



PACIFIC LEGAL FOUNDATION

November 15, 2013

Ms. Brianna Menke
County of Los Angeles
Department of Regional Planning
320 West Temple Street, Room 1354
Los Angeles, CA 90012

VIA EMAIL: bmeenke@planning.lacounty.gov

Re: Comments on General Plan Update (October 2013 Hillside Management Area (HMA) Ordinance)

Dear Ms. Menke:

This letter addresses proposed policies contained in the October 2013 Draft Hillside Management Area (HMA) Ordinance, for the County's consideration as it updates the General Plan.

Introduction

Pacific Legal Foundation (PLF) is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of monitoring and litigating matters affecting the public interest. For more than forty years, PLF has been litigating in support of property rights. *See, e.g., Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987). Because of its history and experience with regard to issues affecting private property, PLF believes that its perspective may provide you with some valuable insight as you update the County's HMA. We do not advocate any particular policy or law. Instead, our aim is to identify some of the legal implications of certain draft policies contained in the draft ordinance, should they be adopted.

Summary of Law

Our comments primarily concern the potential for some of the proposed policies to infringe constitutionally protected private property rights. The Fifth Amendment to the United States Constitution provides, in relevant part, that private property will not "be taken for

public use without just compensation.” U.S. Const. amend. V; *see also* Cal. Const. art. I, § 19 (private property may be taken only for a “public use” and “only when just compensation” has been paid). The United States Supreme Court has explained that the Takings Clause was designed to ensure fundamental fairness—i.e., “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.” *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

To ensure fairness and protect private property rights, the Takings Clause strictly guards against extortionate conditions, that the government might be inclined to force a property owner seeking a permit to develop or use his/her land to accept. In *Nollan*, 483 U.S. at 837—one of the cases that PLF litigated—the Supreme Court determined that an “essential nexus” must exist between any permit condition and the public purpose allegedly requiring the condition. In *Nollan*, the Coastal Commission required the property owner of beach-front property to dedicate a strip of beach as a condition of obtaining a 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 unlawful taking.

With these basic principles in mind, we urge you to consider the legal implications of some of your proposed policies, as outlined below.

Comments Re: Proposed Issue Summary on Hillside Management Area (HMA)

1. Requirement To Dedicate Land To Open Space

This proposed policy requires applicants for conditional use permits to dedicate part of their land to open space. In Rural Land Use Designation areas the requirement is 70% of

the gross area of a development site. Draft HMA Ordinance § 22.56.215(F)(1). In other areas, the requirement is 25%. Draft HMA Ordinance § 22.56.215(F)(2)(a). In the case of a subdivision, the open space must be given to another entity or the development rights must be permanently extinguished—effectively creating a conservation easement. Draft HMA Ordinance § 22.56.215(F)(5).

This policy raises serious Takings Clause concerns. The policy would condition certain permits on the relinquishment of a right to use the property regardless of the proposal's impact. Under the proposed rule, there is no requirement that the County make an individualized determination that the impact of the project sought to be permitted constitutionally *justifies* such a substantial concession on the part of permit applicants. Absent an individualized showing of an essential nexus and rough proportionality between a project's impact and the need to provide open space and enhance community character, the condition may violate the Takings Clause under *Nollan* and *Dolan*.

If the County wants a property owner to dedicate property, it must first demonstrate that the impact of the proposed project *justifies* the forced dedication. If there is no connection between the project's impact and the dedication requirement then the County must either forgo the requirement or it must pay for the land it takes. U.S. Const. amend. V (prohibiting a taking of private property without "just compensation").

Without such a connection the ownership and management transfer is nothing more than "an out-and-out plan of extortion." *Nollan*, 483 U.S. at 837. The Takings Clause prohibits the County from forcing landowners to bear burdens benefitting the public which, "in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49.

2. Restrictions on Development in Non-HMA Areas

The current proposal applies to land if it is part of a development that includes an HMA. Draft HMA Ordinance § 22.08.080. This means that property that is primarily flat may be taken from landowners as an open space dedication merely because elsewhere in the development something is built on the HMA. This provision does not show a clear connection between the impact of the proposed development and the regulation imposed by the county. Although an exception exists for development that maintains or restores all HMAs in a natural state, the policy still broadly controls many non-HMA areas.

Because the regulation is designed to protect HMAs—and not flatter areas, it is difficult to see the nexus between the harm done in these areas and the required dedication. The policy may violate the Takings Clause, under *Nollan* and *Dolan*. The County has the

burden of establishing how each project that comes before it justifies the uncompensated taking of interests in private property. Specifically, the County must demonstrate, for each project, how the project is *causing* the alleged need for an open space dedication. Here there is no indication that the County will make such a finding. The County's policy of imposing an easement on non-HMA portions of a development—without regard to *Nollan* and *Dolan*—may violate private property rights.

3. Extending the Regulation To Cover Areas Developed at a Low Density

The draft regulation extends the Hillside Management regulations to proposals to develop areas at low densities. Under the current regulations, conditional use permits are only required if the property is developed at a high density. L.A. Cnty. Mun. Code § 22.56.215(A)(2). However, the new proposal removes this distinction and subjects all areas with 25% slopes to the same treatment. Draft HMA Ordinance § 22.08.080.

Similar to the requirements discussed above, the County's proposal risks violating the Takings Clause. This policy raises a concern that the County is not carrying its burden of demonstrating a causal connection between the County's alleged need for hillside preservation and regulation of areas that are developed at a low density. It is not clear that low density development in these areas threatens the HMAs such that an open space dedication is needed.

4. Policy Shift from Preventing Environmental Degradation To Preserving Scenery

Under the draft proposal, the purpose of the ordinance shifts from the prevention of environmental degradation to the provision of community amenities. The old ordinance required conditional use permits if the development was going to cause environmental degradation or the destruction of life and property. L.A. Cnty. Mun. Code § 22.56.215(B)(1). The purpose of the permit was to ensure that development, to the extent possible, maintained existing resources. L.A. Cnty. Mun. Code § 22.56.215(B)(1). The new ordinance shifts away from this responsive focus and instead requires development to "provide[s] open space, and enhance[s] community character." Draft HMA Ordinance § 22.56.215(A)(1).

Further, the regulation requires the applicant to show that the proposal preserves the scenic value of the HMAs to the best extent feasible. Draft HMA Ordinance § 22.56.216(H)(2). Previously the regulation only required applicants to show that a proposal was safe, compatible with natural resources, accessible to services, and creatively designed. L.A. Cnty. Mun. Code § 22.56.215(F)(1). This shift raises concerns that the new regulation is

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not designed to ameliorate the effects of development, but instead to take property from the landowner to provide benefits to existing constituents.

Because the plan will not be approved unless it meets these requirements, the proposal may prevent any development or land use in HMAs. This policy threatens to be a taking of property rights and in fact, may extinguish most development in these areas. To the extent the policy would either deny all economically viable use of private property—or result even in a substantial economic impact—the policy could effect a taking requiring just compensation. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Penn Central Transp. Corp. v. New York City*, 438 U.S. 104, 124 (1978)

We appreciate your consideration of our comments.

Sincerely,



PAUL J. BEARD II
Principal Attorney