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VIA E-MAIL AND
FIRST CLASS MAIL

Chairman Andrew Do and Members of the
Board of Supervisors
Orange County Hall of Administration
333 West Santa Ana Blvd.
Santa Ana, CA 92701

Re: Buck Johns adv. County of Orange

Dear Chair Do and Members of the Board:

Our firm has been retained to represent the Johns family in connection with a dispute regarding that certain real property identified as APN 439-051-14 (the "Subject Property.")

As you are aware, the Johns' home abuts the Subject Property. A fence has existed near the Southern border of the Johns' property since before they purchased it in 1977. The fence line is partially on the Subject Property. Until recently both the Johns and the County believed the Subject Property belonged to the Johns. In as much as it was on your agenda recently, you all obviously are aware of efforts to resolve the dispute related to the Subject Property whereby the Johns offered to purchase it from the County. Regrettably, that effort has thus far been unsuccessful.

Once the effort to amicably resolve the Johns' claim to the Subject Property by a purchase failed, we were retained us to explore other options by which they may assert their rights to it. While a negotiated resolution that is mutually beneficial to both sides remains their very clear preference, recent events may leave them with no choice other than to pursue litigation. Specifically, we understand Supervisor Foley is exercising the so called "District Prerogative" to instruct County Staff to remove the fence. Our clients are very concerned about the potential change to the status quo that has existed for over 35 years. Accordingly, we are writing to request that the County agree to cease any efforts to remove the fence in order to allow settlement discussions to occur. If the County does not agree to do so, our client has instructed us to move forward with litigation to prevent the fence from being removed and to pursue various claims as discussed below.

In the event the Johns are forced to litigate, the circumstances and title history of the Subject Property would entitle them, at minimum, to an equitable easement, in perpetuity, over the Subject Property. While we have just begun investigating the title issues pertaining to the Subject

Property (and from our initial efforts anticipate discovering facts giving rise to other real property claims), the known objective facts support the equitable easement doctrine. Importantly, there is not a prohibition against obtaining an equitable easement on land owned by a governmental entity, as might be the case with a prescriptive easement. In terms of the facts, the Johns held the good faith and objectively reasonable belief that they owned the Subject Property. Indeed, they personally and financially assisted in the construction of a sediment catch basin and appurtenant facilities on and adjacent to the Subject Property. With the County's knowledge and support, the Johns paid $25,000 towards the sediment catch basin project costs to protect their property (including the Subject Property) from damage from erosion, flooding and sediment residue. The County has made crystal clear through its actions over the years that its only intended use for the Subject Property was for roadway purposes in the event University Drive was extended between Jamboree Road and Irvine Boulevard. In fact, from our preliminary review it appears that this is the only use which the County can make of Subject Property, and any other use would result in a reversion to the subdivider of the tract within which the Subject Property exists. In as much as the County has no intent of ever pursuing the above noted roadway project, it is not harmed in any way by the grant of an equitable easement and the continuation of the status quo. In contrast, the loss of real property, as would be suffered by the Johns in the event of a change to the status quo, has consistently been held by courts to be irreparable.

A Court would be well within its discretion to grant an equitable easement to the Johns in perpetuity, in light of the above facts. As the Second District Court of Appeal determined in *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 765:

> "[T]he courts are not limited to judicial passivity as in merely refusing to enjoin an encroachment. Instead, in a proper case, the courts may exercise their equity powers to affirmatively fashion an interest in the owner's land which will protect the encroacher's use."

In *Hirshfield,* the Court of Appeal held that adjoining landowners, who each constructed improvements and landscaping on the other's property, were entitled to equitable easements to the extent of their respective encroachments. (*Id,.* at 764-767; *see also, Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1010-1011 [upholding trial court's grant of "equitable easement" over neighbor's residential property for access purposes where plaintiffs purchased property under mistaken belief that the property had legal access over the neighbor's property to the public road].)

In addition to the title issue, should the Johns be forced to purse litigation they have asked us to investigate other claims they may have and to assert them. We are looking at several potential claims, and without eliminating the potential for other claims, we can advise you any litigation will include a claim for an inverse condemnation. This claim will be based the dirt trail located on the Johns' property, near its southerly property line, and the fact it is being used by the public

as part of the County's open space program on property adjoining the Johns' property. As you may be aware, the United States Supreme Court recently reaffirmed the bedrock takings principle that any government-compelled occupation of private property, whether by the government or third parties, constitutes a "per se" taking entitling the owner to "just compensation." (*See Cedar Point Nursery v. Hassid* (June 23, 2021) 394 U.S. ____.) There, the Supreme Court held that a California regulation that entitled union representatives limited access to agricultural property for the purpose of soliciting support for a union, constituted a per se taking of private property, necessitating the payment of "just compensation" for the compelled entry. As the Supreme Court noted, the "access regulation grants labor organizations a right to invade the grower's property. It therefore constitutes a *per se* physical taking." (Slip. Op., p.20.)

Whether the inverse condemnation claim for *per se* taking is filed in state or federal court pursuant to 42 U.S.C. § 1983, if successful, the Johns would be entitled to an award of litigation expenses including attorney's fees. (See 42 U.S.C. § 1988 [prevailing plaintiff in Section 1983 action entitled to attorney's fees and costs); and Code Civ. Proc. § 1036 [prevailing inverse condemnation claimant entitled to recover attorney's fees and costs].)

In summary, it is our sincere desire to avoid litigation over the above issues and ask that the Board agree to cease any efforts to remove the fence while we complete our investigation into the facts, and engage in settlement discussions with you. We ask that you provide a response to our request by Friday July 15, 2021, and are hopeful that you will respond in a favorable manner considering the County will suffer no harm by leaving the fence where it has been for as long as anyone can remember.

RUTAN & TUCKER, LLP

A. Patrick Muñoz

APM

cc: Frank Kim, CEO
Leon Page, County Counsel
Client