Filed 3/28/13 Monks v. City of Rancho Palos Verdes CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

JOHN MONKS et al., Plaintiffs and Appellants, v. CITY OF RANCHO PALOS VERDES, Defendant and Respondent.	B237221 (Los Angeles County Super. Ct. Nos. YS010425, YC046655)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stuart M. Rice, Judge. Affirmed.

Stuart Miller; Wellman & Warren and Scott W. Wellman for Plaintiffs and Appellants.

Carol W. Lynch, City Attorney; Richards, Watson & Gershon, Saskia T. Asamura; Kutak Rock, Edwin J. Richards and Christopher D. Glos for Defendant and Respondent.

This regulatory takings case is before us for the third time. Plaintiffs own real property in the City of Rancho Palos Verdes. They filed this inverse condemnation action against the city, alleging the city had exacted a regulatory taking under the California Constitution (Cal. Const., art. I, § 19) by enacting a resolution that precluded them from building homes on their vacant lots. In the first appeal, we held that plaintiffs were entitled to a trial on their takings claim and were not limited to seeking a writ of administrative mandate to overturn the city's resolution (*Monks v. City of Rancho Palos Verdes* (B172698, Feb. 23, 2005, mod. Mar. 15, 2005) [nonpub. opn.]). On remand, the case was tried to the court. The parties settled plaintiffs' *temporary* takings claim; plaintiffs were paid $4.25 million. That left only the permanent takings claim for trial. After the presentation of evidence and closing argument, the trial court found that the city's resolution did not constitute a permanent regulatory taking.

In the second appeal, we reversed the trial court, concluding that the city's resolution effected a permanent regulatory taking. (See *Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263.) We remanded the case so the trial court could determine an appropriate remedy. On remand, the city opted to allow plaintiffs to build homes on their lots. Plaintiffs asserted they were also entitled to compensation for the decline in the fair market value of their properties. The trial court disagreed, stating that the city had remedied the permanent taking by repealing the offending resolution and enacting a new resolution allowing plaintiffs to develop their properties.

In this appeal, plaintiffs contend the trial court erred in ruling they could not recover damages for the decline in the fair market value of their properties. We agree with the trial court. The city did not have to pay compensation to plaintiffs for the permanent taking because it provided a constitutionally acceptable alternative remedy: It allowed plaintiffs to build homes on their lots.

I

BACKGROUND

In ancient times, there was a landslide in part of what is now known as the City of Rancho Palos Verdes. The ancient landslide covers two square miles on the south

central flank of the Palos Verdes Peninsula. Plaintiffs' lots are located on the ancient landslide.

In August 1957, an area in the ancient landslide, east and southeast of plaintiffs' lots, began to slide; this area is commonly known as the Portuguese Bend landslide. Between January 1974 and March 1976, an area also in the ancient landslide, south and southwest of the lots, began to slide; this area is commonly known as the Abalone Cove landslide. Both remain active.

A. City Council Proceedings

On September 5, 1978, the Rancho Palos Verdes City Council enacted an urgency ordinance prohibiting the development of property in the ancient landslide area. Section 6 of the "Landslide Moratorium" stated: "It has recently come to the attention of the City Council that the land identified in the Landslide Moratorium Map which was previously thought to be stable may in fact be susceptible to or experiencing current landslide movement. In order to protect the public health, safety and welfare[,] it is necessary for the City of Rancho Palos Verdes to conduct extensive geological studies to determine the stability of the land in question and to determine what remedial measures, if any, the City can take to protect residents of the community. Until such geological studies are completed and evaluated[,] it cannot be determined whether grading and new construction in the Landslide Moratorium Area will adversely impact the stability of said area. . . ." (City of Rancho Palos Verdes, Ordinance No. 108U, § 6.)

The city retained Robert Stone & Associates to perform a geotechnical investigation of the Abalone Cove landslide. In a February 28, 1979 report, Stone referred to the area in the northern part of the moratorium, stating in part: "Only two actions are likely to cause renewed sliding within this area. One is loss of support on the downward slope as a result[] of headward propagation of the active Portuguese Bend and Abalone Cove landslides. . . . The other action which could cause renewed sliding would be build up of ground water above the level previously experienced during the last several thousand years."

In December 1991, the city council established an administrative procedure allowing property owners to seek exclusion from the moratorium. To be exempt, the property owner had to show, among other things, that the proposed development would "not aggravate any existing geologic conditions in the area." (City of Rancho Palos Verdes, Ordinance No. 276 (Dec. 17, 1991).)

On May 26, 1993, Perry Ehlig, the city geologist, sent a memorandum to the director of public works, proposing that the moratorium area be divided into zones. Zone 2 encompassed plaintiffs' lots. Most of those lots are around an acre in size, and many have ocean views. There are a total of 111 lots in Zone 2: Sixty-four lots have homes, and 47 are undeveloped. Plaintiffs own 16 of the undeveloped lots. Their property is zoned exclusively for single-family homes.

Discussions between city officials and lot owners sometimes focused on the "factor of safety," a geotechnical term used to explain the stability of a parcel of land. The factor of safety was expressed as a number reflecting the relationship between the physical factors that cause instability and those that aid stability. A safety factor of 1.00 indicated that the instability forces are equal to the stability forces, and the property was therefore considered "barely stable or almost unstable." A safety factor of 1.5 indicated that the forces of stability are at least 50 percent greater than the forces that cause instability. A "localized" safety factor referred to the stability of a *single lot* in Zone 2; a "gross" safety factor referred to Zone 2 *in its entirety*.

On March 6, 2001, the city council authorized a study by Cotton, Shires & Associates (CSA) to determine—as stated in the minutes—"if it is safe to build on lots with a localized safety factor of 1.5 assuming that the gross area factor is not that high and to determine any cumulative effect by development of the . . . vacant lots." CSA was instructed to review existing data.

On September 12, 2001, CSA submitted an initial report. The city council discussed the report at a regular meeting on September 18, 2001. Bill Cotton, of CSA, attended the meeting, discussed the report, and answered questions from the council. Members of the public were permitted to speak. Plaintiff John Monks was there and

did so. The city provided CSA with additional information and asked that a revised report be prepared.

On January 14, 2002, CSA sent a final report to the city manager. The report stated: "It is our opinion that there is insufficient subsurface information to properly characterize either the depth to the base of landsliding, strength properties of the landslide materials, or the groundwater levels. These parameters are essential elements in the conduct of a thorough slope stability analysis. The standard-of-care for the geotechnical engineering profession is to achieve a factor of safety of 1.50. . . . Without these data, no accurate slope stability analysis can be undertaken, no reliable factor of safety can be calculated, and no dependable landslide mitigation scheme can be designed. We conclude that one cannot quantitatively determine the factor of safety and, therefore, we cannot judge that level of risk of development in the prehistoric landslide area (i.e., Zone 1 and Zone 2)."

The report further stated: "Regarding the question of allowing the remaining lots in Zone 2 to be developed, we believe that the lots can be developed without **causing** the large, regional landslide to be destabilized. This conclusion assumes that individual parcels will be developed using [certain] grading methods and construction techniques, that strict geotechnical review by the City Geotechnical Reviewer and the project geotechnical consultant will be required and that certain conditions . . . are adhered to. In our judgment, the additional development in Zone 2 will be exposed to the same level of unknown potential risk to which existing residents are exposed. If the City decides to allow development of the remaining approved parcels in Zone 2, it should do so with the understanding that the risk of . . . reactivation of all or part of the regional landslide mass is **unknown**. It is clear that the factor of safety of the landslide mass that underlies Zone 2 is above 1.00, but likely less than the industry's standard safety threshold of 1.50." (Boldface in original.)

On January 16, 2002, most of the plaintiffs jointly filed an application with the city's department of planning, building, and code enforcement, requesting an exclusion from the moratorium.

On May 20, 2002, while plaintiffs' application was pending, the city council held an "adjourned" regular meeting to discuss the CSA report. According to the agenda for the meeting—made public earlier that day—the council would decide whether to approve a proposed standard for granting development permits in Zone 2, namely, to "[c]ontinue to deny requests for development permits for new homes in . . . Zone 2 . . . based on the current lack of evidence that the subject land has a factor of safety of 1.5 or greater, unless an applicant submits a complete Landslide Moratorium application that is supported by adequate geological data." The council invited public comments. Monks was present and spoke, saying that he owned three vacant lots and had retained a geologist who determined that his property had a safety factor of 1.5 or higher. Monks supported the use of a localized safety factor of 1.5. After comments from the public, the council approved the conclusions in the CSA report and the proposed standard for granting development permits to build new homes in Zone 2.

On June 12, 2002, the city council approved "Resolution No. 2002-43," which was intended to set forth the city council's decisions from the May 20, 2002 meeting. The resolution stated in part that city staff should "continue to deny requests for development permits for new homes in the Zone 2 area . . . because of the current lack of evidence that the Zone 2 area has a factor of safety of 1.5 or greater, until an applicant submits a complete Landslide Moratorium Exclusion application that is supported by adequate geological data demonstrating a factor of safety of 1.5 or greater of the Zone 2 area to the satisfaction of the City Geologist; the City Council approves the . . . application, and all other permits to develop [the property] are issued by the City."

At the time of the resolution's adoption, city officials were well aware that, as stated in an October 16, 2000 letter from the city manager to Monks, "the geologists all agree that the gross stability of the land area referred to as Zone 2 has a factor of safety of less than 1.5." As early as March 1996, the city geologist knew that "the factor of safety [for Zone 2] is probably not 1.5 but is greater than 1.25." And the CSA report

stated that the safety factor of Zone 2 was "likely well below the geotechnical standard of 1.50."

B. Preliminary Legal Proceedings

In light of Resolution No. 2002–43, plaintiffs decided not to pursue their pending application for an exclusion from the moratorium. Instead, on July 10, 2002, plaintiffs filed this action, consisting of a petition for a writ of administrative mandate and a complaint for inverse condemnation.[1]

On May 6, 2003, plaintiffs filed a memorandum of points and authorities, arguing that the city council had abused its discretion in approving Resolution No. 2002-43—warranting relief under their writ petition—and that the resolution constituted a "taking" within the meaning of article I, section 19 of the California Constitution—warranting relief on their claim for inverse condemnation. The memorandum pointed out that plaintiffs "have had no opportunity to testify, to offer opinions of their own experts, or to question City officials and consultants," and if "'the administrative record is not an adequate basis on which to determine if the challenged action constitutes a taking' . . . , plaintiffs reserve their right to take discovery and introduce additional evidence, particularly in the form of their own testimony, the testimony of experts, and the examination of City officials."

The city filed an opposition to the writ petition and the inverse condemnation claim. Plaintiffs filed a reply.

On October 31, 2002, the parties appeared before the trial court, Judge Lois Anderson Smaltz presiding, to present argument. During the proceeding, Judge Smaltz stated: "I set the matter for oral argument because there were some references . . . in

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[1] During the course of this action, plaintiffs have included John Monks, Lisa Monks, Michael Agahee, Mary Agahee, Raymond M. Barnett, Michael A. Broz, Stephen Case, William Clark, Amy Clark, Richard Cruce, Ariel Compton-Cruce, Christopher Haber, Laura Haber, Michael Kiss, Francis Ruth, Patricia Ruth, Christopher Smith, Dominic Teh, Joe Tabor, and Norma Tabor.

your points and authorities[] with respect to questioning whether the court would set a hearing. I did conclude, based upon the authorities you submitted, that an evidentiary hearing is not appropriate. So [the court] will rely on the evidence that was previously submitted in the administrative hearing and that was referred to throughout your authorities here."

After the parties had presented argument, Judge Smaltz stated on the record that the writ petition was denied and that Resolution No. 2002-43 did not constitute a taking. Later, she filed a statement of decision, stating in part, "The court perceives no need for further evidentiary hearings or trials." Judgment was entered in favor of the city. Plaintiffs appealed.

C. First Appeal

We reversed the trial court, concluding that plaintiffs were entitled to a trial on the merits of their takings claim and were not limited to writ relief in seeking to invalidate Resolution No. 2002-43. (See *Monks v. City of Rancho Palos Verdes* (B172698, Feb. 23, 2005, mod. Mar. 15, 2005) [nonpub. opn.].) In reaching that conclusion we relied primarily on *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 13–16, and *Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1173–1179. Our decision was based on the principle that "'administrative mandate is not a substitute for a trial on the takings issues.'" (*Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405, 411; accord, 11 Miller & Starr, Cal. Real Estate (3d ed. 2006) § 30:32, pp. 30-162 to 30-164.)

We also held that plaintiffs' takings claim was ripe and that plaintiffs did not have to exhaust their administrative remedies by applying for development permits with the city given that the outcome was certain: The city would deny the applications because plaintiffs could not show that the gross safety factor of Zone 2 was 1.5 or higher. We concluded that administrative exhaustion would have been futile.

Finally, we rejected the city's argument that plaintiffs' takings claim was barred by the 90-day statute of limitations (Gov. Code, § 65009, subd. (c)(1)(B)). Resolution No. 2002-43 was approved on June 12, 2002, and this action was filed on July 10, 2002.

We remanded the case to the trial court with directions to conduct an evidentiary hearing on plaintiffs' takings claim.

D. Trial

The case was tried to the court, Judge Cary H. Nishimoto presiding, on nonconsecutive days from November 20, 2006, to March 28, 2007. The trial court had the benefit of not only the administrative record but the testimony of witnesses, primarily experts.

In late January 2007, during the liability phase of the trial, plaintiffs settled their "temporary" takings claim with the city for $4.25 million, expressly leaving the permanent takings claim to be decided by the court. The settlement of the temporary takings claim was intended to compensate plaintiffs for the *lost use* of their properties from the date of enactment of the offending regulation (Resolution No. 2002-43) until its repeal and replacement by a new regulation permitting them to build homes (Ordinance 498). The temporary taking began on May 20, 2002, when the city council agreed to the terms of Resolution No. 2002-43. That resolution was repealed on January 21, 2009, and was replaced by a new regulation (Ordinance 498) effective October 15, 2009, which authorized development of the 16 lots. As stated in the settlement agreement, plaintiffs agreed to release the city "from all claims of damages arising out of a temporary taking from the beginning of time through final judgment, including but not limited to attorneys' fees and costs."

At the conclusion of the trial, the court found that plaintiffs' permanent takings claim lacked merit because, under state nuisance law, "the potential for significant land movement in Zone 2, however minor, can only be deemed to constitute . . . a substantial and reasonable interference [with collective social interests]." The court also found that the moratorium did "not go too far in regulating plaintiffs' . . . interests" in light of its important nature, its negligible effect on permitted uses, and its lack of interference with plaintiffs' reasonable investment-backed expectations. On July 18, 2007, the trial court entered judgment in favor of the city. Plaintiffs appealed.

E. Second Appeal

We reversed the trial court, concluding that Resolution No. 2002-43 constituted a permanent taking of plaintiffs' properties. As we explained: "[O]ur inquiry follows the law applicable to a categorical taking, also known as a . . . total taking, or per se taking. . . . [W]e must determine whether the moratorium is justified by state principles of nuisance or property law. . . . The city invokes only nuisance law. [¶] . . .

"The construction of homes on plaintiffs' lots must pose a significant harm to persons or property to constitute a public or private nuisance. . . . But that element of a nuisance is not satisfied here. Thus, nuisance law does not support the moratorium.

"At the outset, we note that the burden is on the city to prove that the moratorium is justified by state nuisance law. . . . Further, '[i]t seems unlikely that common-law principles would have prevented the erection of any habitable or productive improvements on [the] land; they rarely support prohibition of the "essential use" of land.'

"In essence, the city must show that, under common law nuisance principles, it could obtain an injunction against the construction of homes on plaintiffs' lots. . . . In obtaining such relief, the city would have to establish a reasonable probability of prevailing on the merits of its nuisance claim. . . . For several reasons, we conclude it could not do so.

"First, there is nothing inherently harmful about plaintiffs' desired use of their properties: to build homes. The lots are zoned solely for that purpose. The area was subdivided decades ago. And the city has installed the requisite utilities, including a sewer system.

"Second, the trial court concluded that 'at best there remains *uncertainty* with respect to the stability of the geology of Zone 2 and the surrounding areas within the Ancient Portuguese Landslide area.' (Italics added.) 'Uncertainty' is not a sufficient basis for depriving a property owner of a home. The city must establish a reasonable probability of significant harm to obtain an injunction against a nuisance. The trial

court's determination that the stability of Zone 2 is 'uncertain' does not meet that standard. . . .

"Third, in applying nuisance law, it is important to examine the risk of harm suggested by Zone 2's factor of safety. [Glenn] Tofani[, a geotechnical engineer,] was the only witness to opine that Zone 2—the majority of it—was moving. He calculated various safety factors for the zone—the lowest of any witness—and described the *effects* associated with those calculations. Tofani testified that a house would sustain significant structural damage in about a *decade* if it was close to the uppermost part of a landslide or straddled a line demarking movement on one side and no movement on the other. None of plaintiffs' lots is anywhere near such an area, indicating their homes would take longer than a decade to become distressed. Tofani also stated that even severe structural damage—as illustrated by a red-tagged house—could be repaired. In that regard, plaintiffs' evidence showed that, in 2005, the city approved the construction of a new foundation for a distressed home in Zone 5 even though that zone has a safety factor less than 1.0 and is moving. With respect to personal injury, Tofani said the risk was 'very low,' giving as an example someone tripping over a crack. Neither [John] Foster[, a professor of engineering geology,] nor Tofani was aware of any unusual cracks near plaintiffs' properties. Tofani also said that personal injury could result from a deteriorated structure, but there was no evidence that plaintiffs would allow their homes to decline to such an extent. Tofani did not see any need to evacuate existing homes because there was currently no significant risk to the health or safety of anyone living in Zone 2. Another city witness, [Mark] McLarty, [a certified engineering geologist,] described the risk of personal injury as 'limited' to some sort of 'freakish occurrence.'

"Fourth, the city correctly points out that it may obtain an injunction requiring a property owner to remove a dangerous condition from his land or to stabilize his property to prevent a portion of his land from sliding onto a neighbor's yard. . . . Yet the city does not explain how such an injunction would be of assistance here. This case involves block glides—*large blocks of earth* that move slowly along a *single plane.*

According to Foster, whose testimony on this issue was not challenged, a block glide generally presents no risk of harm to people. The city does not contend that if construction is allowed, one of plaintiffs' lots might slide onto an adjacent lot or that one of plaintiffs' homes might slide into the ocean. This case is not comparable to the sudden breakaway of the 18th hole at the Ocean Trails Golf Course [on June 2, 1999]. Rather, the gist of the city's nuisance theory is that, if an undeveloped lot is moving at all or might move at some time, the property owner—for his or her own good—should not be allowed to build a home that could suffer damage in the distant future, notwithstanding that the potential damage could be repaired.

"Nor does the city argue that construction on plaintiffs' lots is likely to damage the property of others or to cause a block glide by weakening the stability of Zone 2. The CSA report concluded that 'the lots can be developed without **causing** the large, regional landslide to be destabilized.' Although the city council rejected that conclusion, we should credit the opinion of the experts who wrote the report, not the findings of a legislative body like the council. (See *Lucas* [*v. South Carolina Coastal Council* (1992) 505 U.S. 1003,] 1025, fn. 12, 1026–1029 (maj. opn. of Scalia, J.); *id.* at pp. 1039–1041, 1052–1060 (dis. opn. of Blackmun, J.) [criticizing majority for not giving any weight to legislative findings] (*Lucas*).) In a portion of his testimony with which the trial court did not disagree, Foster stated that 16 new homes would not undermine the stability of the area, emphasizing the minimal weight of the additional dwellings and their positive effect on diverting rain water. He also testified, 'From the standpoint of the old landslide surface reactivating the mov[ement] to tear these homes apart, no, I don't see the risk there.' . . . Further, the city's own conduct—in approving additions to existing homes from 1988 to 2005—is inconsistent with its assertion that construction on plaintiffs' properties would be detrimental, especially given the approved expansion and remodeling of homes in Zone 5. 'The fact that a particular use has long been engaged in by similarly situated owners ordinarily imports a lack of any common-law prohibition.' (*Lucas*, *supra*, 505 U.S. at p. 1031.) . . . Here, the city has approved so many exemptions and exception permits for existing homes that applying

the moratorium to plaintiffs' undeveloped lots is equally questionable. For his part, Tofani said that allowing construction on *all 47 undeveloped lots* 'would have a tendency to further reduce the factor of safety.' But that statement, without more, is not substantial evidence as to how or when the desired construction—on *plaintiffs' 16 lots*—might affect anyone's health, safety, or property, if at all. The city does not cite any other evidence on this subject.

"Fifth, while the city's building code requires a safety factor of at least 1.5 for residential construction, the code should be accorded no more weight than the statute in *Lucas*. As the court explained there, the common law, not statutory law, is determinative in a categorical takings case. (See *Lucas, supra,* 505 U.S. at pp. 1025, fn. 12, 1026–1029 (maj. opn. of Scalia, J.); *id.* at pp. 1039–1041 (dis. opn. of Blackmun, J.).) Similarly, although the record contains ample evidence about the factor of safety, in general and as applied to this case, state nuisance law focuses on the actual harm posed by plaintiffs' intended use of the property, not scientific labels that merely reflect the uncertainties of the situation. . . . The risk of property damage and personal injury, as we have said, is not sufficient in any practical sense to justify applying the moratorium to plaintiffs' lots.

"We do not question the use or importance of factors of safety—as recognized by geotechnical professionals—in assessing whether land is suitable for residential construction. But here, given the differing, and sometimes conflicting, views of numerous written reports and several witnesses, the trial court could not make a definitive finding on the safety factor, ultimately deciding that the stability of Zone 2 was uncertain. That finding is simply not adequate to satisfy the city's burden of proof under *Lucas* and state nuisance law.

"Finally, the trial court expressed the view that the city should not have to risk bankruptcy in allowing plaintiffs to build. The city, however, has not raised this consideration. As of now, any potential suits based on a future slide are purely speculative. And speculation does not justify violating the state Constitution and depriving plaintiffs' land of all economically beneficial use.

"For the foregoing reasons, we conclude that the city's resolution effected a permanent taking of plaintiffs' properties. In *Lucas*, the court applied a categorical takings rule to a government moratorium on residential construction along the beach. That moratorium was based on the theory that the presence of homes would contribute to erosion, which, in turn, would expose the homes to damage by the wind and waves. On remand, the South Carolina Supreme Court concluded that the common law did not justify the moratorium despite the property damage to beachfront homes. *Lucas* compels the conclusion we reach today.

"We therefore remand the case to the trial court for the determination of an appropriate remedy. In that respect, plaintiffs express concern that the city might impose additional or new restrictions on their attempt to build. We expect the city to proceed in good faith. 'Government authorities, of course, may not burden property by imposition of repetitive or unfair land-use procedures. . . .' . . . The city may not 'engage in endless stalling tactics, raising one objection after another so that the regulatory process never comes to an end.'" (*Monks v. City of Rancho Palos Verdes* (2008) 167 Cal.App.4th 263, 305–310, some citations omitted, original italics.) To be specific, we "remanded [the case] for further proceedings to determine an appropriate remedy for the *permanent taking* exacted by the city." (*Id.* at p. 310, italics added.)

The city petitioned the California Supreme Court for review. The petition was denied on December 17, 2008 (S168175). The remittitur issued on January 15, 2009 (B201280).

F. Proceedings on Remand

On January 21, 2009—six days after the remittitur issued—the city council adopted "Resolution No. 2009-06," which repealed Resolution No. 2002-43, the regulation that effected a permanent taking of plaintiffs' properties. The new resolution recited that it was adopted in response to the second *Monks* appeal and was the "initial step that will be taken by the City to avoid having to pay compensation to the plaintiffs for a permanent taking of their properties."

After the repeal of the offending regulation, the city began work on an exemption from the 1978 moratorium that would allow plaintiffs to build homes on their properties. For example, the city engaged in an environmental analysis and held public hearings required by the California Environmental Quality Act (CEQA) (Pub. Resources Code, §§ 21000–21189.3).

On September 15, 2009, the city council adopted Ordinance 498, which established a new exception to the 1978 moratorium, allowing plaintiffs to develop their 16 lots. Section 8 of the ordinance set forth the application process: a signed "Landslide Moratorium Exception" (LME) application submitted to the director of planning, building, and code enforcement; a letter setting forth the reason for the request and a full description of the project; a site plan; a grading plan (if grading was proposed); geological, geotechnical, soils, and other reports required by the city to demonstrate that the proposed project would not aggravate the existing situation; and an application fee. Ordinance 498 took effect on October 15, 2009.

Also on September 15, 2009, the city council adopted "Resolution No. 2009-72," which certified a mitigated negative declaration (MND) under CEQA for plaintiffs' properties.

On or about September 29, 2009, the city filed an ex parte application for an order dismissing the case as moot. Plaintiffs opposed the city's motion, contending they were entitled to a trial on damages for the decline in the fair market value of their properties during the period covered by the temporary takings claim (May 20, 2002, to October 15, 2009). Plaintiffs attributed the decline in value to (1) the general decline in the real estate market and (2) public statements by city officials describing plaintiffs' properties as unstable and dangerous.

On October 14, 2009, the trial court heard argument on the city's motion and stated that the case was not moot because the city had not yet approved all of the LME applications. The court ordered that the application filed by most of the plaintiffs on January 16, 2002—before the enactment of Resolution No. 2002-43—be deemed the current LME application for all 16 lots and that the city not charge any application

processing fees other than what was paid in 2002 ($5,750). The court tentatively denied the city's motion to dismiss and continued the trial date for damages in order to monitor the LME application process. The parties were instructed to provide the court with a status report and to return to court ex parte as needed.

On October 16, 2009, a coalition of property owners in Zone 2 who opposed the development of plaintiffs' properties filed a petition for a writ of administrative mandate, alleging that the city violated CEQA in adopting the MND and was required to prepare a full environmental impact report (*Enstedt v. City of Rancho Palos Verdes* (Super. Ct. L.A. County, 2011, No. BS123281)). In *Enstedt*, the plaintiffs in the present case—the "*Monks* plaintiffs"—were the real parties in interest. Eventually, the city, with the assistance of plaintiffs' counsel, prevailed in *Enstedt*. The petitioners in *Enstedt* filed an appeal, which was dismissed at the petitioners' request before the opening brief was filed (B236344).

In processing the LME applications submitted by three of the plaintiffs, the city learned that the grading required to develop their lots exceeded the grading limitation of less than 50 cubic yards imposed by city law. (See Rancho Palos Verdes Mun. Code, § 17.76.040.B.1.) On January 5, 2010, the city adopted ordinance 502, amending the moratorium chapter of the municipal code to increase the permitted grading on plaintiffs' properties from less than 50 cubic yards to less than 1,000 cubic yards. (See Rancho Palos Verdes Mun. Code, § 15.20.040.P.) This increase was enacted solely to benefit plaintiffs as opposed to other property owners in Zone 2. The municipal code, as amended, stated that the increase in grading applied to properties "belonging to the plaintiffs in the case 'Monks v. City of Rancho Palos Verdes, 167 Cal. App. 4th 263, 84 Cal. Rptr. 3d 75 (Cal.App. 2 Dist., 2008)[.]'" (Rancho Palos Verdes Mun. Code, § 15.20.040.P.)

On or about March 12, 2010, the parties attended a settlement conference conducted by the trial court. By then, all of the plaintiffs had submitted documentation in connection with their LME applications, which the city was processing. The trial

court continued the possible trial date to December 6, 2010. On July 13, 2010, the city notified the trial court that the LME applications for all 16 lots had been approved.

By January 21, 2011, the city had received "planning entitlement" documents for nine of the 16 lots; seven had been approved, and two were expected to be approved soon. The plaintiffs owning the remaining seven lots had not submitted any documentation after their LME applications had been approved. As of April 12, 2011, planning entitlement documents had been submitted for 11 lots; the city had approved eight, and the documents for the other three lots were under review for completeness. Building permits had issued for three lots.

On April 21, 2011, the trial court established a briefing schedule on the issue of whether plaintiffs were entitled to any damages and set the matter for hearing on May 16, 2011. Plaintiffs filed a memorandum, asserting they were entitled to damages for the decline in their property values after May 20, 2002, the date of the taking. The city filed a memorandum, arguing that plaintiffs had been fully compensated for a *temporary* taking by way of the $4.25 million settlement and had received an appropriate remedy for a *permanent* taking: the city's decision to allow plaintiffs to develop their lots and its processing of the applications to issue building permits.

On May 16, 2011, the parties appeared in the trial court to present oral argument on the damages issue. At the conclusion of the hearing, the trial court ruled that plaintiffs were not entitled to damages for any decline in the value of their properties, and there were no remaining issues to be tried. The trial court also ruled on an in limine motion brought by plaintiffs in which they sought to exclude the testimony of the city's expert real estate appraiser, John Ellis. Plaintiffs argued that his testimony was based on the allegedly false assumptions that their properties were susceptible to landslides and that they might be denied building permits under the city's new administrative process. The trial court granted the motion on the ground that it was moot because plaintiffs were not entitled to any further damages. The court commented that, if Ellis's testimony were relevant, he would be allowed to testify and that plaintiffs' objections to his testimony went to its weight, not its admissibility.

On or about September 19, 2011, the city submitted a final status report to the trial court, stating that "planning entitlements" had been approved for eight lots, and the "planning entitlements" for three other lots were expected to be approved in the near future. The plaintiffs who owned the other five lots had not submitted any documentation after the approval of their LME applications.

On October 21, 2011, the trial court, Judge Stuart A. Rice presiding, entered judgment as follows: (1) the city shall continue, in good faith, to process development applications for plaintiffs' 16 lots; (2) the city shall not charge permit fees for any of plaintiffs' lots until the lot owner obtains full approval for a house *or* until December 31, 2016, whichever occurs first; (3) the judgment shall apply to any future owner of any of plaintiffs' lots; (4) the trial court retains jurisdiction to enforce the judgment for any applications filed on or before December 31, 2016; (5) judgment is entered in favor of the city on all outstanding causes of action; and (6) the parties are to bear their own costs and attorney fees.

On November 7, 2011, plaintiffs filed an appeal, specifically challenging the trial court's determination that the city was entitled to judgment in its favor on all outstanding causes of action.

II

DISCUSSION

The question on appeal is whether the trial court erred in ruling that plaintiffs are not entitled to damages for a decline in the fair market value of their properties given that the city exacted a permanent regulatory taking of their land. Because that question is one of law, the proper standard of review is de novo. (See *Davis v. Los Angeles Unified School Dist. Personnel Com*. (2007) 152 Cal.App.4th 1122, 1131.)

The parties have already resolved, by way of settlement, whether plaintiffs were entitled to damages for a temporary taking. (See *Kavanau v. Santa Monica Rent Control Bd*. (1997) 16 Cal.4th 761, 773.) Consequently, that issue is not before us.

As for the remedy in a permanent regulatory takings case, both the United States Supreme Court and the California Supreme Court have stated that the public entity has

the option of compensating the property owner *or* repealing the offending regulation. "If the alleged taking is a 'regulatory taking,' i.e., one that results from the application of zoning laws or regulations which limit development of real property, . . . the owner must afford the state the opportunity to rescind the ordinance or regulation or to exempt the property from the allegedly invalid development restriction once it has been judicially determined that the proposed application of the ordinance to the property will constitute a compensable taking. . . . Compensation must be paid for a permanent taking only if there has been a final judicial determination that application of the ordinance or regulation to the property is statutorily permissible and constitutes a compensable taking. Even then the state or local entity has the option of *rescinding its action in order to avoid paying compensation for a permanent taking*." (*Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 13–14, italics added.)

"[A] regulation of property that 'goes too far' may effect a taking of that property . . . . In such a case, the property owner may bring an inverse condemnation action, and if it prevails, the regulatory agency must *either* withdraw the regulation *or* pay just compensation." (*Kavanau v. Santa Monica Rent Control Bd.*, *supra*, 16 Cal.4th at p. 773, italics added.)

Where a regulation constitutes a taking, "invalidation [of the regulation is] an adequate alternative to forcing the state to pay compensation for a permanent taking. . . . 'Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, or exercise of eminent domain.'" (*Hensler v. City of Glendale*, *supra*, 8 Cal.4th at p. 11, italics omitted.) The government "may elect to rescind its regulation and thereby avoid having to pay compensation for a permanent deprivation." (*Lucas*, *supra*, 505 U.S. at p. 1030, fn. 17.)

Plaintiffs rely on *Klopping v. City of Whittier* (1972) 8 Cal.3d 39 (*Klopping*) in asserting they must be compensated for the decline in the fair market value of their properties. But that case says nothing of the sort. *Klopping* was not a regulatory takings case but, instead, involved the recovery of damages when a public entity makes

precondemnation statements and thereafter acts unreasonably in acquiring or attempting to acquire property through the exercise of its *power of eminent domain*.

In *Klopping*, the City of Whittier adopted a resolution on May 11, 1965, stating it intended to initiate proceedings to create a parking district. Plaintiffs' properties were included among those to be condemned. On November 10, 1963, the city initiated eminent domain proceedings. Thereafter, the city imposed assessments on certain property owners to subsidize the cost of establishing the parking district. On February 23, 1966, one of the property owners to be assessed, Alpha Beta Acme Markets, Inc., filed suit against the city to enjoin the assessment. On July 7, 1966, the city adopted a second resolution, stating that because of the Alpha Beta suit, (1) it would be impossible to sell bonds to fund the parking district, (2) due to the inability to sell the bonds, the proposed acquisition of the properties could not go forward, and (3) it would not be fair and equitable to continue the "restraining effect" of the pending eminent domain actions on the use of the properties to be condemned. The resolution authorized the dismissal of the eminent domain actions but stated that the city would reinstate condemnation proceedings if and when the Alpha Beta suit was resolved in the city's favor. On November 16, 1966, the eminent domain actions were dismissed.

On July 6, 1967, while the Alpha Beta suit was still pending, two individuals who owned properties subject to the prior eminent domain actions filed claims with the city, seeking damages for the decline in the fair market value of their properties caused by the city's two resolutions and its announced intention to refile eminent domain actions if it prevailed in the Alpha Beta suit. The city rejected the individuals' claims, and the individuals (plaintiffs) filed inverse condemnation actions against the city. The city's demurrers were sustained without leave to amend as to any matters occurring *before* the city's eminent domain actions were dismissed but with leave to amend as to matters occurring *after* dismissal. The plaintiffs elected not to amend, and judgments were entered for the city. The plaintiffs appealed.

In concluding that the plaintiffs had stated a claim for relief, the Supreme Court described the nature of the plaintiffs' actions: "[P]laintiffs claim the fair market value

of their properties declined as a result of [the city's] two announcements of intent to condemn made prior to instituting eminent domain proceedings. They contend that because of the condemnation cloud hovering over their lands, they were unable to fully use their properties and that this damage, reflected in loss of rental income, should be recoverable." (*Klopping*, *supra*, 8 Cal.3d at pp. 45–46, fn. omitted.)

The high court discussed the policy implications of recognizing the plaintiffs' theory of recovery, stating: "'It is a matter of common knowledge that a purchaser would not buy property in the process of being condemned except at a figure much below its actual value. It follows, therefore, that in arriving at the fair market value it is necessary that the jury should disregard not only the fact of the filing of the [eminent domain] case but should also disregard the effect of steps taken by the condemning authority toward that acquisition. To hold otherwise would permit a public body *to depress the market value of the property for the purpose of acquiring it at less than market value*.' . . . [¶] . . . However, we are also aware that to allow recovery under all circumstances for decreases in the market value caused by *precondemnation announcements* might deter public agencies from announcing sufficiently in advance their intention to condemn. The salutary by-products of such publicity have been recognized by this court . . . ; plaintiffs likewise agree that a reasonable interval of time between an announcement of intent and the issuance of the [eminent domain] summons serves the public interest. Therefore, in order to insure meaningful public input into condemnation decisions, it may be necessary for the condemnee to bear slight incidental loss. However, when the condemner acts unreasonably *in issuing precondemnation statements*, either by excessively delaying eminent domain action or by other oppressive conduct, our constitutional concern over property rights requires that the owner be compensated. This requirement applies even though the activities which give rise to such damages may be significantly less than those which would constitute a de facto taking of the property . . . ." (*Klopping*, *supra*, 8 Cal.3d at pp. 50–51, italics added, fn. & citations omitted.)

The court also noted: "To allow recovery in every instance in which a public authority *announces its intention to condemn* some unspecified portion of a larger area in which an individual's land is located would be to severely hamper long-range planning by such authorities . . . . On the other hand, it would be manifestly unfair and violate the constitutional requirement of just compensation to allow a condemning agency to depress land values in a general geographical area prior to making its decision to take a particular parcel located in that area." (*Klopping, supra,* 8 Cal.3d at p. 45, fn. 1, italics added.)

The Supreme Court concluded that "a condemnee must be provided with an opportunity to demonstrate that (1) the public authority acted improperly either by *unreasonably delaying* eminent domain action *following an announcement of intent to condemn* or by other unreasonable conduct *prior to condemnation*; and (2) as a result of such action the property in question suffered a diminution in market value." (*Klopping, supra,* 8 Cal.3d at p. 52, italics added.)

The court continued: "Here plaintiffs seek to prove at trial that the fair market value of their properties was diminished because of the *precondemnation statements* issued by defendant city. Specifically they allege that they were unable to fully use their properties and suffered a loss of rental income. It has long been established that rent is an appropriate criterion for measuring fair market value. . . . On the date on which an announcement of future intent to condemn is made, the market value may properly be measured by the anticipated rental income to be received throughout the lifetime of the property. If *as a result of precondemnation statements* rental income is lost, the anticipated rental income would be diminished and a decline in the fair market value would follow. While we reiterate that the valuation date set statutorily at the issuance of the [eminent domain] summons remains intact, if the steps taken toward condemnation are to be disregarded when the condemner acts unreasonably, the condemnee must be compensated for loss of rental income *attributable to such precondemnation publicity*. Rental losses occasioned by a general decline in the property value or by a natural disaster occurring prior to the date of taking must,

however, *be borne by the property owner*." (*Klopping*, *supra*, 8 Cal.3d at p. 53, italics added, fn. omitted.)

Turning to the plaintiffs' allegations, the Supreme Court commented: "Plaintiffs here have alleged that [the city's] actions were unreasonable and performed for the purpose of depressing the fair market value and preventing plaintiffs from using their land. [The city] announced on two separate occasions its intent to condemn. The first resolution was adopted on May 11, 1965; the second on July 7, 1966, at which time [the city] abandoned eminent domain proceedings for the stated reason that it was not 'fair and equitable' to maintain the cloud of condemnation over property owned by plaintiffs and others during the Alpha Beta challenge. Yet, in the same resolution the city recreated a cloud by announcing its intent to reinstitute condemnation proceedings if the Alpha Beta matter was resolved in the city's favor. This latter declaration appears to have no discernible relation to a desire to insure public input into the decision-making process since, presumably, discussion on the advisability and location of a parking district occurred at the time of the May 11, 1965, announcement. In any event, whether there was *unreasonable delay* or whether the July 7 announcement itself constituted *unreasonable action* on the part of defendant is a question of fact." (*Klopping*, *supra*, 8 Cal.3d at pp. 54–55.)

The availability of so-called "*Klopping* damages" was addressed in *City of Los Angeles v. Superior Court* (2011) 194 Cal.App.4th 210. There, the City of Los Angeles implemented a program of purchasing properties near the Los Angeles International Airport (LAX) through voluntary acquisition. Any structures on the acquired properties were demolished, leaving the land vacant. The Court of Appeal explained the purpose of the program, saying: "[I]n 1997, [the City] had begun implementing a 'Residential Soundproofing Program' in order to sound insulate residential dwellings near LAX. It learned, however, that the majority of homeowners and residents of [the] Manchester Square and Belford [neighborhoods] were not interested in soundproofing. A group of residents, supported by political leaders who represented the area, requested that the City purchase the properties in the area in lieu of soundproofing and presented survey

evidence that the vast majority of residents of the area expressed a desire for buyout and relocation. This caused the City to develop the [Voluntary Residential Acquisition and Relocation] Program, which was approved by the Board of Airport Commissioners in July 2000. The Program was voluntary—'[i]f an owner did not voluntarily indicate an interest in having his property purchased, the Airport would not seek to purchase that owner's property.' The Program required demolition of acquired properties because its objective was to mitigate incompatible residential land uses affected by noise from airport operations." (*City of Los Angeles v. Superior Court*, *supra*, 194 Cal.App.4th at p. 219.)

Some of the individuals and companies that owned property near LAX filed an action against the city for inverse condemnation, alleging that, as a result of the city's activities, the value of their properties had declined and that they had suffered a loss of rental income. The trial court granted summary adjudication in favor of the plaintiffs, concluding the city had to compensate them for a taking under the California Constitution (Cal. Const., art. I, § 19). The Court of Appeal granted the city's petition for a writ of mandate, explaining: "It has long been established that acts by a public authority constituting a 'physical invasion' or 'direct legal restraint on the use of . . . property' could amount to a '"de facto taking" of the property' for purposes of an inverse condemnation claim, even where the entity does not formally condemn or intend to condemn. . . .

"In *Klopping*[, *supra*,] 8 Cal.3d 39, the Supreme Court concluded that conduct falling short of physical invasion, legal restraint on the use of the property, or obstruction of access could also lead to a viable claim for inverse condemnation. In *Klopping*, the city had initiated and subsequently withdrawn condemnation proceedings while, at the same time, stating its firm intention to acquire the plaintiffs' properties in the future. The plaintiffs brought suit for inverse condemnation, contending that because of the 'condemnation cloud hovering over their lands, they were unable to fully use their properties and that this damage, reflected in loss of rental income, should be recoverable.' . . . The court was principally concerned with ensuring that in determining

fair market value, the trier of fact consider neither an increase nor a decrease in land value caused by *precondemnation publicity*. . . .

"A year after issuing the opinion in *Klopping*, the Supreme Court clarified its limits in *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110 . . . . In *Selby*, after the city and county had adopted a general plan indicating the general location of proposed streets, an owner of property . . . through which some of the proposed streets would run brought an action seeking a declaration that there had been a taking under *Klopping*. . . . The court disagreed, holding that '[t]he adoption of a general plan is several leagues short of a firm declaration of an intention to condemn property' because such plans are 'subject to alteration, modification or ultimate abandonment, so that there is no assurance that any public use will eventually be made of [the specified] property.' . . . The court [in *Selby*] explained that the holding in *Klopping* applied *only* where the public entity had 'acted unreasonably in issuing *precondemnation statements*, either by excessively delaying eminent domain proceedings or by other oppressive conduct.' . . .

"Following *Klopping* and *Selby*, numerous courts have held that a property owner may recover damages under an inverse condemnation theory where the public entity indicates a firm intention to acquire his or her property and either unreasonably delays prosecuting condemnation proceedings or commences and abandons such proceedings. [Citations.]

"As *Klopping* made clear, to assert a claim for inverse condemnation under its rationale, the plaintiff must establish first, that the public entity engaged in unreasonable activity, either *by excessively delaying initiation of an eminent domain action* or by other oppressive conduct; and second, that the offensive conduct was a precursor to the entity's *condemnation of the plaintiff's property for a public purpose*. . . . This was confirmed in *HFH, Ltd. v. Superior Court* [(1975)] 15 Cal.3d 508, where the court found no basis for a *Klopping*-style inverse condemnation recovery after the city designated the bulk of the plaintiff's land for low-density residential use, but evinced no desire to condemn the land or acquire it for a public

purpose. . . . Describing *Klopping* as addressing inequitable actions undertaken by a public entity '*as a prelude to public acquisition*,' the court explained that in *Klopping*, 'the city in question made public announcements that it intended to acquire the plaintiff's land, then unreasonably delayed commencement of eminent domain proceedings, with the predictable result that the property became commercially useless and suffered a decline in market value. We held only that the plaintiff should be able to include in his eminent domain damages the decline in value attributable to this *unreasonable precondemnation action* by the city. The case thus in no way resembles the instant one, in which plaintiffs make *no allegations that the city intends to condemn the tract in question.*' . . .

". . . [A] claim for precondemnation damages under *Klopping* 'is not akin to a court-created private right of action enabling property owners to collect damages whenever a [public entity] acts "unreasonably."' . . . Rather, there must be a finding of '*unreasonable precondemnation activity* . . . before liability can be imposed on the basis of *Klopping.*'" (*City of Los Angeles v. Superior Court*, *supra*, 194 Cal.App.4th at pp. 222–226, citations omitted, some italics added & omitted.) In concluding that *Klopping* damages were not warranted, the Court of Appeal observed that the plaintiffs had "failed to present evidence to establish the most basic component of a *Klopping* inverse condemnation claim—that the City had condemned their properties, had an intent to eventually acquire their properties through condemnation, or had a plan for future use of their property that would someday require condemnation of their properties . . . ." (*Id.* at p. 226.) "[T]o support their *Klopping* inverse condemnation claim, [the plaintiffs] were required to show (1) that the City *intended to acquire their property for a public purpose through condemnation* at some future point; and (2) that the City engaged in unreasonable actions *geared toward devaluing their property so that the City could acquire it at a discounted price*. Their motion for summary adjudication fell short on both counts." (*Id.* at p. 228, italics added.)

Similarly, in *Joffe v. City of Huntington Park* (2011) 201 Cal.App.4th 492, the Court of Appeal concluded that the plaintiffs could not recover *Klopping* damages,

reasoning that "[i]n *Klopping*, there was no doubt that the City of Whittier had announced its intent to condemn. The city had: (1) adopted a resolution for the initiation of eminent domain proceedings; (2) actually commenced eminent domain proceedings; and (3) adopted a second resolution authorizing dismissal of the proceedings but declaring the city's firm intention to reinstitute proceedings when and if the assessment suit was resolved in its favor. . . . In the instant case, however, the [City's] conduct is not quite so clear. Indeed, the City did not commence eminent domain proceedings and adopted no resolution of necessity. Cases subsequent to *Klopping* have considered the issue of what conduct, shy of the adoption of a resolution of necessity, is sufficient to trigger a duty under *Klopping* to proceed expeditiously or be subject to a suit for damages. While there may be some dispute as to the precise minimum of conduct that will constitute an *announcement of intent to condemn*, it cannot reasonably be disputed that the [City's] conduct in this case did not reach that point. [¶] . . .

". . . [T]he *Klopping* court explained that precondemnation announcements alone should not subject public entities to liability, and that landowners must bear some incidental loss resulting from such general planning announcements. Thus, liability can attach only when the public entity's conduct has passed from the *planning* stage into the *acquiring* stage. . . . Plans for public projects can change or be abandoned; *Klopping* was never intended to inhibit long-range planning or require that public entities acquire property for proposed public improvements before it may be needed. . . . Liability only attaches when the public entity has taken *some action toward actually acquiring the property*." (*Joffe v. City of Huntington Park*, *supra*, 201 Cal.App.4th at pp. 506–508, citations omitted, some italics added.)

As stated in a leading treatise: "In order to give rise to [*Klopping*] damages, the public agency must act improperly either: (1) by an *unreasonable delay* in the initiation of an eminent domain action *following a public announcement of an intent to condemn* specific property that constitutes some official agency action focused on acquisition of that property; or (2) by other unreasonable conduct *prior to the condemnation*; and

(3) the agency's conduct must cause a diminution in the market value of specific property." (11 Miller & Starr, Cal. Real Estate, *supra*, § 30:17, p. 30-82, italics added.) The same treatise points out that "[t]he courts have segregated the public agency's activities into the planning phase and the acquisition phase for purposes of determining when precondemnation conduct gives rise to a damage claim. The owner has no recourse while the activities remain *in the planning phase* because the final decision to proceed with the project is still in doubt and may be modified or abandoned by the agency. The owner may have a right to recover damages *after the agency's activities proceed into the acquisition phase* and it has acted unreasonably. These damages are traditionally referred to as '*Klopping* damages' after the seminal California Supreme Court opinion on the issue." (*Id.* at p. 30-83, italics added, fn. omitted.)

In the present case, the city made no "precondemnation statements," nor did it unreasonably delay in filing an eminent domain action or engage in other unreasonable conduct as a prelude to public acquisition. (See *Klopping*, *supra*, 8 Cal.3d at pp. 50–52; *Selby Realty Co. v. City of San Buenaventura*, *supra*, 10 Cal.3d at p. 119.) Plaintiffs did not allege or make an offer of proof that "the city intend[ed] to condemn the [properties] in question." (*HFH, Ltd. v. Superior Court*, *supra*, 15 Cal.3d at p. 517, fn. 14.) This case does not "present[] the distinct problems arising from inequitable zoning actions undertaken by a public agency *as a prelude to public acquisition* . . . or from zoning classifications invoked in order to evade the requirement that land *used by the public* must be acquired in eminent domain proceedings." (*Id.* at p. 516, fn. 14, citations omitted, some italics added; see *City of Los Angeles v. Superior Court*, *supra*, 194 Cal.App.4th at p. 228.) The city did not enact Regulation No. 2002-43 "as a prelude to public acquisition" or an attempt to evade the use of its power of eminent domain so it could dedicate plaintiffs' properties for a "public use." Nor did the city engage in unreasonable or oppressive conduct so it could "acquire [plaintiffs' lots] *at a discounted price*." (*City of Los Angeles v. Superior Court*, *supra*, 194 Cal.App.4th at p. 228, italics added.) Rather, the city enacted the offending regulation to prevent plaintiffs from building homes—the sole purpose for which the properties were

zoned—and the city based that regulation on its interpretation of a report commissioned to determine whether plaintiffs' properties were subject to landslides. (See *Monks v. City of Rancho Palos Verdes*, *supra*, 167 Cal.App.4th at pp. 276–279.) Further, the city's conduct did not "pass[] from the *planning* stage into the *acquiring* stage." (*Joffe v. City of Huntington Park*, *supra*, 201 Cal.App.4th at p. 507, original italics.) This is a regulatory takings case, and, consistent with that legal theory, the city never intended to acquire plaintiffs' properties for a public purpose or any purpose; there was neither a planning stage nor an acquiring stage. Indeed, the city did not want plaintiffs' properties to be *used by anyone* for any zoned purpose, public or private.

Nevertheless, plaintiffs emphasize that "when private property *is taken for public use*, '[t]he just compensation to which the owner is constitutionally entitled is the *full and perfect* equivalent of the property taken. . . .' This 'means substantially that *the owner shall be put in as good position pecuniarily as he would have been if his property had not been taken*.'" (*Redevelopment Agency v. Gilmore* (1985) 38 Cal.3d 790, 796–797 (*Gilmore*), 1st italics added.) In *Gilmore*, the Supreme Court addressed the issue of "just compensation" when a public entity exercises its power of eminent domain and acquires ownership and possession of private property. As the high court stated, "[I]f the government *pays for condemned property* only after taking and *using it*, the owners 'are entitled to have the *full* equivalent of the value of [its] use at the time of the taking paid contemporaneously with the taking.'" (*Gilmore*, at p. 797, some italics added.)

Here, the city did not exercise its power of eminent domain, did not condemn plaintiffs' properties or take them for public use, and did not pay for any condemned property after using it. Rather, the city committed a *regulatory* taking by enacting an overly restrictive resolution on development. As we stated in plaintiffs' second appeal, "the [city's] resolution, by implementing the [construction] moratorium and continuing to prevent plaintiffs from building on their properties, 'deprive[d] [plaintiffs'] land of all economically beneficial use.'" (*Monks v. City of Rancho Palos Verdes*, *supra*, 167 Cal.App.4th at p. 270.) Unlike the plaintiffs in *Gilmore*—who lost their properties forever through public acquisition and were therefore entitled to the "full and perfect

equivalent of the property taken" (see *Gilmore*, *supra*, 38 Cal.3d at p. 797, italics omitted)—the *Monks* plaintiffs were subjected to a regulatory taking, retained ownership and possession of their lots and, through this inverse condemnation action, won the right to build homes on their properties. In short, the remedies available where a public entity acts unreasonably in condemning private property for public use are not the same as those when property owners prevail in a regulatory takings case.

In sum, the city did not "act[] improperly either by *unreasonably delaying* eminent domain action following *an announcement of intent to condemn* or by other unreasonable conduct *prior to condemnation*." (*Klopping*, *supra*, 8 Cal.3d at p. 52, italics added.) Plaintiffs are not entitled "'to collect damages whenever a [public entity] acts "unreasonably."' . . . Rather, there must be a finding of 'unreasonable *precondemnation activity* . . . before liability can be imposed on the basis of *Klopping*.'" (*City of Los Angeles v. Superior Court*, *supra*, 194 Cal.App.4th at p. 226, citation omitted, italics added.) No precondemnation activity—unreasonable or otherwise —occurred in this case. Thus, *Klopping* does not apply here, and plaintiffs are not entitled to damages for the decline in the fair market value of their properties. Having concluded that plaintiffs are not entitled to a trial on additional damages, we need not address plaintiffs' contentions regarding the trial court's ruling on their in limine motion to exclude the testimony of the city's real estate appraiser.

III

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.