

### 3. **The Evidence More than Supports the Factual Finding**

Actually, the trial court made a *number* of findings, all of them supported by substantial evidence, and *any* of them sufficient to support its ultimate finding concerning the unreasonableness of the Agency's conduct in sending Mr. Mesdaq the Polanco Notice. Those "sub-findings," and the evidence that supports them, are summarized below.

#### a. **The Agency Was In Partnership with GRH**

The trial court made many comments throughout the case that reflected its general discomfort with the unusual relationship between the Agency and GRH, the private developer. (See, *e.g.*, 16 RT 2281:17-19 ["The relationship between [the Agency] and the developer with regard to the developer acquiring this property is troublesome."] See also 17 RT 2437:15-17 ["I have some reservations about the whole process of having government in partnership with a private developer and then taking somebody's property to give to that developer."].)<sup>22</sup>

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<sup>22</sup> The symbiotic relationship between the Agency and GRH – and the *proof* that the Agency had no real interest in any supposed environmental issue, except to wield it against Mr. Mesdaq for the benefit of the developer in trying to coerce a sale – was that the Agreement between the Agency and GRH expressly provided that the *developer* had "sole responsibility," and actually *indemnified* the Agency, as to such issues. (15 RT 1957-1961. See also 16 RT 2227:11-13.) This was never going to cost the Agency a dime.

The trial court was obviously also concerned about the *unusual, for-profit* nature of the Agency’s relationship with GRH. (See, *e.g.*, 17 RT 2368:19-2369:19 [“The Agency knew that they were going to acquire this property and then essentially give it to the developer. So it wasn’t property that was going to be used to build a new City Hall or a new Fire Department. . . . The only purpose the City is acquiring this property for is to give to the developer for purposes of this hotel.”].)<sup>23</sup>

The trial court was also concerned about the close communications between the Agency and the developer with reference to the *timing* and the *purpose* of the Polanco Notice specifically. (See, *e.g.*, 16 RT 2277:5-7 [“So it appears that, that Mr. Sanchez [a staff member for the Agency] had a conversation with [GRH], and this was discussed. Before the

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<sup>23</sup> It has no immediate bearing on the issues raised here, but it bears mention that the public reaction to the United States Supreme Court case in *Kelo v. City of New London, Conn.* (2005) 545 U.S. 469 – approving the practice of taking one person’s property for the purely economic purpose of giving it to another business that promises higher tax revenue – has been profoundly unpopular.

Indeed, Proposition 90 – dubbed the “Protect Our Homes Act” – has qualified as an initiative for the general election ballot for November 7, 2006. When it passes, it will amend the California Constitution to prevent – as to all eminent domain cases that are not yet final, presumably including this one – precisely what occurred in *Kelo*, and precisely what occurred here. One way or the other, Mr. Mesdaq will almost certainly get his property back.

Notice went out.”] See also 16 RT 2273:4-9 [“I just think that the letter went out as an accommodation to the developer.”]. See also 15 RT 1957:11-25, where one of the principals of GRH confirms that he and his partners were already discussing using the Polanco Notice as a bargaining tool “prior to the notice actually being sent.” See also 16 RT 2182:26-28, where another principal in GRH confirmed that, with the Polanco Notice, they were trying to “up the ante.” See also 16 RT 2183:11-16, where that same principal confirms the close and ongoing communications between the Agency and the developer “to try and work this out.”)

**b. The Agency Knew There Was No Contamination**

The trial court understood that, when the Polanco Notice was sent to Mr. Mesdaq, the Agency really knew there were no environmental issues associated with the property. (See 16 RT 2277:27-2278:2 [“But you know, maybe having this Notice go out at all under these circumstances is unreasonable. . . . We’ve got a 1998 Report that essentially gives this pretty much a clean bill of health.”] See also 17 RT 2368:19-24 [“Okay the problem is, at the time the letter went out the Agency knew, number one, that there wasn’t evidence of hazardous substances on the property. The Agency had the 1998 report and no, nothing to contradict the conclusion in that report. Nothing whatsoever.”].)

The specific evidence to support the trial court's conclusions on this point is extensive. (See, *e.g.*, 15 RT 1989 [Mr. Sanchez, the Agency staffer, testifying that he was not aware of Mr. Mesdaq causing any contamination or creating any nuisance on his property during the time he has owned it]. See also 16 RT 2217-2222 [David Allsbrook, the Agency official primarily responsible for acquiring Mr. Mesdaq's property to give to the developer, who testified that he had "no recollection" of the 1998 report that recommended against any further environmental assessments for the property; that he did not even review the Phase One report that Mr. Mesdaq prepared that found no evidence of contamination on his property; and, most oddly, that the Polanco Act Notice he sent to Mr. Mesdaq in this case was much different than the "hefty package" he utilized previously in connection with the Ballpark project (which advised property owners, for instance, of recommendations on how to "cure," and identified specific follow-up)].)

**c. The Polanco Notice Went Only to Mr. Mesdaq**

Another extraordinary fact that emerged at trial was that, with respect to this proposed 40,000 square foot development – where only 5,000 square feet belonged to Mr. Mesdaq, with the remainder owned by different interests, but controlled by GRH – the Agency *sent the Polanco*

Notice only to Mr. Mesdaq: As the trial court observed throughout the trial:

“I will say that it appears that even though the Polanco Notice might be proper, this particular Polanco Notice is unique in the sense that it wasn’t sent out in accordance with any protocol. In this case, or with regard to this development or with regard to this project. It wasn’t sent to anybody else and it was sent out at a critical time in the negotiations.

I’m just saying it was geared to this particular piece of property, this particular owner.” (17 RT 2318:16-2319:2; emphasis added.)

(See also 16 RT 2274:21-24 [“The way that it’s presented there’s a protocol. You do this, you do this, you do this, then the Polanco letter goes out, then you do this. And that’s not what we have.”].)

The fact that the Polanco Notice was sent only to Mr. Mesdaq was openly confirmed by Mr. Allsbrook (again, the Agency official primarily responsible for acquiring Mr. Mesdaq’s property for the benefit of GRH). (See 16 RT 2227:11-13.) The implications of that fact alone are obvious, and damning.

**d. The Notice Went Out for Negotiation Purposes**

Finally, the trial court was keenly aware of the evidence that the Agency sent Mr. Mesdaq the Polanco Notice not because ordinary municipal process required it, but because it was a critical moment in the

negotiation between Mr. Mesdaq and the developer. The Agency knew how expensive the Polanco Notice process is for a property owner; and, as an essential partner with the developer, it wanted to pressure Mr. Mesdaq to accept its insulting offer and thereby waive his right to challenge any of its decisions. Consider, for instance, these various excerpts from the trial court's explanation of its ruling:

"I think a review of the evidence indicates that they – they didn't have to send it out. They didn't certainly have to send it out when they did, and I think Mr. Sanchez's deposition testimony is very – is very telling. And I just – I just have some real concerns about that." (16 RT 2272:23-28.)

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"And I listened carefully to Mr. Allsbrook's testimony. With regard to the question of timing of the letter, he never answered that. He kind of gave a speech. But I'm not sure why the letter out when it did." (16 RT 2273:1-9.)

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"Why did it go out at the exact time that there was a discussion about using it as a negotiation tool? . . . That's what Mr. Sanchez testified to in his deposition." (16 RT 2273:16-23.)

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"We have the developer and [the Agency] this close in negotiating this thing. They're sending letters, saying fill in the blanks. We want to get this property, there's an active participation on the part of [the Agency] with the developer." (16 RT 2278:19-23.)

“Then we’ve got Mr. Sanchez testifying under oath we talked about this, and we talked about using this Polanco Notice as a negotiating tool. And it goes out on a particular day.” (16 RT 2278:26-2279:1.)

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“But somebody connected with the developer had a conversation with Sanchez. Right before that letter went out. About using it as a negotiating tool.” (16 RT 2284:7-10.)

Again, the specific evidence that supports those strong conclusions is compelling. (See, *e.g.*, 15 RT 1957-1959 [testimony from Mr. Sanchez, the Agency staffer, that he had discussions with the developer the day the Polanco Notice went out, and talked about the developer using the potential for clean-up costs as a negotiating tool]. See also 16 RT 2153-2160 [Mr. Samimi, another principal in GRH, testifying that he was hoping the Polanco Notice would compel Mr. Mesdaq to “work a deal”; that they used the Polanco Notice as a negotiation tool, to “up the ante”; and that they knew that the attorneys’ fees associated with the Notice are “so exorbitant,” and that the clean-up costs could be “significant”].)

**e. Conclusion**

Add all of that evidence up – and then add all reasonable inferences to which the evidence is entitled (see *Hasson v. Ford Motor Co.* (1977) 19 Cal.3d 530, 544) – and the conclusion is inescapable: the Agency was never concerned about contamination; it was concerned only about

putting the “squeeze” on Mr. Mesdaq and advancing its “for profit” partnership agenda with the private developer. The ultimate price to the Agency – actually, of course, to GRH – of just over \$77,000 is easily supported, and must now be *affirmed*.

**D. More Than Sufficient Evidence Supports the Trial Court’s Award of Litigation Expenses**

The Agency’s final argument challenges the trial court’s order awarding Mr. Mesdaq his litigation expenses. But again the Agency confuses the standard of review applicable to the issue, and misconstrues the broad basis of the trial court’s careful ruling.

**1. This Was a Pure Finding of Fact**

On page 3 of its Opening Brief, the Agency asserts, without discussion or legal citation, that: “[T]he award and reasonableness of litigation expenses are mixed questions of fact and law, and are decided *de novo*.” On page 93, the Agency’s argument is that the trial court “abused its discretion.” (See also page 96, where the Agency asserts that the statute requires the trial judge to make a “discretionary determination” as to the reasonableness of the offer after weighing all the evidence.)

In fact, however, the statute – Code of Civil Procedure section 1250.410 – says nothing about *mixed questions*, or about trial court *discretion*. It speaks, instead, to the authority of the trial court, on motion