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Calistoga City Council
1232 Washington Street
Calistoga, CA 94515
Email: cityhall@ci.calistoga.ca.us

VIA UNITED STATES MAIL AND E-MAIL

Mr. James C. McCann
Calistoga City Manager
1232 Washington Street
Calistoga, CA 94515
Email: jmccann@ci.calistoga.ca.us

Dear Honorable City Council Members and Mr. McCann:

It has come to our attention that, pursuant to the Draft UDP under consideration at the upcoming meeting on Tuesday, the City Council will consider new requirements that “[a]ny large development . . . should include a pedestrian and bicycle bridge across the Napa River” and that “[p]ublic access to and along the river must be provided by all properties bordering the Napa River.” It is our understanding that the proposed requirements do not contemplate the payment of just compensation to property owners subject to them.

Interested members of the public have asked us to provide a comment letter describing the legal impact of these requirements. It is our belief that the requirements could meet with a viable legal challenge. Specifically, the requirements raise serious takings and Mitigation Fee Act issues, among other concerns.

Legal Background

The Fifth Amendment to the United States Constitution provides in relevant part that private property shall not “be taken for public use without just compensation.” Article I, section 19, of the California Constitution similarly provides that private property may be taken only for a “public use” and “only when just compensation” has been paid. These constitutional provisions protect individual property owners from government actions that impact arbitrarily and unevenly on isolated

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individuals. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 49 (1960) (“The Fifth Amendment’s guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”).

In *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987), the Supreme Court determined that an “essential nexus” must exist between a permit condition and the public purpose requiring the condition. In *Nollan*, the California Coastal Commission required the property owner of beach-front property to dedicate a strip of beach as a condition of obtaining permit to rebuild his house. *Id.* at 827-28. The United States Supreme Court held that there must be a nexus between the condition imposed on the use of land and the social evil that would otherwise be caused by the unregulated use of the owner’s property. *Id.* at 837. Without such a connection, a permit condition is an illegal regulatory taking—i.e., “not a valid regulation of land use but ‘an out-and-out plan of extortion.’” *Id.* (citations omitted).

In *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Supreme Court defined how close a “fit” is required between the permit condition and the alleged impact of the proposed development. Even when a nexus exists, there still must be a “degree of connection between the exactions and the projected impact of the proposed development.” *Id.* at 386. There must be rough proportionality—i.e., “some sort of individualized determination that the required dedication is related *both in nature and extent* to the impact of the proposed development.” *Id.* at 391 (emphasis added). Otherwise, the condition will be held unconstitutional as an illegal regulatory taking.

California statutory law also provides protection against regulatory takings. The California Legislature adopted the Mitigation Fee Act to provide protection against unlawful conditions (not just fees) imposed by local government entities. Like *Nollan* and *Dolan*, the statute requires a sufficient connection between a permit condition (such as public access) and the alleged impact of the proposed development. The statute demands that government determine a “reasonable relationship” between the need for and cost of the condition, and the type of development project on which the condition is imposed. Cal. Gov. Code § 66001(a)(4), (b). The “reasonable relationship” standard in Section 66001 mirrors the Supreme Court’s tests in *Nollan* and *Dolan*. *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 866-67 (1996). Under both federal and state law, the burden is on government to demonstrate the required nexus and rough proportionality. *Dolan*, 512 U.S. at 391; Cal. Gov. Code § 66001(a).

The City’s Public Access Requirements Likely Are Unlawful

We are unaware of any attempt by the City to show the necessary nexus between development on the Napa River and the need for public access ways, or pedestrian and bicycle bridges. Unless a

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development specifically can be shown to create the need for these public goods—goods that the entire public enjoys, and therefore should pay for—the City cannot lawfully demand them from property owners.

We trust that the City will take our comments into account as they consider adoption of the subject requirements. If you have any questions, please do not hesitate to contact us.

Sincerely,

A handwritten signature in black ink, appearing to read "P. Beard II", written over a horizontal line.

PAUL J. BEARD II
Attorney