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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

ELSINORE VALLEY MUNICIPAL  
WATER DISTRICT,

Plaintiff and Respondent,

v.

JOHN O'DOHERTY,

Defendant and Appellant.

E050909

(Super.Ct.No. RIC431267)

OPINION

APPEAL from the Superior Court of Riverside County. Peter L. Spinetta, Judge.  
(Retired judge of the Contra Costa Super. Ct. assigned by the Chief Justice pursuant to  
art. VI, § 6 of the Cal. Const.) Affirmed in part; reversed in part.

Robinson & Robinson, Jeffrey A. Robinson and Gregory E. Robinson for  
Defendant and Appellant.

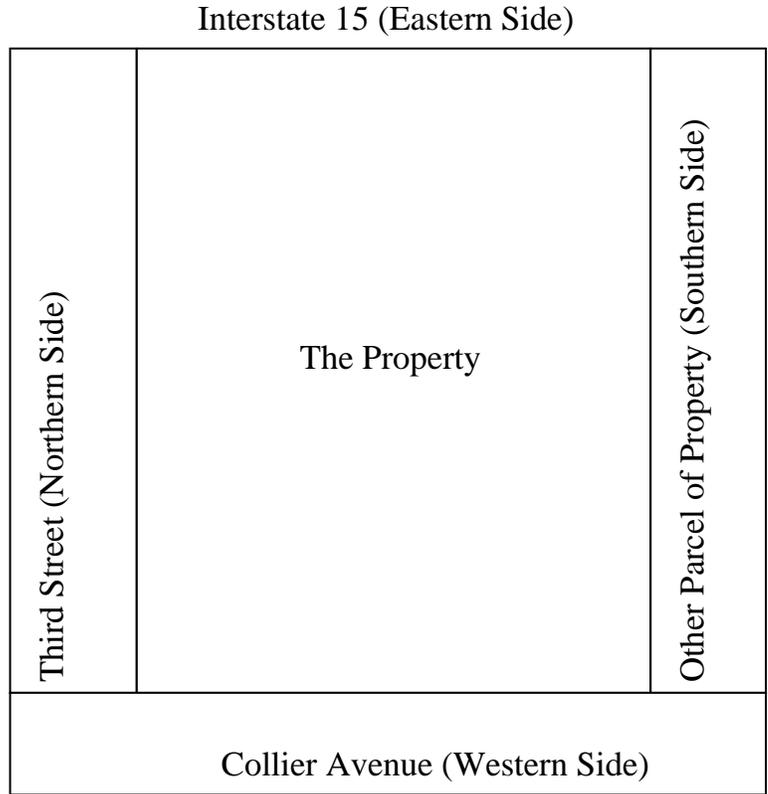
Pacific Legal Foundation, Timothy Sandefur and Adam R. Pomeroy as Amicus  
Curiae on behalf of Defendant and Appellant.

Best, Best & Krieger, James B. Gilpin and Matthew L. Green for Plaintiff and Respondent.

The trial court found John O’Doherty (O’Doherty) was not entitled to any compensation or damages for Elsinore Valley Municipal Water District’s (the Water District) construction of a water pump station on land owned by O’Doherty, which was subject to a public roadway easement. O’Doherty raises four contentions on appeal. First, O’Doherty contends the trial court erred by not awarding him compensation, because the value of his fee interest in the property underlying Third Street was taken. Second, O’Doherty asserts the trial court erred because the construction of the Water District’s pump station on Third Street substantially impaired his property. Third, O’Doherty contends the trial court erred because there was no need for the Water District to take the Third Street property. Fourth, O’Doherty asserts the trial court erred by not awarding him costs and attorney’s fees. We affirm in part, and reverse in part.

### **FACTUAL AND PROCEDURAL HISTORY**

O’Doherty owned a parcel of undeveloped real property (the property) in the City of Lake Elsinore. Third Street runs along the northern edge of the property. Interstate 15 runs along the eastern border of the property. A privately owned parcel of property is located to the south. Along the western border is Collier Avenue. Another parcel of private property is on the opposite side of Third Street. The property is approximately 3.24 acres. Below is very basic depiction of the property and its borders.



Centex Homes needed a water pump station to support the development of approximately 1,000 homes in the Ramsgate Development. The homes were supposed to be developed on the opposite side of the interstate from the property—on the eastern side of Interstate 15. The pump station was designed to be constructed on the eastern two-thirds of Third Street—closest to the interstate—and consume the entire width of the street. Pipes would run under the interstate to connect the pump station to the Ramsgate Development. The pump station was set to use approximately 20,000 square feet of space on Third Street with 12-foot high masonry walls around the project.

O’Doherty was upset that the pump station would create problems for his property by blocking street access to his property, creating storm water drainage issues, and various other problems.

Initially, everyone involved in the pump station project believed the City owned Third Street in fee. Accordingly, the Water District filed eminent domain proceedings against the City, in order to acquire Third Street for the pump station. The Water District alleged the City owned or had an interest in the rear two-thirds portion of Third Street. The Water District asserted it had provided the City with proper notice, and the public interest required the pump station. The Water District requested the rear two-thirds of Third Street be condemned to the Water District, and that the court determine the proper amount of compensation to be paid for the Third Street property.

A stipulation between the Water District and the City was filed with the trial court. The stipulation reflected that the City owned the Third Street property, and the trial court could enter a prejudgment order authorizing the Water District to take immediate and exclusive possession of the rear two-thirds of the Third Street property. The stipulation further reflected that the Water District would indemnify the City and defend the City against all claims and liabilities resulting from the Water District acquiring the property and constructing public improvements on the property. The trial court approved the stipulated order, and filed the order on July 18, 2005. The pump station was constructed while the case proceeded.

A second stipulation, filed on July 25, 2005, reflected the City, the Water District, and O'Doherty agreed that O'Doherty could intervene in the eminent domain

lawsuit. (Code Civ. Proc., §§ 1250.230, 387.)<sup>1</sup> The stipulation specifically excluded a concession by the Water District that O’Doherty had a property interest in Third Street. The trial court ordered O’Doherty could intervene in the lawsuit.

On November 19, 2008, O’Doherty filed a third amended answer. In the third amended answer, O’Doherty contended, “Third Street is a dedicated public street.” O’Doherty asserted the City had a street easement across his property for Third Street, which permitted vehicular access. O’Doherty alleged he owned a fee interest in the property underlying the street easement, up to the centerline of the street.

In the third amended answer, O’Doherty set forth various affirmative defenses. O’Doherty alleged the resolution of necessity passed by the Water District was void because (1) the hearing regarding the resolution was a sham, in that the decision to construct the pump station on Third Street was made prior to the hearing; (2) Third Street was the only option considered for the pump station, because the Water District believed the land would be cost-free; and (3) the Water District did not provide proper statutory notice to the owners of Third Street and the adjoining property owners. O’Doherty went on to assert the Third Street property was not subject to taking by eminent domain for a variety of reasons, such as the project unreasonably interfering with public right-of-way easements.

At some point in the proceedings, the City was excused as a party, ostensibly due to the stipulation between the Water District and the City providing that the Water

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<sup>1</sup> All subsequent statutory references will be to the Code of Civil Procedure, unless otherwise indicated.

District would indemnify and defend the City from and against all claims, costs, litigation, loss, damage, liability, fines, or expense arising from the Water District acquiring the property.

On January 13, 2009, the trial court explained that it would bifurcate the issues of (1) whether O’Doherty had an interest in the Third Street property (quieting title), and (2) whether O’Doherty was entitled to compensation. On January 13, 2009, trial commenced. Evidence was presented related to grant deeds and chain of title. The evidence reflected a fee interest in the Third Street property was never conveyed to the City. The trial court found O’Doherty owned the fee up to the centerline of Third Street (the neighbor on the opposite side of Third Street owned the other half of the “street”).

The trial court stated the City possibly had an easement interest in the Third Street property, but even that level of interest was “not that clear” to the trial court, due to the evidence. The trial court asked the parties to explain what evidence showed the City held an interest in the Third Street property either by way of an implied dedication or easement. The trial court found there was little evidence indicating that a public entity held an easement interest in the Third Street property. After the trial court’s statement regarding the lack of evidence, O’Doherty and the Water District orally stipulated that the Third Street property was dedicated as a public street.<sup>2</sup> After the stipulation was made, the trial court concluded the City held a public road easement across O’Doherty’s property for Third Street.

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<sup>2</sup> It is unclear why O’Doherty made this stipulation.

The trial court decided the next stage of the trial would address the right-to-take issue. O’Doherty raised several arguments about why the Water District did not have the right to take the Third Street property, such as (1) lack of notice, and (2) the Water District abused its discretion in adopting the resolution because the Water District had already committed to the construction of the water pump station prior to the hearing on the resolution of necessity.

The first right-to-take issue addressed by the trial court was “whether appropriate notice was given pursuant to [section] 1235.235, and the additional question that if notice was required by the act, and was not given, was such notice waived . . . is [O’Doherty] estopped from claiming invalidity of the resolution of necessity by reason of failure to give such notice?”

Trial proceeded with evidence related to timelines of when certain meetings took place, and when the pump station project was discussed. When the Water District rested, the trial court tried to clarify the Water District’s position. The trial court summarized the Water District’s position as notice to O’Doherty was sufficient because O’Doherty had known about the pump station project for years and had been arguing against the project for years. The Water District’s trial counsel agreed with the summary and specified that the Water District believed principles of estoppel and waiver applied because O’Doherty did not assert the notice issue until “nearly a year and half into the case.”

The trial court found the first resolution of necessity was invalidly passed because the Water District failed to give O’Doherty proper notice. The trial court

ordered a conditional dismissal of the eminent domain case. (§ 1260.120, subd. (c)(2).) The trial court stated that the Water District's eminent domain case would be dismissed unless by May 1, 2009, the Water District adopted a resolution of necessity after: (1) conducting a good faith hearing, (2) providing proper notice, and (3) making required offers to O'Doherty and any other necessary person. The trial court ordered the Water District conduct the hearing without considering the fact that the pump station was already constructed. Thus, if the Water District did not adopt a resolution of necessity, then the eminent domain lawsuit would be dismissed. Separately (not as part of the conditions), the trial court ordered the Water District pay O'Doherty's reasonable litigation expenses, including attorneys' fees, due to the Water District's failure to provide adequate notice.

At a hearing on litigation expenses, the trial court stated O'Doherty was only entitled to fees related to the notice issue. The Water District asserted that \$15,000 would be an appropriate allocation for time spent on the notice issue, and the trial court agreed. However, the trial court questioned whether O'Doherty's trial attorney, Jeffrey Robinson (Robinson), was entitled to fees from O'Doherty, because it appeared Robinson was hired on a contingency basis. Ultimately, the trial court found no litigation expenses had been incurred because O'Doherty was not obligated to pay Robinson's firm any fees "for the result obtained so far with respect to notice."

In May 2009, the Water District filed a "Return to Order of Conditional Dismissal." The Water District alleged that it had complied with all of the terms of the conditional dismissal. The Water District asserted that it gave notice of the resolution

hearing to O'Doherty and all other necessary parties; an offer to purchase the Third Street property was made to O'Doherty, as well as to other parties; the resolution of necessity was considered without regard to the fact that the pump station had already been constructed; and the Water Board adopted the resolution of necessity (Resolution No. 09-04-07). The trial was ultimately scheduled to resume on December 3, 2009.

On November 17, 2009, the Water District submitted a final compensation offer to O'Doherty in the amount of \$300,000, which included interest and costs; the offer was set to expire at the start of trial (December 3). The Water District informed the trial court that the property owner on the other side of Third Street accepted the Water District's compensation offer of approximately \$50,000. Thus, the Water District was the owner of the northern half of Third Street.

O'Doherty filed objections to the Water District's right to take the Third Street property pursuant to the newly adopted resolution of necessity. O'Doherty raised the following objections: (1) the substance and procedure of the resolution of necessity constituted a gross abuse of discretion; (2) the public interest did not require the taking; (3) the taking was not compatible with the most public good and least private harm; (4) the Third Street property was not necessary for the project; (5) the resolution was adopted in violation of O'Doherty's constitutional rights against taking; (6) the proposed use of the Third Street property was not compatible with the public use of Third Street; and (7) the project was not more necessary than the other public uses of Third Street.

When trial resumed, the trial court started by addressing O’Doherty’s taking objections. The trial court began with the first objection related to gross abuse of discretion. The trial court explained that a resolution of necessity must be the product of good faith deliberations and the findings related to the resolution must be supported by substantial evidence. The trial court explained that the determinations were limited to the evidence in the administrative record. Next, the trial court explained the findings that must be made as part of a resolution of necessity: (1) the project is necessary and in the public interest; (2) the project is planned in a manner that is compatible with the greatest public good and least private injury; and (3) the acquired property is necessary for the project.

The trial court started with the third factor. The trial court asked the Water District what evidence in the administrative record supported the finding that the eastern-most 30 feet of Third Street was necessary for the project. The trial court explained that there was a 30-foot space between the pump station and the interstate that was essentially “empty space” or “useless space”—essentially it was unclear why the pump station was not built closer to the interstate, so that less of Third Street was blocked, or consumed, by the pump station.

The Water District asserted that it had a statutory right to “install facilities in the street without paying any compensation.” The Water District gave the example of sewer lines and water lines. The Water District argued that the trial court had found, based on the stipulation of the parties, that Third Street was a dedicated public right-of-way; the Water District reasoned that it could construct facilities on the Third Street

property, due to the public road easement. The Water District further argued that an adjoining land owner did not have a right in inverse condemnation or trespass ejection against a public entity that installed facilities in a public right-of-way. The Water District stated that there was a sewer line running underneath the 30-foot empty space to the pump station, with valves and air ducts on the surface area. The Water District explained that the administrative record showed large trucks and trailers needed access to the area, and therefore the additional 30-foot space was desirable for a repair work area.

The trial court asked if the 30-foot space was necessary for the project. The Water District responded that the question involved “micro level questioning”—examining the taking space by space. The Water District opined that the bigger property should be considered, rather than just the 30-foot gap between the interstate and the pumping station.

O’Doherty asserted there was no evidence the valves needed to be located where they were. O’Doherty argued that there was nothing in the administrative record suggesting that the 30-foot area was needed to access the valves. O’Doherty asserted the empty space reflected that the project was planned with the mindset that the Water District “could get the whole street for free without any reference to the statutory standards for an eminent domain taking.” O’Doherty argued that the design of the 30-foot “dead zone” caused the pump station project to unnecessarily consume access to his property from Third Street. O’Doherty asserted he did not want the court to

micromanage the Water District's decisions, but argued there was not substantial evidence that the Water District needed all the land it took.

Without rendering a finding on the third factor, the trial court instructed the parties to move on to the second factor—whether the project was planned in a manner that is compatible with the greatest public good and least private injury. The court asked the Water District why it did not construct the pump station parallel to the interstate, so as to gain the same public benefit, while minimizing the private harm (the pump station was constructed at a 90-degree angle to the interstate). The Water District again argued that it was inappropriate to question minute aspects of the project, and that the Water District had a right to build its facilities in the public right of way. The Water District asserted that the pump station would have fallen outside the bounds of the public right of way if it were built parallel to the interstate.

O'Doherty argued that as a member of the public he had a right to use Third Street—the street was not solely reserved for utilities. O'Doherty asserted that the private harm would have been minimized by constructing the pump station parallel to the interstate, because it would have allowed O'Doherty to still have access to the property from most of Third Street. O'Doherty asserted that he was not trying to second-guess the Water District or show which design was better; rather, he was trying to prove that the pump station was designed without any consideration of how to maximize the public good while minimizing the public harm, because for years no one thought the project would involve a taking. O'Doherty asserted, “[T]his was not designed by a civil engineer trying to minimize the private harm, it was designed by a

civil engineer that said we've got the street for free, let's take it all." The Water District argued that the pump station was designed to avoid having to exercise eminent domain powers.

Without making a finding on the second factor, the trial court moved onto the issue of whether the Water District was irrevocably committed to the project at the time of the hearing on the resolution of necessity. The trial court stated that there was nothing in the record indicating that the Water District was committed to the project simply because it had already been built at the time of the hearing. For example, the trial court pointed out that the Water District found the project to be necessary for reasons other than the fact that it had already been built.

O'Doherty asserted there were other indications that the Water District was irrevocably committed to the project, such as contractual commitments that compelled the Water District to go forward with the project. The trial court asked whether "[a]s of April 2009" the Water District was a party to a contract that required it to go forward with the pump station project. The Water District said the pump station had already been constructed by April 2009.

At that point, the trial court went back to the issue of whether the project maximized the public good while minimizing the public harm. The trial court stated the fee burdened by the Third Street easement was "relatively valueless" since it was subject to the public right of way easement. Therefore, the trial court concluded the only injury was the impaired access to the property. The trial court also found if the pump station were constructed parallel to the interstate, then the Water District would

have needed to purchase “big chunks” of O’Doherty’s property. The trial court stated it wanted to deliberate on the issue.

When the trial court returned from recess, it stated its findings. First, the trial court found the administrative record supported the conclusion that the project was necessary. Second, the trial court found that placing the pump station parallel to the interstate would have required taking a large section of O’Doherty’s property, and therefore would have cost the public more money. Thus, the trial court concluded that the record supported a finding that the project was designed to maximize the public benefit while minimizing the private harm. Next, the trial court addressed whether the taking was necessary for the project. The trial court found the 30-foot “dead space” contained a blow-out valve that needed to be accessed, and therefore the administrative record supported a conclusion that the taking was necessary. The trial court held that the “resolution is valid.”

The trial court felt that it did not need to address O’Doherty’s other objections, because the three factors were the only findings necessary for a valid resolution. O’Doherty asserted that the remaining objections addressed the Water District’s other statutory bases for adopting the resolution of necessity, and therefore, he was still entitled to a trial on those objections. The trial court concluded that the other bases were unnecessary for the adoption of the resolution, and therefore the objections related to those bases were irrelevant.

The trial then moved into phase two, which concerned damages or the value of the property taken. The trial court summarized the Water District’s position as (1) “the

underlying fee being taken here is not a compensable interest . . . because essentially . . . it was subject all along to being used for the purposes for which it was taken, that is to say, it was—the Water District always had a right to build facilities on there, public utilities have a right to build facilities on there. . . . Essentially that makes it of no value, simply not being compensable”; and (2) “the only thing taken here was really, if anything, was access to the property . . . however, rights of access are not compensable interests either, unless . . . they’re substantially impaired. In this case, . . . there was no taking of the right of access here, because it was not substantially impacted.”

Next, the trial court explained that O’Doherty’s fee interest in Third Street was “subject to whatever proper public uses . . . that street may be put to.” The trial court said if the pump station was not consistent with “a proper street use” then O’Doherty would be entitled to compensation. Thus, the trial court framed the issue of whether O’Doherty was entitled to compensation as “whether building a pump station is consistent with street use.” The trial court concluded that a street is “an avenue or thoroughfare for the flow of not only people, but tangible and intangible items, goods, information.” The trial court remarked that sewer lines, gas lines, and utility poles may be placed “under or on a street, because all of those . . . deal with the flow of people, goods, or items and their distribution for public purposes.”

The trial court found that the pump station was constructed for the purposes of (1) pumping water, in order to make the water flow from one area of town to another; and (2) taking in sewage water. The trial court concluded that the pump station “precludes usage of the street or portion of the street in question for vehicle traffic, but

it still is consistent, in my view, with the overreaching purpose of a street, which is to provide for the flow of people and/or goods or items for the public benefit. It substitutes one for the other.” The trial court pointed out that Third Street terminated at the interstate, so the pump station only “preclude[d] utilization for vehicular traffic for just a relatively short distance.” The trial court reasoned that since the pump station allowed water to flow under the interstate, it “actually increases [the] flow” of goods, rather than impedes the flow. Ultimately, the trial court held that the pump station was “within street use purposes.” Therefore, the trial court concluded O’Doherty had “no compensable interest by virtue of his owning the underlying fee, subject to those rights of the city or District.” In other words, the pump station was within the scope of the street easement.

Next, the trial court addressed the issue of whether O’Doherty was entitled to compensation due to his rights of ingress and egress being substantially impaired by the pump station. The trial court found the issue involved a mixed question of law and fact, and the finding should be made by the court, not a jury.

O’Doherty stated that before the pump station was constructed, he would have had two or three driveways for the property along Third Street, and therefore would not need access along Collier Avenue. O’Doherty explained that he had to have two driveways due to City requirements, and now he would have to construct one along Collier Avenue (due to the pump station), but the City would require him to purchase neighboring private property and use a 12-foot strip of his own property to construct a deceleration lane to support the driveway, due to Collier Avenue being a “a major

arterial highway.” O’Doherty stated the Water District took the position that O’Doherty would have always needed to construct a driveway on Collier Avenue, but O’Doherty disagreed.

O’Doherty also raised issues related to the impairment of a visibility easement, a storm water easement, a light easement, and an air flow easement. O’Doherty also asserted an impairment due to the Water District’s gutter discharging storm water onto his property, and the Water District’s generator discharging exhaust fumes onto the property. The Water District argued that O’Doherty’s appraiser’s assessment of damages was not based on impairment of light and visibility; therefore, even if there were substantial impairments, O’Doherty could not prove damages. O’Doherty asserted there were not comparable properties in the area such that an appraiser could isolate the value of the visibility impairment, and therefore, the issue went to the overall value of the property.

As the argument continued, the trial court stated that the heart of O’Doherty’s argument was that he had been damaged because he can no longer develop the property in the manner he would like. The trial court asked, “Is there a taking or a compensable interest when your, quote/unquote, right as a property owner to develop your property is impacted?” O’Doherty asserted there was such a compensable interest. The Water District argued that there was no taking unless all economically viable uses of the property were eliminated. O’Doherty argued that he lost all economic use of the strip of property that now had to be dedicated to a deceleration lane, which was not required prior to the pump station. The Water District argued there was evidence that O’Doherty

would have been required to have an access point on Collier even if the pump station had not been constructed.

As to the issue of ingress and egress, the trial court asked what the term “substantial impairment” meant. O’Doherty felt substantial impairment should be evaluated by the effect of the project on the potential future use of the property. The Water District asserted substantial impact on ingress and egress should be evaluated by whether there was a reasonable means of accessing the general system of public streets. The Water District argued that O’Doherty could still access Third Street, so there was not a substantial impairment, although there could have been a substantial impairment if O’Doherty had been completely blocked from accessing Third Street.

The trial court asked if people could still access the property from the remaining front “stub” of Third Street. O’Doherty said that they could access the property, but that the property could no longer be put to its highest and best use without the remaining length of Third Street. The Water District argued that the property could still be put to its highest and best use with an access point on Collier Avenue. The trial court felt evidence would need to be taken on the issue. O’Doherty asserted that there were 10 or 12 reasons supporting a finding of substantial impairment, and a trial should be had on all the issues, not just a single issue. O’Doherty argued that the various factors came together to create a substantial impairment, and therefore, looking at the factors individually would be problematic.

The trial court decided to proceed with offers of proof on the issues of substantial impairment of ingress and egress, visibility, and the right to disperse storm water.

O'Doherty alleged the evidence would show there was a box culvert under the interstate that allowed storm water to flow across the property. Additionally, O'Doherty asserted the evidence would show he had been told that he could not have an access point on Collier Avenue. The evidence would reflect that there could have been driveways along Third Street. Further, the evidence would show that the City would have abandoned Third Street to O'Doherty, thus making the property larger. O'Doherty explained that if the City vacated the Third Street property to him, then he would have created a private driveway/street on the Third Street property. The trial court asked if the City would have allowed access along Collier if O'Doherty converted Third Street into a private driveway. O'Doherty responded, "Yes, yes"; however, O'Doherty then stated that access would not have been allowed on Collier Avenue. O'Doherty argued that there would have still been a negative impact by the pump station even if the City did not vacate the Third Street property in favor of O'Doherty.

O'Doherty explained that the property could have been developed into a two-story office building or used for light industrial purposes. There would have been three access points along Third Street to serve the building or buildings. O'Doherty argued that the access points in the middle of Third Street and the far end of Third Street were no longer possible due to the pump station. O'Doherty explained that fire and safety regulations require more than one driveway, so there would have to be an access point constructed on Collier Avenue, if the property were to be developed. O'Doherty argued that constructing the access point on Collier with a deceleration lane would shrink the available building space on the property and require the purchase of a portion of the

property to the south. Thus, O’Doherty argued that the pump station was the cause of him having to construct the access point on Collier.

O’Doherty asserted that a trial was needed on the issue of causation, because a City engineer would testify that the City would have always required an access point on Collier Avenue. Thus, the Water District would assert that the pump station was not the cause of needing to construct an access point on Collier. The trial court concluded that causation was a key issue and decided to hear live testimony from Ken Seumalo (Seumalo), the City engineer. O’Doherty asserted it was “not fair” to isolate the causation issue from the rest of the substantial impact issues, because all the impacts needed to be considered together. O’Doherty argued that he should be allowed to put on his entire case before a substantial impairment finding was made. The trial court said that O’Doherty “should be given a full opportunity to present evidence on whether there is substantial impairment”; however, the trial court did not “think that . . . requires [a] full presentation of [the] case.” The trial court stated that O’Doherty would be allowed to make a “full offer of proof with respect to substantial impairment.”

O’Doherty offered a variety of photographic exhibits showing the property before and after the construction of the pump station, for the purpose of demonstrating that a Collier access point would not have been required. O’Doherty’s testimony was offered as both a percipient witness and an engineering expert. O’Doherty stated the evidence would show the Water District took 72 percent of the length of Third Street, which meant a loss of two driveways along Third Street. O’Doherty argued this evidence showed an impairment of the ability to subdivide the property. The Water

District argued it was still feasible to subdivide the property with the rearranged access points. The trial court asked if there was anyone available to testify about the damages O'Doherty suffered as a result of not being able to subdivide, and O'Doherty responded, "Not at this point."

Next, O'Doherty offered evidence that, Seumalo's predecessor at the City, Ray O'Donnell (O'Donnell), told O'Doherty in 2001 or 2002 that no access on Collier Avenue would be permitted due to Collier being a major arterial road. O'Doherty stated O'Donnell had not been deposed and was not available to testify. O'Doherty said the evidence would reflect Seumalo also told O'Doherty that an access point would not be allowed on Collier Avenue, but Seumalo later changed his mind and now believed a shared driveway with the adjacent southern property owner would be required on Collier.

O'Doherty next explained the evidence he would offer related to storm water. O'Doherty planned to bring expert testimony regarding the "preferred manner" for handling storm water. It would be shown the storm drain would have been constructed along the center of Third Street, but would now have to be built on the property, due to the pump station. O'Doherty explained expert testimony would show it would cost \$250,000 to \$1,000,000 more to handle the storm water now that the pump station has been constructed, due to the different route the storm water system would have to take.

As to reduced visibility from Third Street, O'Doherty asserted that, as an abutter, he had a right to have traffic view the property so as to entice people to visit whatever business may be constructed on the property. The trial court pointed out that Third

Street did not have traffic because it was not a public street. O'Doherty responded, "that's right," but then argued, "[T]here can't be any doubt that cars could and did go up and down the entire length of that street." The trial court remarked that the visibility issue could also relate to the right to view the street from the property, as well as the right to have people from the street view the property. O'Doherty agreed that people on the property would not enjoy staring at the block wall around the pump station. The trial court asked what the value of reduced visibility would be. O'Doherty responded that the visibility factor had not been isolated in terms of damages; rather, it was calculated within all the rest of the damages. O'Doherty asserted that it would be "difficult to isolate a damage number" related to visibility.

O'Doherty explained the evidence related to reduced light overlapped the evidence related to reduced visibility. As to reduced air, O'Doherty remarked that the "pump station has a generator that takes air off of the property and pushes exhaust gases onto the property when it's operating." In regard to subdividing, O'Doherty offered to provide testimony related to the access point on Collier and reduced building size, as well as O'Doherty's reasonable expectation that the City would have vacated the Third Street easement in favor of O'Doherty, thus giving O'Doherty the unburdened fee.

The Water District also made an offer of proof. The Water District asserted Seumalo would testify that the City would have required an access point on Collier Avenue regardless of the pump station. The Water District explained that even if the pump station were not constructed, and Third Street were vacated in favor of O'Doherty, then access on Collier would have been required because there needed to be

more than one access point to public streets. Thus, even if there were three driveways on Third Street, O’Doherty would have still needed an access point on Collier. The Water District offered that Seumalo would explain the access on Third Street alone would be insufficient because Third Street dead ends, so if there were an emergency blocking the intersection of Third Street and Collier, then the three driveways along Third Street would be useless—an access point on Collier would be required regardless of the pump station.

In addition to the foregoing causation evidence, the Water District asserted the evidence would show O’Doherty had not historically used the rear portion of Third Street to access the property—O’Doherty only used the front 28 percent of the street. Further, the Water District argued that Third Street was never an improved public street, therefore, the only public street access to the property had always been Collier Avenue. The Water District reasoned there could not be a substantial impairment to the access of a public street since Collier has always been the only public street along the property.

Next, the Water District argued the trial court should not focus upon impairment of specific development plans. Rather, the Water District argued the issue was whether the land was still available to be used for commercial or light industrial purposes. Additionally, the Water District argued O’Doherty did not have a right to run a storm water system “in a public street.” O’Doherty argued he had a right to bring his storm water system out to the street. The Water District argued the issue was whether the pump station interfered with O’Doherty’s rights and the trial court had already found the Water District “had the right to put [its] stuff there.” The Water District asserted

O'Doherty did not have a right to place a storm water system under Third Street, because "his access issue doesn't extend below the surface of the street."

In regard to visibility, light, and air impairment, the Water District pointed out O'Doherty did not have independent damages evidence for those allegations. Further, the Water District argued that it was inconsistent for O'Doherty to argue a loss of visibility from a public street that was "never maintained as a public street." The Water District also argued the property could still be seen from Collier, and therefore, there was not a substantial visibility impairment.

Next, the Water District asserted O'Doherty's arguments related to access were problematic because they were based on an assumption that the property owner on the opposite side of Third Street (Cartier) would have allowed O'Doherty to use Cartier's side of the street. The Water District asserted there was no evidence that if the City vacated Third Street, Cartier would have permitted O'Doherty to use Cartier's half of Third Street as part of a private street/driveway. In other words, if the City owned the Third Street easement and vacated it, then O'Doherty would have been left with one lane (up to the centerline), not the whole street.

The trial court explained it would take live testimony from Seumalo. The trial court stated if Seumalo testified access on Collier Avenue would have been required even if there were multiple access points on Third Street, i.e., the pump station did not exist, then that would "put an end" to the substantial impairment claim.

Seumalo was called as a witness on behalf of the Water District. Seumalo became the City's engineer in 2004. From 1998 to 2001, Seumalo worked as an

associate civil engineer in charge of capital improvement projects, such as street projects, for the City. Seumalo was familiar with the property and the pump station. Seumalo was not aware of any development plans for the property having been submitted to the City. Seumalo recalled discussing a potential project with O'Doherty years prior.

Seumalo stated access to Collier would have been required on the property prior to the pump station having been built. Seumalo explained that since Third Street was a dead-end street it was considered to be a single driveway, and therefore a second access point would have been required on Collier, along the southern border of the property. Seumalo stated that if there were an "incident at the mouth of Third Street at its connection to Collier Avenue [then it] would render that project landlocked," if there were not an access point on Collier.

Seumalo testified that if Third Street were vacated in favor of O'Doherty, then there would still need to be an access point on Collier Avenue, because there must be more than one access point onto a public right of way. Seumalo believed a deceleration lane on Collier would have been required regardless of the pump station, because the lane was needed due to the speed of traffic on Collier.

Seumalo explained that Collier Avenue is a circulation street, and therefore the City tries to limit driveways on the street, thus, the City would encourage O'Doherty to share a driveway with the neighboring property owner to the south. However, if the neighboring property owner did not want to share a driveway, then O'Doherty might be required to construct an emergency-only access point on Collier that would not require a

deceleration lane.<sup>3</sup> Thus, commercial development of the property would still be possible with only one driveway on Third Street and an emergency-only driveway on Collier Avenue.

On cross-examination, O’Doherty showed Seumalo an e-mail dated August 5, 2004, from one of O’Doherty’s attorneys to a City engineering technician. In the e-mail, the attorney wrote, ““The existing grade of Collier Avenue renders Third Street the only effective option for public street access to my client’s proposed project.”” Seumalo stated that he was not aware of any response being made by the City to the e-mail. Seumalo agreed that at his deposition he did not produce documents indicating there would be a requirement for a shared southern driveway. Seumalo did not recall ever telling O’Doherty that there would be a requirement for a shared southern driveway on Collier.

Seumalo testified that projects have been approved with access points only on dead-end streets; Seumalo stated it was a matter of an exception being made. Seumalo believed O’Doherty might have qualified for the exception prior to the pump station being constructed. Seumalo explained that granting such an exception would have been part of the negotiations for developing the property; however, Seumalo believed the City would have argued “aggressively” for the shared driveway on Collier. Seumalo explained that since O’Doherty never submitted development plans, Seumalo could

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<sup>3</sup> An emergency access point is a driveway that is a minimum of 18-feet wide—large enough for a fire truck. The driveway would likely be blocked by a gate, which would be locked with a Knox Box. Only emergency personnel have the key to the Knox Box.

only testify about what he might have recommended to the City—Seumalo makes recommendations, or comments on projects, to the Planning Commission. Seumalo said he did not know what the Planning Commission might do with his comments or with O’Doherty’s application, if one were submitted.

O’Doherty called Carleton Waters (Waters) as a witness. Waters was a transportation engineer. Waters was privately employed, but worked with private developers in the City for “six or seven years,” and worked with the City for five years. Waters began working in the City in 2001. Waters conducted a traffic study in connection with the O’Doherty property based on the before and after versions of the pump station construction. Waters never spoke with Seumalo about the O’Doherty project. Waters said the City’s policy is to have “at least two access points.”

Waters began discussing the pre-pump station access point options. Waters stated two access points along Third Street would have been consistent with the City’s policy; however, Waters never asked the City whether access on Collier would have been required prior to the pump station being built. Waters felt Third Street only access was sufficient because there would likely be driveways on the undeveloped Cartier property (opposite/north side of Third Street) that would allow access onto Third Street, thus there were multiple ways to approach Third Street in case of an emergency. The Cartier property abuts Collier Avenue as well as Central Avenue. Central Avenue is another major street, so if the Cartier property were developed, then there would likely be multiple driveways onto at least one of the major streets and onto Third Street. Thus, emergency vehicles could drive across the Cartier property to gain access to the

O'Doherty property if there were an emergency at the front of Third Street. In other words, Waters was describing shared access with the northern property owner, as opposed to the City's suggestion of shared access with the southern property owner.

The trial court asked if having the two driveways on Third Street would be problematic if the Cartier property were not developed. Waters responded, "That could be a potential issue, yes." Waters stated that possible solutions would be gaining an easement across the Cartier property, or constructing a temporary emergency access point on Collier Avenue until the Cartier property were developed. Waters did not believe a temporary emergency access point would require a deceleration lane; however, he never spoke to the City about whether a deceleration lane would be needed for a temporary access point. Waters also never spoke to the City about the idea of access being created across the Cartier property. Waters was not aware of any development plans for the Cartier property. Waters felt that the Cartier access point would be more desirable to the City because the "[C]ity works very hard to limit the amount of access" to Collier. Waters said that if the Cartier property were not available for development, then an emergency access point on Collier would be the likely solution. However, Waters stated that the City prefers permanent access points to temporary ones. Ultimately, Waters said that the two access points on Third Street would have satisfied the policies of the City's engineering department, and no permanent access points on Collier would have been required.

The trial court asked if it was correct in understanding Waters's testimony: Waters at one point said the two driveways on Third Street would *not* have been

sufficient, and the City would have required additional access from Collier or the Cartier property. Waters clarified that it was possible the two driveways on Third Street would be considered insufficient until the Cartier property was developed.

Waters then moved to discussing the post-pump station plan with only one driveway on Third Street. Waters explained that an access point would have to be created on Collier Avenue due to the pump station. Waters stated that there could be a “single blockage point” if a driveway were not created to Collier, due to the pump station. Waters explained that there needs to be a means “to get to the arterial [traffic] system at one point or another.” Waters was asked if creating an emergency-only access point on Collier would be a viable option now that the pump station had been built. Water said that it would be “highly problematic,” because the emergency only access should not be the permanent plan, and the pump station had blocked access to the Cartier property. Waters explained that the problem would be that a blockage at the front of Third Street would trap people on the property until emergency personnel unlocked the emergency access gate. Thus, Waters believed the most feasible access solution, in order to have development plans approved, would be a deceleration lane on Collier—a permanent access point on Collier. Waters explained that O’Doherty would have to work with the southern property owner to obtain approximately 300 feet of property for the deceleration lane.

Waters estimated that prior to the pump station there was a 20 to 30 percent likelihood that the City would have required a permanent access point on Collier. Waters believed after the pump station the City was 90 percent likely to require a

permanent access point on Collier. Waters felt the shared southern driveway was consistent with the City's desire to limit access points along Collier.

In regard to visibility, Waters stated that prior to the pump station being constructed there was "no substantial traffic" on Third Street. The O'Doherty property was visible from Collier and the interstate. The property was still visible from the remaining portion of Third Street.

O'Doherty called a variety of other witness. First, O'Doherty himself testified as a percipient witness who was familiar with the property and as an engineering expert. O'Doherty discussed the storm water issues on the property, and how storm water would have been channeled down Third Street if it were not for the pump station blocking the path.

Second, O'Doherty called Roger Doverspike (Doverspike), a licensed appraiser. Doverspike believed the property was valued at \$1,130,000 before the pump station was constructed. The trial court asked Doverspike to estimate the value of the property assuming (1) there could not be driveways on the upper two-thirds of Third Street; (2) as a consequence of the lack of driveways, the property could not be subdivided horizontally into three parcels, each having its own driveway onto Third Street, instead there would have to be an access easement across the subdivided parcels; and (3) there would only be one access point to the property, which would be located on the lower one-third of Third Street. With those conditions in mind, Doverspike estimated the property would be worth \$675,000. Doverspike explained that having only one access point to the property would make it "virtually" impossible to subdivide the property.

Third, O’Doherty called Richard Schmid (Schmid), a civil engineer. Schmid opined that having access only along Third Street would have been permitted prior to the construction of the pumping station. Schmid would have been surprised if O’Doherty had been allowed access to Collier, because “most entities would not want you to take access off an arterial highway.” Schmid explained that most municipalities required at least two permanent access points to a site, so after the pump station was constructed, O’Doherty would need an access point along Collier, as well as the access point on Third Street. Schmid believed the access point on Collier would require a deceleration lane, due to the speed of traffic on Collier.

The trial court found O’Doherty was not entitled to any compensation or damages for the Water District’s construction of a water pump station on land owned by O’Doherty that was subject to a public roadway easement.

## **DISCUSSION**

### A. TAKING

#### 1. *CONTENTION*

O’Doherty contends the trial court erred by finding that the Water District did not take his property.<sup>4</sup> We agree.

#### 2. *STIPULATION*

As a threshold issue, we asked the parties to provide supplemental briefing on the following issue: “May a public road dedication be created by oral stipulation?” We felt

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<sup>4</sup> Pacific Legal Foundation has filed an amicus brief supporting O’Doherty’s taking argument.

this issue was important, because we need to understand exactly what interest O’Doherty held in the Third Street property, before we can analyze whether the trial court erred as to the taking issue. O’Doherty asserts the oral stipulation in this case may not be binding because the City was not a party to the stipulation; therefore, O’Doherty contends this court is not bound by the stipulation. The Water District contends the stipulation would not create a public road dedication and would not be binding on the City, but that the stipulation could be effective for purposes of this case. We agree with the Water District.

“A court is free to disregard a stipulation only if it is ‘illegal’ or ‘contrary to public policy.’ [Citation.]” (*Estate of Burson* (1975) 51 Cal.App.3d 300, 306.) For example, if a stipulated judgment amount bears no rational relationship to the amount of damages actually suffered by a respondent, then the court may disregard the stipulation. (*Greentree Financial Group, Inc. v. Execute Sports, Inc.* (2008) 163 Cal.App.4th 495, 501.) “Where a private road has been offered for public dedication, that offer may be [expressly] accepted either by formal action of the public entity or [impliedly accepted] by public use. [Citation.]” (*Wright v. City of Morro Bay* (2006) 144 Cal.App.4th 767, 770.)

There is nothing indicating that a public road dedication may be created by oral stipulation, especially where the City is not a direct party to the stipulation. Thus, we agree with the parties that the stipulation is likely not effective outside the “walls” of this case. However, it is not clear that the stipulation qualifies as illegal or contrary to public policy, such that this court can disregard it. Rather, it seems that the stipulation

falls within the doctrine of invited error. In other words, the stipulation is incorrect or erroneous because it concerns a fact that could very well be untrue or not an accurate reflection of public records; however, the parties and court are estopped from disregarding the error. (*In re Marriage of Broderick* (1989) 209 Cal.App.3d 489, 501.) The invited error doctrine applies when the error was the result of “affirmative conduct demonstrating a deliberate tactical choice on the part of the challenging party. [Citations.]” (*Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 706.)

In the instant case, both parties chose to enter into the problematic stipulation. Thus, this court is bound to follow the erroneous stipulation for purposes of this case because, while erroneous, it does not appear to be illegal or contrary to public policy. In sum, for purposes of this case we will continue the probable fiction created in the trial court: we will assume that (1) O’Doherty and the adjoining property owner dedicated Third Street as a public road; (2) the City accepted the dedication; and (3) the dedication resulted in a public street easement across the Third Street portion of O’Doherty’s fee.

### 3. STANDARD OF REVIEW

“Whether the [Water District’s] actions constituted a taking is a mixed question of law and fact. [Citations.] Our review is neither entirely de novo nor entirely limited by the substantial evidence rule. [Citation.] ‘Mixed questions of law and fact involve three steps: (1) the determination of the historical facts—what happened; (2) selection of the applicable legal principles; and (3) application of those legal principles to the facts. The first step involves factual questions exclusively for the trial court to determine; these are subject to substantial evidence review; the appellate court must

view the evidence in the light most favorable to the judgment and the findings, express or implied, of the trial court. [Citations.]’ [Citation.] Thus, we do not apply de novo review to factual findings underlying the trial court’s judgment, instead applying the substantial evidence rule. [Citation.] Only the second and third steps involve questions of law, which we review de novo. [Citation.]” (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 269-270.)

#### 4. *EMINENT DOMAIN*

“Eminent domain is the power of government to take private property for public use.’ [Citation.]” (*City of Needles v. Griswold* (1992) 6 Cal.App.4th 1881, 1891 [Fourth Dist., Div. Two].) Typically, in an eminent domain case, the focus is “limited to the amount of compensation owed the property owner.”” (*City of Los Angeles v. Superior Court* (2011) 194 Cal.App.4th 210, 220.) In an inverse condemnation action, the property owner must prove there was a taking for public use before the property owner can reach the issue of compensation. (*Ibid.*) Thus, the instant case is more akin to an inverse condemnation action than an eminent domain action, because the trial court found that there was not a taking—the taking aspect is usually not an issue in eminent domain proceedings. Accordingly, our law related to the “taking contention” is derived from inverse condemnation cases, despite this case officially being an eminent domain action.<sup>5</sup>

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<sup>5</sup> O’Doherty filed a “Complaint in Intervention,” which listed an inverse condemnation cause of action. The trial court struck O’Doherty’s complaint, but retained O’Doherty’s answer to the Water District’s eminent domain action.

“The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. [Citations.]” (*Lingle v. Chevron U.S.A., Inc.* (2005) 544 U.S. 528, 537.) In other words, a “government action which results in a permanent physical occupation of private property is invariably a taking.” (*Moerman v. State of California* (1993) 17 Cal.App.4th 452, 457; see also *Cwynar v. City and County of San Francisco* (2001) 90 Cal.App.4th 637, 652 [taking per se].)

#### 5. DEDICATED PUBLIC STREET

“By the dedication of land for a street, the municipality acquires not only the easement of passage, but also the right to grade and improve the surface of the street, and to lay sewers, drains, and pipes for various utilities beneath the surface. In short, the municipality has authority to make or contract for such improvements in the property as will make it reasonably fit for the purpose of its dedication . . . .” (*Mancino v. Santa Clara County Flood Control & Water Dist.* (1969) 272 Cal.App.2d 678, 682.) As to the purpose of a street, Vehicle Code section 360 provides, “‘Highway’ is a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel. Highway includes street.”

#### 6. ANALYSIS

In the instant case, the Water District built a water pumping station on Third Street. The pump station was designed to be constructed on the eastern two-thirds of Third Street—closest to the interstate—and consume the entire width of the street. The pump station was set to include 12-foot high masonry walls around the project. Given that the pump station project blocked vehicular traffic on the eastern two-thirds of Third

Street, the pump station was not consistent with the easement for a public street. Further, since the pump station was a permanent structure, it constituted a physical invasion of O’Doherty’s fee, which underlies the street easement. In short, the construction of the pump station resulted in the taking of a portion of O’Doherty’s fee, which was burdened by a stipulated public street easement, because the pump station was a permanent public structure and it was not consistent with a street easement. Accordingly, we must reverse the trial court’s finding that the pump station did not constitute a taking.

The Water District asserts the pump station does not constitute a taking because it has the right to construct projects along and across any street. The Water District cites Water Code section 71695, which provides, “A district may construct works along and across any . . . street, avenue, highway . . . . Such works shall be constructed in such manner as to afford security for life and property, and the district shall restore the crossings and intersections to their former state as near as may be, or in a manner so as not to have impaired unnecessarily their usefulness.”

We do not find the Water District’s reliance on this code section to be persuasive, because the statute does not exempt a water district from the takings clause. Put differently, while the statute gives a water district permission to construct projects in various places, it does not reflect that a water district may invade a landowner’s rights without paying just compensation to the landowner. (See *Dunbar v. Humboldt Bay Municipal Water Dist.* (1967) 254 Cal.App.2d 480, 482-484, 488 [Water district, which

constructed a dam near landowner's property, was liable in inverse condemnation for diminution in property value.] )

Further, we are not persuaded by the Water District's contention it may build the pumping station across Third Street without paying just compensation, because the Water District does not reconcile Water Code section 71695 with Government Code section 66439, subdivision (c), which provides, "An offer of dedication of real property for street or public utility easement purposes shall be deemed not to include any public utility facilities located on or under the real property unless, and only to the extent that, an intent to dedicate the facilities is expressly declared in the statement." The stipulation related to the street easement did not mention an agreement related to public utility facilities. Thus, it does not appear there is an exception for the pump station.

The Water District also cites to *San Diego Metropolitan Transit Development Board v. Price Company* (1995) 37 Cal.App.4th 1541 (*San Diego*), to support its argument. In *San Diego*, a transit agency filed a condemnation action against a landowner to acquire a permanent easement along the landowner's property and a temporary construction easement. The transit agency planned to construct a light rail line in the center of a street, and the property owner's land was located next to an intersection along the street. (*Id.* at p. 1543.) As a result of the rail line in the center of the street, the landowner would lose direct access to the southbound side of the street, but would still have direct access to the northbound side of the street. (*Id.* at p. 1544.)

The trial court found that the landowner did not suffer a compensable loss because the impairment of access was not substantial. (*San Diego, supra*, 37

Cal.App.4th at p. 1545.) The appellate court affirmed the trial court’s judgment. (*Id.* at p. 1550.) The appellate court concluded the record supported the trial court’s finding that the rail line would not substantially impair the landowner’s property. (*Id.* at p. 1549.) The appellate court reasoned that a landowner is not entitled to compensation if a project does not substantially impair the landowner’s right to access the public streets. (*Ibid.*)

The Water District asserts that *San Diego* shows, “the [Water] District’s exercise of its rights under Water Code section 71695 is not compensable absent a substantial impairment of O’Doherty’s access right.” We do not find the Water District’s reliance on *San Diego* to be persuasive because the case relates to impairment of access as opposed to a taking, and therefore, does not seem to be on-point with the contention.

Next, the Water District asserts the pumping station is consistent with the street easement. The Water District cites a variety of cases to support its position. One case cited by the Water District is *Bello v. ABA Energy Corporation* (2004) 121 Cal.App.4th 301, 307, which provides, “as a result of the demands of urbanization, public rights-of-way located in developed areas are subject to a wide range of ‘other and further uses’ besides surface transportation, including the installation of sewage, water, gas, and communications lines.” *Bello* involved a lawsuit for trespass and ejectment following an energy company’s construction of an underground pipeline, which ran along the shoulder of a public road, but part of the public road was on a private landowner’s parcel subject to an easement. (*Id.* at p. 306.)

We do not find the Water District's position to be persuasive because Vehicle Code section 360 provides that streets are for vehicular travel. While the law may provide for cables, pipes, and drains to run concurrently along or under streets, vehicles must also be able to use the street. In this case, the pumping station cuts off vehicular use of Third Street. Thus, the pumping station is not analogous to an underground pipeline; rather, it is the equivalent of a building. Accordingly, we are not persuaded that the pumping station is consistent with the street easement.

Finally, the Water District asserts there has not been a taking of O'Doherty's fee because the Water District does not want title to O'Doherty's underlying fee or claim any interest in the land "beyond that which is encompassed by the Project itself." We do not find the Water District's argument to be persuasive, because the fact that the Water District does not want title to the property fails to explain how the pump station is not a physical invasion of O'Doherty's land. In other words, the Water District's interest in the title of the property is not a controlling fact for the determination of a taking. Rather, the controlling facts are that the pump station is a permanent, physical, public structure on O'Doherty's land, which is not consistent with the easement. Moreover, we note the Water District's claim that it is not interested in the title to pumping station land appears somewhat disingenuous since the sole cause of action in this case is for eminent domain, and it was brought, in part, against "all persons unknown claiming an interest in the or to property [*sic*] sought to be acquired." (See *City of Ontario v. Kelber* (1973) 35 Cal.App.3d 751, 754 [Fourth Dist., Div. Two] ["Title vests in the condemner."].)

B. REVERSION INTEREST

O’Doherty contends the trial court erred by not awarding him compensation for the taking of the imminent reversion interest he held in the street easement. O’Doherty asserts the trial court informally found the City was probably planning to vacate the Third Street easement in favor of him, and therefore, he is entitled to compensation for the future value of the pump station property unburdened by the street easement. O’Doherty concedes the trial court “made no formal findings on abandonment.”

It appears that the abandonment of the street easement relates to the amount of compensation that O’Doherty is entitled to. For example, if the City owned an easement, and was planning to vacate the easement in favor of O’Doherty in the near future, then he could be entitled to the future value of the property that was taken, as opposed to the value of the property burdened by the street easement. (See *City of Palm Springs v. Living Desert Reserve* (1999) 70 Cal.App.4th 613, 628 [Fourth Dist., Div. Two] [ “[A] future interest is generally not compensable unless the reversion is imminent[.]”].) We do not see how the trial court erred by not making this abandonment finding, because it appears to be relevant only to the issue of compensation. Since the trial court found the pump station was consistent with the street easement, and thus there was not a taking, it was reasonable for the court to not speculate about the possible future value of O’Doherty’s interest. Only if the court found that a taking had been established should it have broached the subject of compensation. (See *City of Los Angeles v. Superior Court, supra*, 194 Cal.App.4th at p.

220 [a taking must be established before issue of compensation can be reached].)

Accordingly, we conclude that the trial court did not err.

C. ABUTTER’S RIGHTS AND SEVERANCE DAMAGES

1. *CONTENTION*

In a single section of his opening brief, O’Doherty contends the trial court erred by not awarding him “severance damages” for the “impairment of his abutter’s rights.” Specifically, O’Doherty asserts he should be awarded damages for the pumping station (1) curtailing his ability to discharge storm water from his property; (2) reducing the square footage of future construction projects on his property; and (3) significantly blocking the access to public streets from the property. O’Doherty’s contention mixes two legal ideas: (1) severance damages, and (2) abutter’s rights. (See Cal. Rules of Court, rule 8.204(a)(1)(B) [“State each point under a separate heading[.]”].)

In order to explain the problem with this contention, we describe the two different concepts, starting with abutter’s rights. “Beginning in the 1800’s, American courts began to recognize a number of ‘abutter’s rights’ enjoyed by property owners along public roads. [Citation.] These rights, described as being in the nature of easements and ‘deduced by way of consequence from the purposes of a public street’ [citation], include the right of access to and from the road, and the right to receive light and air from the adjoining street. [Citations.] Judicial recognition of these rights derives from the perceived expectations of those who own or purchase property alongside a public street, to the effect that the land enjoys certain benefits associated with its location next to the road. [Citations.] It is well-established, however, that

abutter's rights are qualified, rather than absolute; a property owner 'cannot demand that the adjacent street be left in its original condition for all time.' [Citations.]”

*(Regency Outdoor Advertising, Inc. v. City of Los Angeles (2006) 39 Cal.4th 507, 517.)*

We now turn to severance damages. “When ‘the property acquired [by eminent domain] is part of a larger parcel,’ in addition to compensation for the property actually taken, the property owner must be compensated for the injury, if any, to the land that he retains. [Citation.] Once it is determined that the owner is entitled to severance damages, they . . . normally are measured by comparing the fair market value of the remainder before and after the taking. [Citations.] [¶] Because severance damages are intended to compensate the property owner for the destruction of the integrity of his land [citation], the property owner must be able to demonstrate both how his property functions as an integrated unit and how the value of what remains has been injured by the taking of a part. In the case of a single parcel of property devoted to a unitary use, the impairment is usually self-evident: in the case of a dairy farm, for example, if all the pasturage is condemned, the value of what remains may be significantly impaired.” *(City of San Diego v. Neumann (1993) 6 Cal.4th 738, 745, fn. omitted.)*

Since O’Doherty contends the trial court erred by not awarding him “severance damages” for the “impairment of his abutter’s rights,” this court cannot determine if he is asserting he is entitled to damages for (1) the partial destruction of the City’s Third Street easement, which relates to abutter’s rights, e.g., he cannot access the road as easily; or (2) the severance of his fee, which relates to severance damages, e.g., the potential construction square footage of the property has been reduced. In other words,

abutter's rights relate to the loss of the street, while severance damages relate to the loss of the fee underlying the street easement. Therefore, it is unclear exactly what injury O'Doherty's contention relates to—the loss of the City's street or the severing of his fee.

For the sake of addressing O'Doherty's concerns, we reframe his contentions. We reframe the storm water and access issues as relating solely to abutter's rights, and reframe the square footage issue as relating solely to severance damages. We reframe these issues based on our review of O'Doherty's briefs and the trial record. For example, in regard to storm water, the trial court said to O'Doherty's trial attorney, "Pardon me. We're talking about any rights that he may have as an abutting owner, not as the owner of the underlying fee." O'Doherty's trial attorney responded, "Correct."

## 2. *ABUTTER'S RIGHTS*

### a) Standard of Review

O'Doherty does not inform this court which standard of review should apply. Through our own research, we have found different standards of review that have been applied when reviewing trial courts' substantial impairment findings: (1) abuse of discretion, (2) substantial evidence, and (3) a mixture of the independent and substantial evidence standards. (*Perrin v. Los Angeles County Transportation Com.* (1996) 42 Cal.App.4th 1807, 1812 [substantial evidence]; *People ex rel. Dept. Public Works v. Home Trust Investment Co.* (1970) 8 Cal.App.3d 1022, 1028 [abuse of discretion]; *Border Business Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1554 (*Border*) [Fourth Dist. Div. Two] [mixture].)

We follow the precedent set by this court, and apply the mixed standard of review. In *Border*, this court concluded the finding of whether there was substantial impairment is a mixed question of law and fact. (*Border, supra*, 142 Cal.App.4th at p. 1554.) “In reviewing a mixed question of law and fact, we defer to the express or implied factual findings of the trial court and determine the applicable legal principles de novo. The standard which applies to the third step of the analysis, applying the law to the facts, depends upon whether factual or legal issues predominate.” (*Ibid.*)

b) Access

“A property owner possesses an easement of access. ‘This easement consists 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.’ [Citation.] However, every governmental interference with the right does not constitute a taking, entitling the landowner 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. [¶] . . . [¶] Substantial impairment cannot be fixed by abstract definition; it must be found in each case upon the basis of the factual situation.’” (*Perrin v. Los Angeles County Transportation Com., supra*, 42 Cal.App.4th at p. 1811.)

O’Doherty wanted to have all of his driveways, or access points, along Third Street. He planned to have two or three driveways along Third Street, because the City required at least two access points in case of emergencies. Seumalo stated that direct access to Collier would have been required on the property prior to the pump station

having been built. Seumalo explained that since Third Street was a dead-end street it was considered to be a single driveway, and therefore a second access point would have been required on Collier. Seumalo stated that if there were an “incident at the mouth of Third Street at its connection to Collier Avenue [then it] would render that project landlocked,” if there were not an access point on Collier.

The foregoing is substantial evidence supporting the trial court’s finding that O’Doherty’s property did not suffer substantial impairment of ingress and egress due to the pump station. Regardless of the pump station, O’Doherty would have needed to construct access points on Third Street and Collier, which he can still do despite the pump station since the lower one-third of Third Street is still available. While O’Doherty may have lost the ability to have a second driveway on Third Street, there is evidence supporting the finding that such a loss is not substantial, since O’Doherty would have always needed direct access to Third Street and Collier, and he will still be able to have direct access to both streets.

O’Doherty cites a variety of cases to support his contention. However, he does not explain why the foregoing evidence is insufficient to support the trial court’s ruling. Thus, we find O’Doherty’s argument to be unpersuasive.

c) Storm Water

O’Doherty asserts that the trial court erred by finding that his property was not substantially impaired due to the curtailing of his ability to discharge storm water onto or under Third Street. We disagree.

O'Doherty explained that he had been planning to run a storm sewer down Third Street, and then connect his storm sewer with an existing flood channel at the end of Third Street, towards Collier. O'Doherty explained the pump station would interfere with his storm water drainage plans, because the pump house was going to consume the entire width of Third Street and involve water and sewer lines, but the plans did not involve provisions for storm water.

O'Doherty planned to bring expert testimony regarding the "preferred manner" for handling storm water. It would be shown that the storm drain would have been constructed along the center of Third Street, but would now have to be built on the remaining O'Doherty property, due to the pump station. O'Doherty explained that expert testimony would show it would cost \$250,000 to \$1,000,000 more to handle the storm water now that the pump station has been constructed, due to the different route the storm water system will have to take.

The trial court asked if there was a storm drain system on Third Street that O'Doherty would have been able to connect to prior to the construction of the pump station. O'Doherty's trial attorney responded, "Not that I'm aware of, your Honor." It did appear that there was "a drainage facility" running parallel to Collier, near Third Street. The trial court asked if O'Doherty was asserting he had a right to connect to non-existent drainage pipes along Third Street. O'Doherty's trial attorney responded, "Yes, . . . our [engineering] experts would talk about the fact that the property owner would have the right to put that public storm drain water down the public right-of-way."

A landowner has “the right to maintain ditches or drains for the benefit of his lands, providing he maintains no nuisance in so doing, nor interferes with the use as a highway. [Cases cited.]’ [Citation.]” (*People v. Goodspeed* (1948) 85 Cal.App.2d Supp. 821, 826.) There is nothing indicating that a landowner has the right to connect to storm water systems in a particular way, and O’Doherty does not direct this court to such a case or statute. In other words, while a landowner may have a right to discharge storm water towards the street, there is nothing indicating that landowner has a right to discharge storm water in their preferred manner. Further, it does not appear that O’Doherty was planning to offer legal proof that he had such a right; rather, he was going to offer the testimony of engineers. Since there is nothing showing that a right belonging to O’Doherty was substantially impaired, we conclude the trial court did not err.

O’Doherty asserts there is evidence reflecting that a City engineer told O’Doherty he would be able to discharge storm water down Third Street. The problem with this argument is that there is also evidence that O’Doherty never submitted development plans to the City for approval. Thus, it does not appear that O’Doherty had any right to begin constructing the storm drain in a particular manner on Third Street, such that he should now be compensated for losing that right. Rather, O’Doherty’s argument only reflects that his idea for a storm water system may no longer be feasible due to the pump station. Consequently, we are not persuaded that the trial court erred.

#### 4. SEVERANCE DAMAGES

O’Doherty asserts that, but for the pumping station, the stipulated Third Street easement (which the City did not participate in creating) would have been abandoned to him by the City, which would have increased the size of O’Doherty’s parcel.

O’Doherty contends that by eliminating the possibility of abandonment, the buildable square footage of his property has been significantly reduced. Thus, O’Doherty asserts the market value of his property has been greatly reduced. O’Doherty contends the trial court erred by finding O’Doherty “never had a right to [the] abandonment of Third Street.”

We cannot determine from O’Doherty’s brief exactly what error he is asserting. It appears that he is taking issue with (1) the abandonment finding, but also (2) the square footage finding. It is also unclear which issue within either of those findings that O’Doherty finds problematic. For example, a trial court’s finding related to a “reasonable probability” of abandonment has required procedural steps, and we cannot determine if O’Doherty is asserting the evidence failed within one of those steps or whether there was an overall failure. (See *Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.* (2007) 41 Cal.4th 954, 968 [discussing the reasonability probability of a zoning change].) This court is not inclined to act as cocounsel on appeal and furnish legal arguments as to how exactly the trial court’s ruling might have constituted error, especially in light of O’Doherty’s stipulation, which created the easement for purposes of this case. (*Doe v. Lincoln Unified School Dist.* (2010) 188 Cal.App.4th 758, 767.) Since O’Doherty does not specify exactly which

finding he is taking issue with—the abandonment or square footage finding—we treat the issue as waived. (*People v. Stanley* (1995) 10 Cal.4th 764, 793; *Los Angeles Unified School Dist. v. Casasola* (2010) 187 Cal.App.4th 189, 212.)

## 5. COMBINATION

O’Doherty contends that all of the foregoing impairments, i.e., blocked access, curtailed drainage, and reduced square footage, create a substantial impairment when considered together; O’Doherty also mentions a restricted view as an impairment. O’Doherty asserts, “The court impermissibly invaded the province of the jury, denying the opportunity to assess the credibility of the various competing witnesses who testified relating to the facts affecting value.” It is unclear if O’Doherty’s argument relates to (1) abutter’s rights, i.e., loss of the City’s public road, (2) severance damages, i.e., loss of his fee underlying the easement; (3) a procedural evidence issue; or (4) a due process issue. While we attempted to sort through O’Doherty’s arguments when they were raised as somewhat separate issues, it is beyond the scope of this court’s role to do the same when the issues are intentionally combined. Thus, we treat this issue as waived, since we are unable to decipher the exact legal contention being raised. (*People v. Stanley, supra*, 10 Cal.4th at p. 793.)

## D. “RIGHT TO TAKE” OBJECTIONS

O’Doherty contends the trial court erred by denying his “right to take” objections. O’Doherty raises three arguments: (1) more property was acquired than was necessary for the project; (2) the project was not planned or located in the manner that would be most compatible with the greatest public good and the least private injury;

and (3) the District was irrevocably committed to the project before passing the resolution of necessity.

“Section 1240.030 specifies that property may be taken for ‘a proposed project’ if three things have been established: ‘(a) The public interest and necessity require the project. [¶] (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. [¶] (c) The property sought to be acquired is necessary for the project.’” (*City of Stockton v. Marina Towers LLC* (2009) 171 Cal.App.4th 93, 104.) A legislative body’s formal findings on these and other issues is known as a resolution of necessity. (§ 1245.230.) No public entity may condemn property unless it has first adopted a resolution of necessity that makes all three findings. (*Stockton*, at p. 104.)

We conclude O’Doherty’s contention related to the resolution of necessity is moot. In O’Doherty’s opening brief, he asks this court to reverse the judgment and direct the trial court to hold a jury trial for the sake of determining “the amount of just compensation due to O’Doherty for the taking of his property.” We have already concluded O’Doherty is entitled to compensation for the taking of his fee interest burdened by the stipulated street easement. Thus, whether the resolution of necessity was properly or improperly passed is inconsequential—O’Doherty has received the relief requested in regard to the taking of his property. O’Doherty does not assert that he is entitled to further relief due to the procedure by which the resolution of necessity was adopted, e.g., further damages beyond those owed for the taking. Since there is no further relief to be offered, because we have already concluded O’Doherty is entitled to

compensation for the taking, the issue is moot. (See *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1574 [“The pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief.”].)

E. LITIGATION EXPENSES

1. *ATTORNEYS’ FEES*

O’Doherty contends he was the prevailing party during the first phase of the trial related to the notice issue, because he secured a conditional dismissal. Thus, O’Doherty asserts the trial court erred by not awarding him attorneys’ fees. We disagree.

We review a trial court’s decision to award or deny attorney fees for an abuse of discretion. ““An exercise of discretion is subject to reversal on appeal where no reasonable basis for the action is shown. [Citation.]’ [Citation.]” (*Moran v. Oso Valley Greenbelt Assn.* (2004) 117 Cal.App.4th 1029, 1034.)

Section 1260.120, subdivision (c)(2), provides that if, in an eminent domain case, a court orders a conditional dismissal in favor of a defendant, then in the conditional dismissal order, the court “may impose such limitations and conditions as the court determines to be just under the circumstances of the particular case including the requirement that the plaintiff pay to the defendant all or part of the reasonable litigation expenses necessarily incurred by the defendant because of the plaintiff’s failure or omission which constituted the basis of the objection to the right to take.” “Litigation expenses” includes “[r]easonable attorney’s fees.” (§ 1235.140, subd. (b).)

During the hearing on the litigation expense issue, the trial court said, “[A]s I understand the law, [O’Doherty is] entitled to attorneys’ fees only if he incurred them, and incurred them, as I understand it, means he has either paid them or became obligated to pay them.” The trial court questioned whether O’Doherty was obligated to pay attorneys’ fees under the contingency fee agreement he had with his trial attorneys. The trial court concluded, “there has been no showing that Mr. O’Doherty—no satisfactory showing that Mr. O’Doherty is obligated under the law to pay [the law] firm any fees for the result obtained so far with respect to notice, and nor is there any obligation, nor has it been shown, that he has paid [his trial attorney] in fact for these things. And therefore, I find that no litigation expenses have been incurred as yet, and therefore, I deny the application at this time.”

The trial court’s reading of the term “incurred” in the statute is supported by *Salton Bay Marina, Inc. v. Imperial Irrigation District* (1985) 172 Cal.App.3d 914, 953-954, fn. 8 (*Salton Bay*). In *Salton Bay*, the appellate court observed, “courts have denied an award of attorney fees if the contingency fails to occur and therefore the property owner is not liable for *any* attorney fees. [Citations.]” (*Ibid.*; see also *Avenida San Juan Partnership v. City of San Clemente* (2011) 201 Cal.App.4th 1256, 1283 [*Salton Bay* is “a tour de force on the question of what constitutes reasonable fees in inverse condemnation actions where there is a contingency agreement. (In any event the case reiterated the ‘actually incurred’ standard.)”].)

There are various exhibits attached to O’Doherty’s motion/application for attorneys’ fees. One of the exhibits is a letter about O’Doherty’s “engagement

agreement” with his trial attorneys. The letter, written by O’Doherty’s trial attorney, is intended to clarify the attorneys’ fees earned by the firm. The letter reflects, “Our written contingency fee arrangement has always been based on the underlying assumption that our fees would be earned and payable when (a) you are a prevailing party, and (b) you have recovered funds (including any award of attorneys’ fees, through judgment, settlement, or otherwise) to pay our fees.”

As the letter continues, it addresses the possibility that O’Doherty could be a prevailing party, but not be awarded money. In the event such a situation occurs, the letter provides, “the Engagement Agreement obligates you to pay the Firm, upon recovery, a reasonable fee to be determined, without limitation, by reference to our basic hourly rate of \$295.00. This does not supersede or change the existing agreement. Therefore, if after the favorable ruling and any award of attorneys’ fees, there is a subsequent ruling or settlement whereby you recover funds as a prevailing party or through judgment, settlement or otherwise, the parties shall receive their respective shares accordingly . . . .”

At the hearing on the motion/application, O’Doherty’s attorney said the “engagement agreement” reflected the following wording, “Total net recovery means that total monetary amount received, including award of attorneys’ fees and court costs.” The trial court asked if that meant “[o]ne third of any net recovery.” O’Doherty’s trial attorney responded, “That is correct.” Nevertheless, in a declaration, O’Doherty swore he was billed \$35,640 for attorneys’ fees.

The trial court could reasonably deduce from the evidence and argument that O’Doherty is not required to pay his attorneys unless he recovers a monetary sum from the Water District. The letter about the engagement agreement was just that—a letter between the parties discussing their understanding of the agreement, but it was not the agreement itself. Since the contingency of winning a monetary sum was not triggered by the conditional dismissal, O’Doherty was not obligated to pay his attorneys any fees, per the agreement. (*Salton Bay, supra*, 172 Cal.App.3d at pp. 953-954, fn. 8.) Since O’Doherty did not have an obligation to pay his attorneys, the trial court could reasonably conclude O’Doherty was not entitled to an award of attorneys’ fees. (*Ibid.*) In sum, the trial court did not abuse its discretion, because the trial court’s ruling is supported by case law, statutory language, and evidence in the record.

O’Doherty asserts the trial court erred because O’Doherty and his trial attorneys “always contemplated payment of a fee when O’Doherty was a prevailing party and entitled to recover attorneys’ fees.” We do not find this argument to be persuasive because the subjective expectations of O’Doherty and his attorneys are not controlling. The issue is whether the trial court was unreasonable in concluding the relevant contingency had not been triggered in this case, such that O’Doherty was not obligated to pay attorneys’ fees. The law and evidence cited *ante*, support the trial court’s conclusion that O’Doherty was not obligated to pay fees because he was not awarded a sum of money. Therefore, we find O’Doherty’s argument to be unpersuasive.

Next, O’Doherty contends the trial court’s decision was unreasonable because trial courts can award attorneys’ fees without regard to contingency fee agreements.

O’Doherty explains that courts can disregard contingency fee agreements and award a reasonable amount of fees. O’Doherty is correct that when a contingency fee agreement is involved, courts have taken different paths to determining the amount of fees to award. Some courts ignore the contingency fee agreement, some award fees based on the agreement, and others use the agreement as a starting point for determining a reasonable fee. (*People ex rel. Dept. of Transportation v. Yuki* (1995) 31 Cal.App.4th 1754, 1769.)

We do not find O’Doherty’s argument to be persuasive because the trial court was not bound to follow a particular case, given the different approaches. (*McCallum v. McCallum* (1987) 190 Cal.App.3d 308, 315, fn. 4.) In this case, the trial court opted to follow reasoning that was approved by the Court of Appeal (Fourth Dist., Div. One) in *Salton Bay*. It was within the trial court’s authority to follow the *Salton Bay* reasoning, and therefore, we are not persuaded the trial court’s decision was outside the bounds of reason.

## 2. COSTS

O’Doherty contends the trial court erred by not awarding him costs as part of his litigation expenses during the first phase of the trial because O’Doherty was the prevailing party on the notice issue. We disagree.

The trial court denied O’Doherty an award of costs for the same reason that it denied O’Doherty an award of attorneys’ fees—O’Doherty had a contingency agreement that did not trigger an obligation to pay until O’Doherty received a monetary award. Since O’Doherty did not receive a monetary award he was not obligated to pay

for litigation expenses. As a result, no expenses were incurred. Since no expenses were incurred, O’Doherty was not entitled to an award of litigation expenses.

As set forth *ante*, the trial court’s conclusion was reasonable, based on the law, argument, and evidence in the record. The trial court could reasonably deduce that O’Doherty was not obligated to pay his trial attorneys for costs incurred until he was awarded a monetary sum in the case. As a result, the trial court did not err, because the trial court’s decision was reasonable.

### 3. PHASE TWO OF THE TRIAL

O’Doherty contends the trial court erred by not awarding him costs at the end of the second phase of the trial. We disagree.

“A costs award is reviewed on appeal for abuse of discretion. [Citations.]” (*El Dorado Meat Co. v. Yosemite Meat and Locker Service, Inc.* (2007) 150 Cal.App.4th 612, 617.) Section 1268.710 relates to eminent domain proceedings and provides: “The defendants shall be allowed their costs, including the costs of determining the apportionment of the award made pursuant to subdivision (b) of Section 1260.220, except that the costs of determining any issue as to title between two or more defendants shall be borne by the defendants in such proportion as the court may direct.”

A problem is created here by O’Doherty’s reliance on an eminent domain fee statute. (§ 1268.710.) The argument does not connect to the procedural history of the case, because the case proceeded as though it were an inverse condemnation action (not an eminent domain action), as explained *ante*—whether or not there was a taking is usually not an issue in an eminent domain matter. O’Doherty asserts that it is “clear” he

is entitled to costs based on the language of section 1268.710. O’Doherty’s reasoning fails because the trial court and the parties did not treat this action like an eminent domain matter, i.e., there was a finding of no taking of O’Doherty’s property.

The trial court reasoned O’Doherty was not entitled to his costs, because the District did not take O’Doherty’s land—it was properly using the street easement. The trial court concluded the Legislature did not intend for costs to be awarded to parties whose land was not taken. The trial court’s reasoning is supported by the following Supreme Court holding: “Property owners are, of course, not constitutionally entitled to costs in inverse condemnation actions if they are unable to prove that there has been a taking or damaging of their property by the defendant governmental entity. [Citation.]” (*City of Los Angeles v. Ricards* (1973) 10 Cal.3d 385, 391.) Thus, there is legal authority supporting the trial court’s reasoning that costs are not to be awarded to a defendant who has not suffered a taking. As a result, we conclude the trial court’s ruling did not constitute an abuse of discretion.

Nevertheless, the trial court will likely revisit this ruling due to our reversal of the taking finding, assuming O’Doherty brings another motion for costs. We will direct the trial court to vacate its ruling on the costs issue as it pertains to the second phase of the trial, in the event O’Doherty brings another motion for costs.

### **DISPOSITION**

The taking ruling is reversed. The trial court is directed to proceed with trial on the issue of the compensation owed to O’Doherty for the taking of the property burdened by the street easement. If O’Doherty brings another motion for costs

(§ 1268.710), then the trial court is directed to vacate its prior ruling and rule on the new motion. In all other respects, the judgment is affirmed. Appellant is awarded his costs on appeal. (§ 1268.720.)<sup>6</sup>

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

MILLER \_\_\_\_\_  
J.

We concur:

RICHLI  
Acting P. J.

KING  
J.

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<sup>6</sup> Since this is officially an eminent domain matter, and we have concluded a taking occurred, we rely on the eminent domain scheme of laws.