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February 9, 2012

The Honorable Tani Gorre Cantil-Sakauye
Chief Justice
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

Re: Request for Depublication re *Avenida San Juan Partnership v. City of San Clemente* (Dec. 14, 2011, G043479, G043534) __ Cal.App.4th __

Dear Chief Justice and Associate Justices:

Under Rules of Court 8.1125, amici the League of California Cities ("LCC") and the California State Association of Counties ("CSAC") respectfully request depublication of part of the opinion in *Avenida San Juan Partnership v. City of San Clemente* (Dec. 14, 2011, G043479, G043534) __ Cal.App.4th __ ("Opinion" or "Op.") finding that the regulation in question, although invalid, could nonetheless effect a regulatory taking. The Opinion affirms the decision of the trial court that (1) the City's downzoning of the property was irrational spot zoning; (2) if the City declines to rescind the downzoning, the City is liable for a regulatory taking; and (3) the spot zoning and takings claims were not barred by the statute of limitations. The LCC and CSAC request depublication only of that part of the Opinion referring to regulatory takings.

The Court of Appeal's finding that the City could be liable for a regulatory taking—where the court also concludes that the regulation is invalid—is at odds with well-established precedent. In its Opinion, the court held that an *invalid* government regulation can result in a regulatory taking. The Opinion contradicts *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, which is directly on point. In *Lingle*, a unanimous United States Supreme Court held that the takings inquiry necessarily *assumes* that the regulation at issue is valid. *Id.* at 543. The Supreme Court ruled that the regulatory takings inquiry focuses on whether a *valid* regulation so severely diminishes the value of property that it becomes the functional equivalent of a direct physical appropriation. *Id.* at 539. Under *Lingle*, the exclusive remedy for a regulation that exceeds the government's power is invalidation; compensation for a taking is precluded. *Id.* at 543.

Here, the Court of Appeal erroneously ruled that a property owner's remedy for an invalid regulation is *either* the agency's rescission of the invalid regulation *or* an award of monetary compensation under the regulatory takings doctrine. Once the court has found the regulation to be invalid, however, the remedy of compensation for a regulatory taking is no longer available. *Id.*

Interest of Amici

The LCC is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

CSAC is a non-profit corporation with all of the state's 58 counties as members. CSAC sponsors a Litigation Coordination Program, administered by the County Counsels' Association of California and overseen by CSAC's Litigation Overview Committee. The Litigation Overview Committee, comprised of county counsels throughout the state, monitors litigation of concern to counties statewide. The Committee has determined that this case raises issues affecting all counties.

If the regulatory takings part of the Opinion were to remain precedent, the members of the LCC and CSAC and other government agencies in California could be liable for compensation to property owners in any case where a court finds that regulation imposed on the property is invalid. The ruling could shift vital public funds to property owners and have a chilling effect on government regulation necessary to plan communities, protect the environment, preserve affordable housing, and protect public health and safety. The Opinion would increase litigation that would benefit neither property owners nor regulatory agencies, and cause public agencies to incur significant costs to defend regulatory takings claims that by law should be dismissed immediately upon a finding that the regulation is invalid.

Moreover, the Court of Appeal's ruling will expose public agencies to new and potentially significant costs for the property owner's attorneys' and experts' fees and court costs. Under *Lingle*, the instant case should have ended following the trial court's determination that the regulation was invalid. Yet, after finding the regulation invalid,

the trial court proceeded to hold a trial on the agency's liability for a taking. The trial court found a taking and awarded not only compensation for the lost value of the property, but also attorneys' fees to the property owner.[1] The Court of Appeal affirmed the finding of a taking and the award of fees. Accordingly, if the Opinion remains precedent, the City ultimately will be liable for attorneys' fees for an unnecessary regulatory takings trial, even if it elects to rescind the invalid regulation. The regulatory takings part of the Opinion should, therefore, be depublished.[2]

Factual and Procedural Background

In 1980, Avenida San Juan Partnership bought 2.85 acres of vacant land in a residential neighborhood in the City of San Clemente. At the time, the property was zoned for six houses per acre. In the early 1980's, Avenida applied to subdivide the property for development of four houses. Op. at 3. In 1983, following the City's approval of Avenida's tentative map application, a landslide occurred in a nearby canyon. The slide prompted Avenida's neighbors to request that the City rezone Avenida's property as open space. The City declined to change the zoning. For reasons not stated in the Opinion, Avenida did not proceed with its development. *Id.* at 3.

In 1993, the City amended its general plan to create RVL zoning and impose it on Avenida's property and several other properties. RVL zoning allows one house per 20 acres. In 1996, the City adopted an ordinance imposing the RVL zoning on Avenida's property to conform to the 1993 amended general plan. All property surrounding Avenida's lot, however, remained zoned RL, which allows four houses per acre. *Id.* at 4.

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[1] Code of Civil Procedure section 1036 requires an award of attorneys' and experts' fees and court costs to prevailing property owners in inverse condemnation cases. While mandamus actions challenging the validity of regulation typically involve only filing fees and perhaps the cost to prepare an administrative record, the costs incurred by a plaintiff in an inverse condemnation action, which may include deposition and trial transcripts, jury fees, exhibit costs, etc., could far exceed the costs of a mandamus proceeding.

[2] Neither the parties nor the lower courts addressed *Lingle* or the argument in this letter. A court may consider an issue raised on appeal by amici, however, if "the issue posed is purely a question of law based on undisputed facts, and involves important questions of public policy." *Fisher v. City of Berkeley* (1984) 27 Cal.3d 644, 654 & n.3; *Lavie v. Proctor & Gamble Co.* (2003) 105 Cal. App. 4th 496, 503.

In 2006 Avenida applied again for a tentative map for four houses, accompanied by a request for a general plan amendment and a rezoning of the property to RL. In 2007, the City declined to rezone the property and denied the application on the ground that it did not conform to the applicable zoning and general plan. *Id.* at 4-5.

Avenida brought suit in state court, requesting a writ of mandate to require the City to rezone the property to the same zoning as surrounding properties and damages for a regulatory taking. *Id.* at 5. In September 2009, the trial court found that the City's downzoning of the property in 1996 was "arbitrary and capricious" because the record showed no rational basis for zoning the property for one house for each 20 acres while the surrounding properties were zoned for a higher density. *Id.* The court issued a writ of mandate declaring that the City's action denying Avenida's land use application was "null and void" and ordering the City to adopt a resolution vacating its earlier resolution denying Avenida's application. *Id.*

In December 2009, the trial court held the regulatory takings phase of the trial. It found that the City's downzoning of the property and denial of the 2006 application for rezoning was irrational, in bad faith, and a pretext to keep the property open space. *Id.* at 7-8. The court concluded that the City's action effected a regulatory taking under *Penn Central Transp. Co. v. City of New York* (1978) 438 U.S. 104. *Id.* at 8. In addition to applying the three-factor test of *Penn Central*—(1) economic impact, (2) interference with investment-backed expectations, and (3) character of the government action—the court invoked several other factors as a basis for his ruling, including a finding that the rezoning was "arbitrary," Avenida was treated unequally, the City's action was motivated by a desire to please Avenida's neighbors by keeping the property open space, and the City had a bias against development of the property. *Id.* at 8-9.

The trial court awarded damages of $1.3 million for the taking. *Id.* at 9. Following the City's motion for a new trial, the court concluded that under *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, the judgment should be modified to give the City the choice of either rescinding the disapproval of Avenida's application or paying $1.3 million in damages plus interest, attorneys' fees, and costs. Op. at 10. Both parties appealed the judgment: the City on liability and the amount of damages; Avenida on the amount of damages.

The Court of Appeal Opinion

The Court of Appeal agreed that the City's 1993 general plan amendment, 1996 downzoning, and 2007 disapproval of Avenida's rezoning request and development application were "arbitrary and capricious" and "irrational discrimination," *id.* at 13, 19, constituting "blatant spot zoning." *Id.* at 16. The City's rationale for downzoning the property, the court held, was not supported by the evidence. *Id.* at 15. The court affirmed the judgment granting a writ requiring the City to either rescind the downzoning, or pay damages to Avenida for a taking. *Id.* at 32.

The Court of Appeal affirmed the trial court's judgment finding a taking under the three *Penn Central* factors. *Id.* at 19. The appellate court found that the downzoning interfered with Avenida's investment-backed expectations. *Id.* The court also applied the character factor of *Penn Central* to find that the City's regulation was "irrational" and "appears to have been largely motivated to keep the subject parcel open space." *Id.*

With regard to the economic impact of the regulatory action, the appellate court found that the "economic effect" of the downzoning was "dramatic," relying on the trial court's conclusion that after the downzoning, the property was worthless. *Id.* The court affirmed the trial court's findings as to the economic impact of the downzoning on the property, despite the Court of Appeal's determination that the trial court had no evidence on which to base its conclusion that the property had no value as zoned RVL, and stating that the "trial court erred in failing to account for the property's value with the one house the RVL zoning allows," *id.* at 28, opining that the property "must still have some value even if the current land use restrictions remain in place." *Id.* at 30.[3] The court also

[3] The Court of Appeal rejected the City's evidence that the property had a value of $825,000 zoned RVL, which the court characterized as an "assumption," merely because the evidence was "proffered by the City's own appraiser" and because the trial judge "impliedly rejected it." *Id.* at 20. The appellate opinion does not indicate that there was any other evidence in the record of the value of the property under the RVL zoning, the basis for the trial court's rejection of the only evidence before him on this issue, or the rationale for rejecting evidence of the value of real estate merely because it was presented by an appraiser retained by the party offering the evidence. Nor does the opinion explain how the City could have presented evidence on this issue, if not through an expert appraiser. *See* Evid. Code § 813 (limiting admissibility of evidence of value of real property to testimony of qualified witnesses or owner).

invoked what it termed the "'minor' *Penn Central* factors," finding that the City's actions "singled out [the parcel] for unequal treatment." *Id.* at 19.

The Court of Appeal agreed with Avenida that the trial court's conclusion that the value of the property under the RL zoning, $1.3 million, was too low. *Id.* at 27. The court remanded to the trial court to redetermine the amount of damages, but also ordered that the finding that the City is liable for a *Penn Central* taking should *not* be revisited on remand. *Id.*[4]

The Court of Appeal also distinguished a case cited by the City, *Landgate, Inc. v. California Coastal Com.* (1998) 17 Cal.4th 1006, on the ground that *Landgate* "merely stands for the proposition that a *reasonable delay* in the processing of a permit is not a compensable taking." Op. at 20 (emphasis original). The court asserted that "[t]his is not a delay case, and there is no claim that the time required by the permit process itself constituted a taking. Therefore, *Landgate* has no application here." *Id.*

The Court of Appeal Erred in Finding that an Invalid Government Regulation Can Effect a Regulatory Taking

For purposes of this request for depublication, amici do not question the Court of Appeal's determinations that the City's decisions to downzone the property, deny upzoning, and deny the development application were irrational spot zoning and were arbitrary and capricious. Nor do amici question the remedy of invalidation of the City's zoning actions and issuance of a mandate to the City to rezone the property consistent with the surrounding zoning. Rather, amici contend that the Court of Appeal committed reversible error in finding the City liable for a regulatory taking for an action that the court concluded was illegitimate and invalid. The unanimous ruling of the United States Supreme Court in *Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528 forbids this result. Because the Court of Appeal did not follow *Lingle*, or even cite this controlling case, that

[4] The Court of Appeal's ruling that the downzoning effected a taking is open to serious question. The court failed to explain why, if the value of the property before and after the City's action is uncertain until a new trial, it did not also remand for a new trial on liability for a taking. Whether the *Penn Central* factors—economic impact and interference with investment-backed expectations—point to a taking depends almost entirely on the value of the property before and after the government regulatory action. *See Keystone Bituminous Coal Ass'n v. DeBenedictis* (1987) 480 U.S. 470, 492-93.

part of the opinion of the Court of Appeal concerning the regulatory taking should be depublished.

The *Lingle* Court commenced its analysis of a commercial rent control regulation challenged as a taking by confirming the theoretical underpinnings of the regulatory takings doctrine. The Court held that all tests for a regulatory taking "share a common touchstone. Each aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." 544 U.S. at 539. At issue in *Lingle* was the means-ends standard for liability for a regulatory taking the Court had adopted 25 years earlier in *Agins v. City of Tiburon* (1980) 447 U.S. 255. In *Agins*, the Supreme Court held that a regulation could effect a taking if it "does not substantially advance legitimate state interests," regardless of the economic impact of the regulation on the property. 447 U.S. at 260. The "substantially advance" test was generally understood to allow courts to inquire into the rationale for regulation, striking down regulations under the regulatory takings doctrine where the court found that the regulation was not wise, efficacious, or in good faith.

In *Lingle*, in a 9-0 decision, the Supreme Court overruled *Agins* insofar as it allowed courts to inquire into the rationale or efficacy of regulation under the takings clause. A unanimous court found that the "substantially advances" test of *Agins* "prescribes an inquiry in the nature of a due process . . . ." 544 U.S. at 540. The Court ruled: "Today we correct course. We hold that the 'substantially advances' formula is not a valid takings test, and indeed conclude that it has no proper place in our takings jurisprudence." 544 U.S. at 548. The Court went on to state: "[T]his test does not help to identify those regulations whose effects are functionally comparable to government appropriation or invasion of private property . . . ." *Id.* at 542. The Court emphatically confirmed that invalid regulation may *not* be deemed a regulatory taking:

> Instead of addressing a challenged regulation's effect on private property, the "substantially advances" inquiry probes the regulation's underlying validity. But such an inquiry is logically prior to and distinct from the question whether a regulation effects a taking, for the Takings Clause presupposes that the government has acted in pursuit of a valid public purpose. The Clause expressly requires compensation where government takes private property "*for public use*." It does not bar government from interfering with property rights, but rather requires compensation "in the event of *otherwise proper interference*, amounting to a taking." *First English*

> *Evangelical Lutheran Church* [*of Glendale v. County of Los Angeles* (1987)] 482 U.S. [304,] 315 (emphasis added). Conversely, if a government action is found to be impermissible—for instance because it fails to meet the "public use" requirement or is so arbitrary as to violate due process—that is the end of the inquiry. No amount of compensation can authorize such action.

544 U.S. at 543.

In the instant case, the Court of Appeal affirmed the trial court's judgment that the City's actions were irrational, arbitrary, capricious, in bad faith, motivated by a desire to keep the property in open space, and hence invalid. Op. at 12-13. Under *Lingle*, that should have been "the end of the inquiry." 544 U.S. at 543. Where the challenged regulation is invalid, it cannot form the basis of a regulatory takings claim, and Avenida's regulatory takings claim should have been dismissed.[5] Insofar as the Court of Appeal understood *Hensler* to allow compensation for a taking of property based on a finding that the government regulation was not legitimate, that holding has been decisively overruled by *Lingle*.[6]

The danger presented by the Court of Appeal's opinion is that any court ruling that a public agency's regulation of property is erroneous or otherwise invalid, and where the agency does not rescind the regulation, could result in a requirement that the agency pay compensation, if not for a permanent taking, at least for a temporary taking during the

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[5] Spot zoning is a violation of equal protection under the Fourteenth Amendment to the United States Constitution. *Ross v. City of Yorba Linda* (1991) 1 Cal.App.4th 954, 962. The exclusive remedy for a violation of equal protection is an injunction preventing the government action. *See, e.g., Bonner v. Santa Ana* (1996) 45 Cal.App.4th 1465, 1472. The remedy for a regulatory taking is monetary damages. *First English*, 482 U.S. at 314.

[6] California Courts are bound by *Lingle*. The California Supreme Court construes California's takings clause in Article I, section 19 of the California Constitution "congruently" with the United States Supreme Court's construction of the takings clause of the Fifth Amendment to the United Stated Constitution. *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 664, citing *Santa Monica Beach, Ltd. v. Superior Court* (1999) 19 Cal.4th 952, 957, 962-975 and *Hensler v. City of Glendale*, *supra*, 8 Cal.4th at 9, fn. 4.

time required for litigation of a petition for a writ of mandate. Moreover, even if the agency is offered a choice of rescinding the invalid regulation or retaining the regulation and paying just compensation for a taking, in every case where government regulation is found to be mistakenly imposed, the agency could be forced to bear the expense of discovery and trial on the takings claim and the owner's attorneys' and experts' fees if the invalid regulation is found to effect a taking. This result would threaten to drain public treasuries and chill legitimate government regulation. Government mistakes, regardless of whether they impose severe economic burdens on property functionally equivalent to an eminent domain, should not be converted into takings claims; invalidation of the improper regulation is the exclusive remedy. The owner should not be entitled to recover attorneys' and experts' fees for an unnecessary regulatory takings trial in cases where the court finds government regulation to be invalid.

As this Court recognized in *Landgate*, "an essential prerequisite to the assertion of a takings claim is 'a final and authoritative determination of the type and intensity of development legally permitted on the subject property.'" 17 Cal.4th at 1027, citing *MacDonald, Sommer & Frates v. Yolo County* (1986) 477 U.S. 340, 348. "The imposition of a development condition is not a constitutional violation merely because that condition is subsequently shown to have been erroneously imposed." *Landgate*, 17 Cal.4th at 1028. Based on these premises, the *Landgate* Court squarely held that a court's determination as to whether a regulation is valid is "a normal part of the development process, and the fact that a developer must resort to such a determination does not constitute a per se temporary taking." *Id.* at 1030; *see also id.* at 1031 ("[b]ut to conclude that such litigation is a normal part of the regulatory process when the public agency prevails but a per se temporary taking when the public agency loses has no basis in either logic or Supreme Court precedent."). Accordingly, under *Lingle* and *Landgate*, the Court of Appeal's finding that the City's regulatory actions were not permissible requires dismissal of any claim for a regulatory taking.

The Court of Appeal rejected the application of *Landgate* to this case by misinterpreting the holding of the California Supreme Court in that case. The court opined that *Landgate* stands for the proposition that reasonable government delay in processing a permit application does not constitute a taking. Op. at 20. To the contrary, *Landgate* holds that an invalid government regulation simply does not give rise to a temporary taking during the time required to obtain a court determination that the regulation is invalid. Insofar as *Landgate* limited that rule to cases where the government acted in good faith, *see Landgate*, 17 Cal.4th at 1029, that part of *Landgate*'s holding has been overruled by *Lingle*, which eliminated any consideration of the legitimacy of governmental purpose or motivation from the takings inquiry.

Conclusion

The California Supreme Court should decertify those parts of the Opinion that pertain to a regulatory taking.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP
Andrew W. Schwartz

Attorneys for League of California Cities
and California State Association of Counties

cc: See attached service list

PROOF OF SERVICE

Avenida San Juan Partnership v. City of San Clemente, et al.
California Supreme Court Case No. S199533
4 Civil Nos. G043479 and G043534
(OCSC Case No. 30-2008-00101411)

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

On **February 9, 2012**, I served true copies of the following document(s) described as:

REQUEST FOR DEPUBLICATION RE *Avenida San Juan Partnership v. City of San Clemente* (Dec. 14, 2011, G043479, G043534) __ Cal.App.4th __

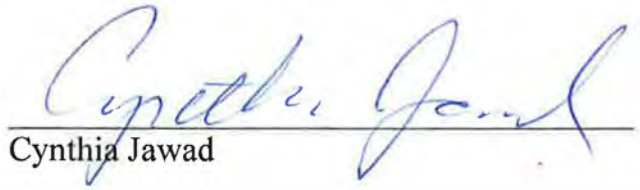
on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Shute, Mihaly & Weinberger LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on **February 9, 2012**, at San Francisco, California.



Cynthia Jawad

SERVICE LIST
Avenida San Juan Partnership v. City of San Clemente, et al.
California Supreme Court Case No. S199533
4 Civil Nos. G043479 and G043534
(OCSC Case No. 30-2008-00101411)

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