ARTICLE:

NO BOUNDARIES: THE EROSION OF PRIVATE PROPERTY RIGHTS BY JUDICIAL DEFERENCE TO REGULATORY OVERREACH

By Karl E. Geier[*]

A fundamental precept of American law is the authority of the government, in the exercise of the police power for the protection of the health, safety, and welfare of the public, to regulate the conduct of individuals in the use and management of their property.[1] In judicial review of legislative decisions, this is embodied in the familiar rule that a regulation will be upheld if rationally related to a legitimate governmental interest or purpose.[2] In the specific area of land use regulation, a governmental decision will be upheld unless "clearly unreasonable, having no substantial relationship to the public health, safety, morals or general welfare."[3] Thus, "as a general matter, so long as a land use restriction or regulation bears a reasonable relationship to the public welfare, the restriction or regulation is constitutionally permissible."[4]

The subjection of "property rights" to regulation for the public good is not debatable. However, the fact that such rights are subject to regulation does not mean that one can ignore "[t]he individual's right to retain the interests and exercise the freedoms at the core of private property ownership."[5] In the language of Justice Holmes in *Pennsylvania Coal Company v. Mahon*, "while property may be regulated to a certain extent, if regulation goes too far, it will be recognized as a taking."[6] Embedded in this is the idea of "property" as the thing that is regulated—i.e., the baseline concept of "property" has to be determined before one can determine what is to be "regulated."[7]

This article outlines a series of recent instances in which the California Supreme Court, and to a lesser degree, the United States Supreme Court, have seemingly adopted a view that bureaucratic objectives or legislative discretion actually *define* what constitutes "property," and have blurred the line between private property within the ownership and control of the owner and the legitimate scope of public regulation. In doing so, the courts have also introduced confusion as to how and what "property" is being regulated, and in the process, given undue attention to the needs of the government without giving due

---

[*]Karl E. Geier is a shareholder with the firm of Miller Starr Regalia and Editor-in-Chief of the firm's 12-volume treatise, *Miller & Starr, California Real Estate 4th*.

consideration to the notion of "property" or the rights that inure to the "owner" of property in the first instance.

This trend, if it may be called one, has emerged despite the Supreme Court's holding in *Lingle v. Chevron U.S.A.*, Inc.,[8] which rejected an earlier test for when a "taking" had occurred as enunciated in the case of *Agins v. City of Tiburon*.[9] *Agins* had articulated the test for whether a regulatory action by the government effects a Fifth Amendment taking by inquiring whether government regulation of private property substantially advances legitimate state interests.[10] *Lingle* quite properly drew back from the *Agins* formulation, which essentially equated the rational basis test with the definition of when a Fifth Amendment taking occurred, and rejected a claim that, solely because a regulation did *not* substantially advance a legitimate state purpose, it therefore constituted a taking.[11] Later decisions have made it clear that, in the absence of a physical invasion by the government of private property, the two clear guidelines relevant for determining when a governmental regulation constitutes a taking are: (a) if the regulation denies all economically beneficial or productive use of land, it requires compensation under the takings clause;[12] and (b) otherwise, "a taking may be found based on a 'complex of factors' including (1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action."[13]

In the latest United States Supreme Court decision in this area, *Murr v. Wisconsin*,[14] the "flexible test" for when a taking has occurred, articulated for the Court by Justice Kennedy, seemingly resuscitates the *Agins* test, suggesting (but not saying) that if a particular enactment advances a legitimate governmental interest, that fact may be of such overriding importance as to preclude a finding that "property" has been "taken" by the regulation in question. Justice Kennedy acknowledged that the states "do not have unfettered authority to 'shape and define property rights and reasonable investment-backed expectations,' leaving land owners without recourse against unreasonable regulations."[15] He also articulated the fundamental notion that underlies all takings cases; inevitably, they require a "balancing" of the government's power to adjust rights for the public good, against the rights of the property owner, which is a fundamental precept of a free society:[16]

> "Property rights are necessary to preserve freedom, for property ownership empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."[17]

However, after saying this, Justice Kennedy went forward and allowed the government to do just that, concluding that the owners should have anticipated regulation of their property because of its location in a natural and scenic area, that the state had a legitimate public interest in protection of the open space and scenic character of the area, and that a "merger ordinance" was a reasonable regulation to achieve preservation of open space and scenic areas. From this, he was able to conclude that the owners' "investment backed expectations" resulting from the "physical condition of the property," and not solely the beneficial nature of the regulation to the public generally, supported the Court's holding that separately owned parcels effectively were "merged" into common ownership by the regulation and constituted a single parcel for purposes of determining whether or not the regulation "went too far" towards depriving the owners of all or substantially all economic use of their property.[18] Along the way, in rejecting the owners' argument that legal lot lines fixed by state law, alone, should determine what constitutes the "property" affected by a regulation, Justice Kennedy wrote:

> "Petitioners' rule would frustrate municipalities' ability to implement minimum lot size regulations by casting doubt on the many merger provisions that exist nationwide today."[19]

Even though Justice Kennedy characterized the "physical characteristics of the property" as suggesting to the property owners that the property was likely to become subject to environmental or other regulation, it is hard to escape the conclusion that the Court allowed the regulatory objective to drive its determination of whether or not the owners had a property interest reflected in the existing lot lines that divided the property—which is what Chief Justice Roberts argued in dissent.

In contrast to Justice Kennedy's somewhat circular definition of the meaning of "property rights" in the context of a taking, Justice Roberts, in dissent, thought the first step would be to determine the relevant "private property," i.e., the metes and bounds that describe its geographic dimensions, before determining whether the regulation of that property "went too far" so that a taking occurred. In the words of Justice Roberts,

> "The question of who owns what is pretty important: the rules must provide a readily ascertainable definition of the land to which a particular bundle of rights attaches that does not vary depending upon the purpose at issue . . .."[20]

According to Justice Roberts,

> "The widespread benefits of a regulation will often appear far weightier than the isolated losses suffered by individuals. And looking at the bigger picture, the overall societal good of an economic system grounded on private property will appear abstract when cast against a concrete regulatory problem. In the face of this imbalance, the Takings Clause 'prevents the public from loading upon one individual more than his just share of the burdens of government' . . .. The result is that the government's goals shape the playing field before the contest over whether the challenged regulation goes 'too far' even gets underway."[21]

Although this debate among the justices of the High Court occurred in the specific context of the Fifth Amendment Takings Clause, it does reflect a mature recognition on the part of the majority as well as the dissent, that there are private interests as well as public interests at stake in such matters. Even if one disagrees with the ultimate conclusion, Justice Kennedy's majority opinion clearly acknowledges the competing rights of the landowner and the need to weigh these rights carefully against the governmental interests, although not to the same degree as Justice Roberts' dissent. It is interesting to compare this discussion with three recent decisions of the California Supreme Court in which the potential risks of a "regulation-centered" conception of property rights has led to extraordinary results. Very little discussion of the "balancing" of private property rights against public needs can be found in the recent California decisions.

In the "inclusionary housing" case of *California Building Industry Association v. City of San Jose,*[22] the California court reviewed the validity of a local ordinance that imposed a mandatory duty on the part of the developer of market rate housing to also construct price-controlled "affordable housing" as a condition of the right to proceed with any development. The court's opinion recited at length the important "regulatory objective" of increasing the amount of "affordable housing for extremely, very low, lower, and moderate income households to meet the city's regional housing needs allocation as determined by ABAG."[23] The court then went on to state its conclusion that "the challenged ordinance seeks to increase the city's stock of affordable housing and promote economically diverse residential projects . . . by [imposing] price controls rather than other use restrictions."[24] Since price controls, like other forms of regulation, are a constitutionally permissible means to achieve a municipality's legitimate public purposes, said the court, the City's ordinance would withstand scrutiny under the rational basis test, and was also nonconfiscatory.[25] Characterizing the ordinance as doing no more than a nonconfiscatory regulation could do in regulating the pricing on sale or rental of

property by a landowner who was not seeking any land use approvals, the court found neither an "exaction" nor a "development condition" was imposed by the ordinance on a developer of new housing. The ordinance, therefore, also would not constitute "the imposition of an exaction for purposes of the unconstitutional conditions doctrine under the takings clause."[26]

The *City of San Jose* opinion rejected the argument that the inclusionary zoning ordinance effectively required a "conveyance" of the rent- or price-restricted units to persons who qualified based on income standards set by the city, finding that this aspect of the regulation did not "take" the developer's property, it only "restricted" the persons to whom the property could be rented or sold; if from anyone, suggested the court, the only "taking" was from the ultimate purchaser of the unit, not the developer on whom the restriction was imposed. In the court's view, since no conveyance of the property to the City occurred, the imposition of the development condition could not effect an "exaction" and was solely a regulatory limitation on pricing.[27] Even so, having found no "taking" and no "exaction," it implied that if anything was "taken" it was a relatively insignificant part of the whole property—reciting the *Penn Central* formulation[28] that disallows a takings claim as to only one strand or portion of a larger property "bundle of rights" or a larger parcel when the effect is not confiscatory of the whole:

> " 'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole."[29]

The *San Jose* decision applies an expansive notion of regulatory action supported by legislative policies to define away the issue of whether an "exaction" occurred, much in the way that Justice Robert's dissent in *Murr* has predicted will be the trend in other "takings" cases.

A more recent decision by the California Supreme Court has elevated public policy and governmental objectives into a basis for physically invading and occupying private property, while defining it as not a "taking" due to its "temporary" and "transitory" nature. In *Property Reserve, Inc. v. Superior Court,*[30] the court considered a California statute that allowed a state agency the right to enter upon and occupy a portion of a parcel of property with fencing, trucks, drilling equipment, and other appurtenances, in order to conduct precondem-

nation geotechnical investigations over a protracted period of days or weeks, and found it not to constitute a "taking" of the sort that required pre-condemnation "just compensation." As a basis for concluding the intrusive entry was not an exercise of "classic eminent domain," the court relied on a substantial body of statutory law that it characterized as a "common law rule" allowing public officials "a privilege to enter private property in order to conduct statutorily authorized activities on such property."[31] Here, the court focused on one of the essential strands of the bundle of sticks that define property, "the right to exclude others," and found an inherent *exception* in the "right to exclude others," namely, the government's so-called common law right of entry in the exercise of the police power.

In *Property Reserve*, the government crew entered property for days at a time, drilling inspection holes, keeping equipment on the site, and otherwise occupying and using the property, albeit for a limited period of time, and the court basically found this to be within the scope of the police power, although possibly subject to some form of compensation for "damages" even though not a "taking." Concluding that, because the residual effects on the property *once the government had vacated* were "minimal," and that no "physical taking" occurred (even during the period of temporary occupancy), and based on the limited nature of the environmental investigation activities authorized by this statute, the court concluded there was no "taking," or even if there was, then it was statutorily authorized and therefore sanctioned.[32] In a footnote, the court acknowledged the statement in *Nollan v. California Coastal Comm'n*,[33] that "the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property,"[34] but it found this trumped by public interest and necessity as embodied in the "long recognized limitation of a property owner's right to exclude others" embodied in the "common law rule" giving public officials a general right to enter private property for public purposes.[35] In doing so, the court moved into another realm of jurisprudential creativity altogether, elevating a sometimes justifiable governmental incursion into private property into a generalized subjugation of private property to the government's need to use and evaluate the property for its own purposes. As articulated in another article in this publication discussing the *Property Reserve* decision:

> The police power exception to the requirement of just compensation is appropriate only when a significant, emergent public interest is furthered under the pressure of public necessity. Stated another way, at least up until the *Property Reserve*

> decision, it could be assumed that the police power defense could only be utilized when there was a true emergency requiring immediate governmental action. That is clearly not the case with a project that has been planned over an extended period of time.[36]

Nowhere mentioned in the *Property Reserve* opinion is another constitutional right given to private property owners, namely, the right and privilege to be secure in their persons and their property from unreasonable searches and seizures by representatives of the government. The so-called "common law right of entry" seemingly created out of whole cloth in *Property Reserve* stands in stark contrast to the United States Supreme Court's jurisprudence in the context of Fourth Amendment search and seizure law, where bureaucratic efficacy and public necessity never, standing alone, justify the ignoring of constitutional protections. In a leading Fourth Amendment decision, *Camara v. Municipal Court*,[37] the latter Court reversed a California court of appeal decision that allowed the prosecution of the tenant of an apartment for interfering with a public official attempting to execute a warrantless inspection of the apartment for compliance with local health and safety and building codes. Reviewing the purported justification for such inspections, i.e., the vigorous argument that "the health and safety of entire urban populations is dependent upon enforcement of minimum fire, housing and sanitation standards, and that the only effective means of enforcing such codes is by routine systematized inspection of all physical structures," the court observed that this did not override the constitutional requirement of a warrant.

> Of course, in applying any reasonableness standard, including one of constitutional dimension, an argument that the public interest demands a particular rule must receive careful consideration. But we think this argument misses the mark. The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant.[38]

Holding that administrative searches of the kind at issue are "significant intrusions upon the interest protected by the Fourth Amendment," the Court went on to conclude that a person therefore had a constitutional right to refuse entry to an inspector until that inspector obtained a warrant. In a respectful rebuke of the claim that administrative objectives and effective public administration of health and building codes necessitated such warrantless searches, the Court noted

> It is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection

> are satisfied with respect to a particular dwelling. Such standards, which will vary with a municipal program being enforced, may be based upon the passage of time, the nature of the building (e.g., multiple family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. It has been suggested that to vary the probable cause test from the standard applied in criminal cases would authorize a "synthetic search warrant" and thereby to lessen the overall protection of the Fourth Amendment . . . but we do not agree. The warrant procedure is designed to guarantee that a certain decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard.[39]

Needless to say, the standards of "reasonableness" in the context of Fourth Amendment search and seizure law, and "reasonable regulation" in the context of a Fifth Amendment "takings" claim, are quite different. However, it is a fact that a public official's privilege to enter private property relied upon by the California Supreme Court in *Property Reserve* is extremely limited and circumscribed by more than one constitutional protection. The language of *Camara* stands in stark contrast to the California court's allowance of administrative and public policy objectives to override the legitimate and most basic expectations of private property owners to be free of unreasonable governmental intrusions.

The latest case by the California court to touch on these issues is *Lynch v. California Coastal Commission,*[40] which is not a takings case but once again, like *California Building Industry Assn. v. San Jose*, is simply an "invalid conditions" case, at least as viewed by the court. In *Lynch*, the California Coastal Commission had imposed several conditions on landowners who sought to rebuild a seawall that protected their blufftop homes along the Pacific Ocean shore in Encinitas, California. Because of age, exposure, and erosion, an existing seawall providing essential support and stability to these properties had deteriorated and needed to be replaced. After a long administrative process, the Commission had issued a coastal development permit allowing for reconstruction of the seawall (albeit with a different design), but also imposed several conditions, one of which limited the duration of the permit to 20 years, and required the seawall to be removed after 20 years unless the permit was extended and renewed. The Commission coupled this with a prohibition of any blufftop development that might rely on the existence of the seawall.

Faced with the imminent loss of their property in the coming winter, the landowners embarked on a two-pronged strategy. First, they filed a mandamus action challenging the legality of these conditions. Second, they went forward

and accepted the benefits of the permit and built the seawall. They obviously thought just by filing their action first, before "accepting the benefits," they had adequately perfected their objections. But they were sadly mistaken.

In the course of upholding the court of appeal's decision that found a waiver of the right to object based on the fact that the landowners had proceeded to exercise the benefits of the approval, the California Supreme Court first concluded there had been no "waiver" since the landowners obviously had not intended to waive their claims.[41] However, the court then rejected the argument that the objected-to conditions did not affect construction and therefore could be contested while proceeding with the development. The court, based on a novel application of the doctrine of "equitable forfeiture" to the applicant's right to object or contest the conditions imposed under a land use permit, held that a litigant can fail to preserve a claim if he or she fails to raise a "timely objection," and that by proceeding to build the seawall, even after filing a lawsuit against the conditions, the owners had in fact forfeited their right to challenge the conditions.[42] Although the court suggested that the doctrine of equitable forfeiture was well established, it cited only two appellate decisions involving child dependency and criminal proceedings in which certain arguments raised on appeal were asserted to be forfeited by failing to raise issues or objections for consideration by the trial court—only one of which had actually applied the doctrine.[43] More to the point, the court neglected to point out its previous holdings that the so-called "equitable forfeiture" doctrine should be *rarely* applied, and that the rights of the private individual litigant will usually outweigh the strict application of the forfeiture doctrine—rejecting the arguments by governmental agencies that the doctrine should be applied to uphold the governmental objectives.[44] Instead, after reviewing a number of decisions involving "waivers" of objections by the "acceptance of benefits" the court articulated three rather odd reasons for rigorously applying the forfeiture rule in this case, despite the claim that plaintiffs should not have to await the outcome of litigation before taking action to protect their homes.

First, citing the Mitigation Fee Act (which refers only to monetary exactions and has nothing to do with nonmonetary conditions), the court suggested that allowing an "exception" to the equitable forfeiture rule to allow contesting of these nonmonetary conditions would "significantly expand" the Mitigation Fee Act. It did so, despite its prior conclusion in *Sterling Park L.P. v. City of Palo Alto*,[45] that construed the Act as *not* applying to "land use restrictions." In other

words, out of fear that allowing an exception to the judicially created "equitable forfeiture" doctrine would be opening up an implied broadening of a narrowly-proscribed statutory procedure for proceeding "under protest" when contesting a monetary exaction, by *in effect* making a similar procedure available to contest non-monetary exactions, the court essentially refused to balance any private rights against administrative policies and requirements.

Going on, the court noted that creating an "under protest exception" would "also potentially swallow the general rule that landowners must take the burdens along with the benefits of a permit." It inferred that the governmental agency has a right to administer its planning and zoning authority without the fear of the "complete chaos" that would result if every applicant could challenge permit conditions while going forward with their project. "An exception allowing applicants to challenge a permit's restrictions after taking all of its benefits would change the dynamics of permit negotiations and would foster litigation."[46]

Here, again, the court focused exclusively on public decisionmakers' objectives and the government's need for the flexibility to impose arguably illegal conditions in a "negotiation," rather than on the fundamental question of whether the conditions were legal or not. However inadvertently, the court seems to be elevating administrative strategies, or governmental officials' tactical convenience—flexibility in "regulatory negotiations"—into an overarching public good that precludes even considering an exception to a general rule where, by all accounts, the equities of the case and a decent respect for the rights of property owners demanded it.

In its sole use of the term "balancing" in the *Lynch* opinion, the court used it only to refer to the decision makers' need to consider "significant impacts" and "alternative mitigation measures," not the rights or interests of the landowner. "Land use planning decisions entail a delicate balancing of interests. An under protest exception to the general waiver rule would upset this balance and inject uncertainty into the planning process."[47] Moreover, the *Lynch* court suggested that the administrative agency should not be put in a position of having to approve anything (regardless of whether its disapproval could be justified on any rational basis or was supportable by any findings or evidence) if the landowner challenged conditions that were proposed by the agency.

> "[W]e believe the better rule puts the onus on landowners to resolve their challenges before accepting the benefits of a permit. The landowner is in the best posi-

> tion to know how strongly he objects to a particular condition, and to weigh the chance a challenge will succeed against the costs of delaying the project.[48]

It is hard to escape the conclusion that the primary objective the court maintained was the administrative flexibility and authority of the government to cram conditions down the throat of a permit applicant in extremis, rather than to compel the governmental entity to exercise its administrative and quasi-adjudicative authority in issuing permits reasonably and in compliance with applicable constitutional requirements. The court never once addressed the potential illegality of the conditions, as such. Instead, it dismissed the landowners' claims for relief from the harsh "equitable forfeiture" and "acceptance of benefits" rules with two additional non sequiturs:

(1) The owners could have obtained an emergency permit to build a temporary seawall to protect their properties[49]—a theoretical possibility based on statutory language but a difficult one to comprehend in realty—what is a "temporary seawall?"

(2) "Moreover, although it was likely impossible here, in some cases the parties may be able to reach an agreement allowing construction to proceed while a challenge to permit conditions is resolved in court. A clear agreement of this sort could prevent a finding of equitable forfeiture."[50]

Here, the court was being either naïve or disingenuous—if, as the court had earlier implied, a government agency needs the opportunity either to impose potentially illegal or unreasonable conditions or else not to approve a project at all if the landowner intends to challenge an allegedly illegal condition, why would the agency enter into an "agreement" to allow a challenge to the condition? In fact, *Lynch* has made it even less likely that any public entity will consider it necessary to entertain such an "agreement," when it has the option of not agreeing and claiming "equitable forfeiture" if the owner later attempts a challenge after proceeding with the development.

Ultimately, as the United States Supreme Court decisions referred to in this article indicate, a balancing always takes place between the interests of the government, in their regulation for the public health and welfare, and the interest of the private owner, whose property should not be unfairly burdened by conditions for the general welfare that require the owner disproportionally to bear those burdens. However, the California Supreme Court, in the decisions discussed above, has seemly abandoned the notion of "balance" and placed its

thumb heavily on the scales in favor of the government to pursue its own objectives while giving short shrift, and little credence, to the interest of those private owners in maintaining their own property interests. In the *City of San Jose* decision, the court defined the problem away by emphasizing the legitimacy of the legislative goal of increasing the supply of affordable housing as a justification for refusing to consider the affordable housing requirement as an exaction on the developer of market rate housing, claiming it was only a "regulation." *Property Reserve* and *Lynch* evidence an even more one-sided view of government, urging the necessity of governmental flexibility and convenience as overriding any and all legitimate objections to governmental overreaching and intrusiveness. There is little in these opinions that holds out the hope of a more balanced treatment of these interests in future cases.

ENDNOTES:

[1] *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, 4 Ohio L. Abs. 816 (1926).

[2] See, e.g., *U.S. v. Carolene Products Co.*, 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938).

[3] *Village of Euclid v. Ambler Realty Co.*, *supra*, 272 U.S. at 395 (1926). See also *Christensen v. Yolo County Bd. of Sup'rs*, 995 F.2d 161, 165 (9th Cir. 1993).

[4] *California Bldg. Industry Assn. v. City of San Jose*, 61 Cal. 4th 435, 455, 189 Cal. Rptr. 3d 475, 351 P.3d 974 (2015).

[5] *Murr v. Wisconsin*, 137 S. Ct. 1933, 84 Env't. Rep. Cas. (BNA) 1713 (2017), citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

[6] *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

[7] *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497, 107 S. Ct. 1232, 94 L. Ed. 2d 472 (1987) ("Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction." (internal quotations omitted)).

[8] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[9] *Agins v. City of Tiburon*, 447 U.S. 255, 260, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) (abrogated by, Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)).

[10] *Agins v. City of Tiburon*, *supra*, 447 U.S. at 261.

[11]*Lingle v. Chevron U.S.A., Inc., supra,* 544 U.S. at 544-545.

[12]*Palazzolo v. Rhode Island*, 533 U.S. 606, 617, 121 S. Ct. 2448, 150 L. Ed. 2d 592 (2001), quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1015, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992).

[13]*Murr v. Wisconsin, supra*, 137 S.Ct. at 1943, quoting *Palazzolo v. Rhode Island*, *supra,* 533 U.S. at 617, citing *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

[14]*Murr v. Wisconsin*, 137 S. Ct. 1933 (2017).

[15]*Murr v. Wisconsin, supra,* 137 S. Ct. at 1944–1945, quoting *Palazzolo v. Rhode Island*, *supra*, 533 U.S. at 626.

[16]*Murr v. Wisconsin, supra*, 137 S. Ct. at 1943.

[17]*Id.* at 1943.

[18]*Id.* at 1945–1946, 1948.

[19]*Id.* at 1947–1948.

[20]*Murr v. Wisconsin*, 137 S.Ct. at 1953 (dissenting opinion of Justice Roberts).

[21]*Id.* at 1955, quoting *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325, 13 S.Ct. 622, 37 L.Ed.463 (1893).

[22]<*California Bldg. Industry Assn. v. City of San Jose*, 61 Cal. 4th 435, 189 Cal. Rptr. 3d 475, 351 P.3d 974 (2015).

[23]*California Building Industry Association v. City of San Jose, supra*, 61 Cal.4th at 449.

[24]*Id.* at 461.

[25]*Id.* at 463 (While a municipality's authority to impose price controls is subject to constitutional limits, "there is no indication that application of price controls on 15% of a development's for-sale units, along with the availability of economically advantageous density bonuses, exemptions from on-site parking requirements, and financial subsidies, would produce a confiscatory result.").

[26]*Id.* at 465.

[27]*Id.* at 455.

[28]*Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130-131, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978).

[29]*California Building Industry Association v. City of San Jose, supra*, 61 Cal.4th at 464, quoting *Penn Central Transportation Co. v. New York, supra*, 438 U.S at 130-131.

[30]*Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th 151, 204 Cal. Rptr. 3d 770, 375 P.3d 887 (Cal. 2016).

[31]*Property Reserve, Inc. v. Superior Court, supra*, 1 Cal. 5th at 196 n. 18. See also *id.* at 191 ("[N]umerous statutes grant public entities the authority to enter

and to engage in official activities on private property for a very wide range of purposes.").

[32]*Nollan v. California Coastal Com'n*, 483 U.S. 825, 831, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[33]*Nollan v. California Coastal Com'n*, 483 U.S. 825, 107 S. Ct. 3141, 97 L. Ed. 2d 677 (1987).

[34]*Property Reserve, Inc. v. Superior Court*, supra, 1 Cal.5th at 196 n. 18, quoting *Nollan v. California Coastal Comm'n,* v. *supra*, 483 U.S. 825 at 831.

[35]*Property Reserve, Inc. v. Superior Court, supra*, 1 Cal.5th at 196 n. 18.

[36]Basil "Bill" Shiber, *Property Reserve, Inc. v. Superior Court*: When a Governmental Entity or Entry to Test and Inspect Private Property May Not be a "Taking," 27 *Miller & Starr*, *Real Property Newsalert* 95, 105 (November 2016).

[37]*Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 525, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967).

[38]*Camara v. Municipal Court*, supra, 387 U.S. at 533.

[39]*Id.* at 539.

[40]*Lynch v. California Coastal Commission*, 3 Cal. 5th 470, 219 Cal. Rptr. 3d 754, 396 P.3d 1085 (Cal. 2017).

[41]*Lynch v. California Coastal Commission*, *supra*, 3 Cal. 5th at 478.

[42]*Id*. at 476.

[43]See *Lynch v. California Coastal Commission*, *supra*, 3 Cal. 5th at 476, where the court cites only two cases as having established such a doctrine, *In re S.B.,* 32 Cal.4th1287, 1293, fn.2 (2004), and *People v. Romero*, 44 Cal. 4th 386, 411, 79 Cal. Rptr. 3d 334, 187 P.3d 56 (2008). In the first case, a child dependency case, the issue was whether a parent had given the trial court adequate opportunity to consider the legal issue raised on appeal, and the court found that although the doctrine of forfeiture exists, the court of appeal in this case had properly refused to apply it, due to the importance of the parental rights at stake. In the second case, a criminal death penalty appeal, the court applied the doctrine to deny review a claimed objection to an omission by the trial court that was not brought to the trial court's attention and which in any event did not affect reviewability of the sentence because the claimed improper exchange between interpreters and witnesses were themselves fully transcribed and available for review on appeal.

[44]In *In re S.B., supra*, which acknowledged existence of the doctrine but then refused to apply it, the court had said, "[A]pplication of the forfeiture rule is not automatic. [citations omitted] But the appellate court's discretion to excuse forfeiture should be exercised rarely and only in cases presenting an important legal issue. [citations omitted]. Although an appellate court's discretion to consider forfeited claims extends to dependency cases [citations omitted] the discretion must be exercised with special care in such matters." (34 Cal.

4th at 1292 n. 3).

[45]*Sterling Park, L.P. v. City of Palo Alto*, 57 Cal. 4th 1193, 163 Cal. Rptr. 3d 2, 310 P.3d 925 (2013).

[46]*Lynch v. California Coastal Comm'n, supra*, 3 Cal. 5th at 479.

[47]*Id.* at 480.

[48]*Id.* at 480-481.

[49]*Id.* at 481.

[50]*Id.* at 481.

