similarly, the other statute this court identified in its order, section 170.4, subdivision (c)(1), does not validate the rulings Judge Di Figlia made during the period of his disqualification. Section 170.4 is entitled "Powers of disqualified judges." It enumerates certain limited actions that a disqualified judge can perform, notwithstanding his or her disqualification. Among these is the conditional power to proceed with a trial or hearing if a party files a statement of disqualification in the middle of a trial or hearing:

> If a statement of disqualification is filed after a trial or hearing has commenced . . . the judge whose impartiality has been questioned may order the trial or hearing to continue, notwithstanding the filing of the statement of disqualification. The issue of disqualification shall be referred to another judge

> for decision . . . and if it is decided that the judge is disqualified, all orders and rulings of the judge found to be disqualified made after the filing of the statement shall be vacated.

(Code Civ. Proc., § 170.4, subd. (c)(1).)

On its face, section 170.4, subdivision (c)(1), applies only when a party files a disqualification statement during a trial or hearing. It prevents a party from using a statement of disqualification merely to disrupt or delay a trial or hearing that is already under way. If not for this subdivision, a trial court would have no authority to proceed with a trial hearing once a party files a statement of disqualification, and the court would be forced to bring the proceeding to an end. (See Code Civ. Proc., § 170.4, subd. (d) ["Except as provided in this section, a disqualified judge shall have no power to act in any proceeding . . . after the filing of a statement of disqualification . . ."].)

Section 170.4, subdivision (c)(1), eliminates this tactical ploy by allowing the judge to proceed conditionally with the trial or hearing despite the filing of a disqualification statement. But the judge can proceed only on the understanding that the rulings the judge makes after that time will be vacated if the judge is later found to be disqualified. (See 15 AA 4410 [Legislative Analysis of Senate Bill No. 1633, which was subsequently enacted as Code of Civil Procedure sections 170.1 et seq., stating that "approval of the challenge at the subsequent hearing would require a new trial on the original matter"].)

Here, the City filed its disqualification statement after the jury's verdict, when the trial was already over and no hearing was underway. Thus, the statute is inapplicable and the general rules otherwise applicable to the rulings of a disqualified judge govern: rulings made after the grounds for disqualification arose are voidable, except that rulings made before the judge or the parties *discovered* the grounds for disqualification will be vacated only on a showing of good cause. (Code Civ. Proc., § 170.3, subd. (b)(4).)

In sum, this case does not implicate any of the statutory exceptions to the general rule that "a disqualified judge shall have no power to act in any proceeding after his or her disqualification . . . ." (Code Civ. Proc., § 170.4, subd. (d).) The analysis here is simple. Judge Di Figlia was disqualified when Bartolotta associated into the case, and he had no valid authority to act after that point. Accordingly, all the rulings he made after that point are voidable and should be set aside. (Cf. *Urias v. Harris Farms, Inc.*, *supra*, 234 Cal.App.3d at p. 423 [where section 170.3, subdivision (b)(4) was inapplicable by its terms, the general rule of voidability applied, and the rulings of a disqualified judge were set aside].)

CONCLUSION

For the foregoing reasons, this court should reverse with directions to enter judgment for the City on Border's inverse condemnation claims. Alternately, this court should reverse with directions to hold a new trial on all issues.

Dated: June 24, 2002

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 14(c)(1).)

The text of this brief consists of 27, 994 words as counted by the Corel WordPerfect version 9 word-processing program used to generate the brief.

Dated: December 27, 2006

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