# *ARTICLE:*
# *SHEETZ V. EL DORADO COUNTY*: DEATH KNELL FOR DEVELOPMENT FEE PROGRAMS OR HARBINGER OF JUDICIAL DEFERENCE?

*By Karl E. Geier*[*]

The United States Supreme Court's most recent Takings case, *Sheetz v. El Dorado County, California*[1] enunciated a seemingly simple holding, that legislatively-imposed development fees are not, as such, exempt from analysis under the Court's "unconstitutional conditions doctrine" under *Nollan v. California Coastal Commission*[2] and *Dolan v. City of Tigard*.[3] The *Nollan/Dolan* test requires that there be an "essential nexus" between the condition imposed and the impacts of the particular development that the condition seeks to ameliorate (the *Nollan* prong), and that the amount or extent of the exaction must bear a reasonable relationship to the degree or quantum of the impact sought to be ameliorated (the *Dolan* prong).[4] Before *Sheetz*, the *Nollan/Dolan* test had been applied to ad hoc development conditions imposed by local planning officials and legislative bodies in exchange for discretionary approvals of individual development projects, but not to legislatively imposed fee programs imposed on a class of development projects.[5] In *Sheetz,* the Supreme Court held that the California rule that the *Nollan/Dolan* test does not apply to a legislatively-enacted fee program for a broad class of development projects, was incorrect, and remanded the matter to the state courts for further consideration.[6]

The *Sheetz* case involved a traffic mitigation fee imposed on a particular development pursuant to a traffic impact mitigation fee program embodied in the County's general plan, a legislative enactment which the lower court found to be consistent with the California Mitigation Fee Act.[7] The Supreme Court's opinion did not address whether the fee as applied to the particular building permit at issue in the case would survive a *Nollan/Dolan* analysis, nor whether the Mitigation Fee Act itself is unconstitutional, either as applied to any particular development project or in its entirety. The Court's unanimous majority opinion, penned by Justice Barrett, simply concluded that the lower court erroneously failed to consider what the *Nollan/Dolan* test would determine if it were applied to the particular fee imposed on the *Sheetz* appellants. It did not suggest where the Court would come out if it considered the question itself.

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Some commentators have attempted to read more into the Court's opinion, especially in light of Justice Gorsuch's brief concurring opinion (which no other justice joined) that there should be no difference between the *Nollan/Dolan* doctrine as applied to individually imposed ad hoc development exactions and legislatively imposed development fee programs.[8] But Justice Kavanaugh's one-paragraph concurring opinion (joined by Justices Kagan and Jackson), emphasized that the Court up to now, including in the present decision, has "had no occasion to address permit conditions, such as impact fees, that are imposed on permit applicants based on *reasonable formulas or schedules* that assess the impact of *classes of development*."[9] And the majority opinion itself was clear: "We do not address the parties' other disputes over the validity of the traffic impact fee, including whether a permit condition imposed on a class of properties must be tailored with the same degree of specificity as a permit condition that targets a particular development."[10]

Even though the Court did not consider or decide *how* the *Nollan/Dolan* test should apply to legislatively enacted fee schedules or formulae based on the type or amount of development, it is safe to assume that permit applicants will feel free to challenge such fees because the Court has removed the threshold barrier to review that previously existed under California case law.

That said, until another case reaches the United States Supreme Court, it is quite predictable that California courts will continue to defer to legislative enactments that impose development fees much in the same manner as they have traditionally deferred to land use regulations generally—as they have repeatedly demonstrated with other land use "exactions" that have been characterized as "land use regulations" even where there is a monetary component. While *Nollan/Dolan* now must be considered in evaluating legislatively imposed fee programs, the California courts are likely to review such fees not on a granular basis as applied to a particular development project, but rather as a legislative decision weighing impacts of different types of development and adopting a policy to mitigate these impacts across the board without getting bogged down in a project-by-project reconsideration of both impacts and mitigations.

Nothing in the majority and concurring opinions of the United States Supreme Court in *Sheetz*, with the sole exception of Justice Gorsuch's, would directly preclude such an approach, and until the Court reviews another California case raising the issue, it is reasonable to assume that California will not

 

adopt a more stringent test for review of such fee programs. But as the discussion that follows would indicate, such a laissez faire application of *Nollan/Dolan* by California courts to uphold fee programs that do not reasonably attempt to measure the actual impacts of new development and limit the fees exacted as a condition of development approval proportionally to the project-specific impacts, such as some fees under the Mitigation Fee Act, may well still fail if the issue is considered again by the United States Supreme Court.

### A. California Case Law Before *Sheetz v. El Dorado County, California*

The California Supreme Court, in one case mentioned in Justice Barrett's majority opinion, *San Remo Hotel, L.P. v. City and County of San Francisco*, previously said that the *Nollan/Dolan* test applies only to permit conditions imposed on an individual and discretionary basis.[11] As a result, for legislatively-enacted exactions applicable to a class of development rather than a specific permit application, the California courts had adopted a deferential test, considering the fee only in the context of reasonable land use regulations generally, not under the more stringent constitutional conditions test of the *Nollan/Dolan* test.[12] Before *San Remo*, in *Erlich v. City of Culver City*, the court had applied the *Nollan/Dolan* "essential nexus" and "rough proportionality" tests to a discretionary ad hoc development exaction despite it having been imposed by a local legislative body.[13] In *San Remo,* the court distinguished the development fee program involved in that case from the project-specific fee involved in its earlier decision in *Ehrlich*, and suggested a relatively unexacting, deferential standard of review for such legislatively enacted fee programs:

> In holding the fee at issue [in *Erlich*] subject to *Nollan/Dolan* we emphasized that because the city had exercised its discretionary powers in imposing and calculating the recreational impact fee, rather than doing so pursuant to a legislative mandate or formula, imposition of the fee bore much the same potential for illegitimate leveraging of private property as did the real property exactions in *Nollan* and *Dolan.* Thus, the plurality [in *Ehrlich*] concluded that heightened scrutiny was appropriate "[w]hen such exactions are imposed-as in this case-neither generally nor ministerially, but on an individual and discretionary basis." [citation omitted]. The plurality further distinguished "*generally* applicable development fee[s] or assessment[s]," as to which "the courts have deferred to legislative and political processes," from "special, discretionary permit conditions" like the one at issue in *Ehrlich.*[citation omitted].[14]

However, as to the "legislatively enacted fee imposed on a class of develop-

ment projects" issue later addressed in the *Sheetz* decision, the California court in *San Remo* went on to state:

> A majority in *Ehrlich* further agreed that to the extent a development mitigation fee is *not* subject to heightened scrutiny under *Nollan* and *Dolan,* there must nonetheless be a "reasonable relationship" between the fee and the deleterious impacts for mitigation of which the fee is collected.[15]

In other words, under the dictum in *Erlich*, there was a requirement that a general development fee program be "reasonable," but not that it necessarily be closely tailored on a project-by-project basis, or that it specifically consider the "nexus and proportionality" factors required by *Nollan* and *Dolan*. *San Remo* followed the *Erlich* dictum, requiring only a reasonable legislative effort to address the impacts of development on a broad, policy-making basis, not project-specific impacts. *San Remo* therefore held that a development fee imposed legislatively on a broad class of development, leaving no discretion to the administrative or legislative body to alter the fee for individual permit applications, was entitled to a highly deferential standard of review: "[T]he City argues for the more deferential constitutional scrutiny applicable to land use regulations made generally applicable by legislative enactment to a class of property owners. We agree with the City."[16] The court said that the fee program must be "reasonable" in order to pass constitutional and statutory muster,[17] and it again quoted *Erlich* for the notion that "reasonableness" is a highly deferential standard:

> It is also true . . . that government generally has greater leeway with respect to noninvasive forms of land-use regulation, where the courts have for the most part given greater deference to its power to impose broadly applicable fees, whether in the form of taxes, assessments, user or development fees.[18]

This deferential statement in *San Remo* must be understood in its context—the court had just determined the fee was *not* subject to heightened scrutiny under the *Nollan/Dolan* standard because it was a nondiscretionary fee mandated citywide by a legislative measure. Thus, its application of the "reasonableness" standard to such a fee was not an effort to fit such a fee into the "nexus/proportional" analysis of *Nollan* and *Dolan*, which is the analysis that *Sheetz* now requires. Nevertheless, the question remains of how much deference to legislative discretion is appropriate under *Nollan* and *Dolan* even after *Sheetz*.

The Supreme Court in *Sheetz* merely rejected the conclusion of *San Remo*

 

that the *Nollan/Dolan* test categorically does not apply to a legislatively-enacted fee program, but it takes no position on exactly how that test should apply where a fee program is applicable to a broad class of development projects.[19] Thus, even after *Sheetz, San Remo* potentially may still support a determination that such a broad fee program imposed on a class of development by the legislature, unlike an ad hoc fee imposed on a particular development, is entitled to considerable deference. *San Remo* is also echoed by the words of Justice Sotomayor, in her concurring opinion in *Sheetz,* that before even reaching the question of how *Nollan/Dolan* applies to a legislatively-adopted fee, it is first necessary to determine whether there has even been a "taking"[20]—presumably raising the possibility that such a "fee" is analogous to an excise or business tax or similar exercise of the taxing power, as distinguished from the power of eminent domain, which was the point made by the *San Remo* court in the aforementioned quotation from *Ehrlich*.

## B. The United States Supreme Court's Previous References to Legislatively Enacted Fee Programs

While *San Remo's* conclusion that *Nollan/Dolan* is per se inapplicable to a legislatively-enacted development fee program has been rejected in *Sheetz,* the notion that legislatively-enacted fees applicable to a broad class of development projects can be upheld even under the *Nollan/Dolan* test is not far-fetched. Justice Alito's majority opinion in *Koontz v. St. Johns River Water Management District,*[21] comes close to making this exact point:

> [W]e disagree with the dissent's forecast that our decision will work a revolution in land use law by depriving local governments of the ability to charge reasonable permitting fees. . . .Numerous courts—including courts in many of our Nation's most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or *something like it* [emphasis added; citations to Ohio, Illinois, and Texas supreme court decisions omitted]. Yet the "significant practical harm" the dissent predicts has not come to pass. . . .That is hardly surprising, for the dissent is correct that *state law normally provides an independent check on excessive land use permitting fees*.[22] (emphasis added).

The three "most populous state" cases cited by Justice Alito in the bracketed ellipsis of the *Koontz* opinion above may offer an outline of how he, and some other justices on the Court, envision the application of *Nollan/Dolan* to a legislative enactment—although they pointedly did not include the California Supreme Court's decision in *San Remo.*

 

In the first case, *Northern Ill. Home Builders Assn. v. County of Du Page,*[23] the Illinois Supreme Court upheld a traffic impact fee program created under a statewide enabling act that required the fees exacted to be calculated and used to defray the cost of a particular improvement, the need for which had been directly affected by the development project from which it was exacted. This program required quantitative assessments of traffic impacts and the capacity of infrastructure, credit for other improvements installed by the particular development, and a formula spreading costs among new projects based on total traffic generated by these projects that created the need for the improvements. The Illinois court noted that its precedents, like the *Dolan* decision, required that, " 'in order for the impact fees to pass constitutional muster the need for road improvement impact fees must be "specifically and uniquely attributable" to the new development paying the fee'; . . . [A]n exaction which required a developer to provide for improvements ' "which are required by [his] activity," ' would be permissible, but one which required him to provide for improvements made necessary by ' "the total activity of the community," ' would be forbidden."[24]

In the same case, however, the Illinois court rejected a different traffic impact fee imposed under another state enabling act that merely collected fees from developers to be used for the general improvement of traffic conditions in the community. Here, the court said, it was clear that this enabling act "was not written with the specifically and uniquely attributable test in mind. . . ." Indeed, the first act directs that the fees paid by new developments be used to fund *all* road improvements "needed to maintain a reasonable level of service," with the single proviso that "all expenditures must be made for improvements within, or in areas immediately adjacent to, the transportation impact district from which the expended monies were collected."[25] In rejecting this impact fee, the court required that a fee program measure the direct impact on traffic and roads of a particular project and demonstrate a rough proportionality to the amount of the fee charged. The test was not articulated as a matter of legislative discretion, however; instead, it required a direct relationship between the impact and the amount and purpose of the fee, although a fee imposed on a broad class of development was still permissible if used for improvements that addressed the impacts of the new development, as distinguished from the "total activity of the community":

> There is nothing in the first enabling act, or the ordinances based upon it, which restricts the expenditure of funds collected thereunder to deficiencies created by the new development providing those funds. Additionally, the fact that funds

 

> could be used for areas outside the transportation impact district prevents the new development from receiving the direct and material benefit of the road improvements financed by its fees. Although *we agree with the appellate court that there is no requirement that the improvements financed by impact fees must be used exclusively or overwhelmingly by the development paying the fee* [citation omitted], the funds collected from new development in a particular district must be used to finance improvements in that same district.[26] (emphasis added).

The second case cited by Justice Alito was *Home Builders Assn. v. Beavercreek,*[27] where the Ohio Supreme Court applied what it characterized as a "dual rational nexus test" to a traffic impact fee administered through a municipal trust arrangement to fund improvements needed to service new development. "The dual rational nexus test requires a court to determine (1) whether there is a reasonable connection between the need for additional capital facilities and the growth in population generated by the subdivision; and (2) if a reasonable connection exists, whether there is a reasonable connection between the expenditure of the funds collected through the imposition of an impact fee, and the benefits accruing to the subdivision."[28] This, the court maintained, resulted in a "middle level of scrutiny" of legislatively imposed fees, somewhere between the stricter scrutiny of individualized exactions under *Nollan* and *Dolan* and the extremely deferential "rational basis test" applicable to land use regulations generally.

> This test applies a middle level of scrutiny that balances the prospective needs of the community against the property rights of the developer. Municipalities must be given the ability to reasonably address problems that are not subject to precise measurement without being subject to unduly strict review. [Citation omitted]. *It is our opinion that the dual rational nexus test balances both the interests of local governments and real estate developers without unnecessary restrictions*. The trial court applied this test, and it is also the test we adopt for evaluating the constitutionality of an impact fee ordinance when a Takings Clause challenge is raised.[29] (emphasis added).

The Ohio decision placed the burden of proof on the local agency to demonstrate both the need for the traffic improvements to be funded by the fee and the relationship between the particular development project and that need, and required the calculation of the fee to bear a reasonable relationship to the project's proportional share of the cost of the improvements. In other words, the local agency must demonstrate both the impact caused by the particular development impacts and the reasonable relationship that the amount of the fee bore to the cost of ameliorating the impact of the particular development. However, this did not mean the courts would not defer to the legislative judgement:

 

> Given that impact fee ordinances are not subject to precise mathematical formulation, choosing the best methodology is a difficult task that the legislature, not the courts, is better able to accomplish. Rather, a court must only determine *whether the methodology used is reasonable based on the evidence presented*.[30]

While the first two cases Justice Alito cited may be read as supporting a middle level of judicial scrutiny of legislative impact fee programs fees applicable to a broad class of development, the third case, *Town of Flower Mound v. Stafford Estates Ltd. Partnership,*[31]is less germane. In *Flower Mound,* the Texas Supreme Court, following the lead of the California Supreme Court's decision in *Erlich,* simply held that the *Nollan/Dolan* "essential nexus and rough proportionality" test applies to monetary exactions as well as dedication requirements, which is what the United States Supreme Court also found in *Koontz.*[32] The Texas court went a bit further, however, stating it was "not convinced" by the California Supreme Court's holding in *San Remo* that *Nollan* and *Dolan* are categorically inapplicable to a legislatively imposed exaction—thus foreshadowing the United States Supreme Court's ultimate holding in *Sheetz.*[33]

*Flower Mound* did not actually consider a legislatively enacted fee program applicable to a broad class of development projects, it only considered a policy that, as applied, required the developer to rebuild a supposedly impacted local road at a cost which the local government had not demonstrated to bear a reasonable relationship to the actual need or impact of the project versus the generalized need for improvement of the road to accommodate current traffic levels. The Texas court found that the rationale for the exaction was not solely the impact of new development but also the need for capital improvements generated by the public as a whole, and was therefore invalid. Thus, the Texas law failed to limit the exaction's use to pay for improvements needed to address impacts of new development, rather than to fix pre-existing problems of a community-wide nature. Because it did not involve a legislative fee program, as distinguished from a specific improvement condition, however, *Flower Mound* is not particularly helpful in determining how the *Nollan/Dolan* test would apply to a fee program that required a more "reasonable relationship" between impacts and exactions, nor how the United States Supreme Court would apply the *Nollan/Dolan* test to a legislative enactment affecting a broad category of development projects.

None of the majority and concurring opinions in *Sheetz v. El Dorado County* discussed any of the cases cited by Justice Alito in *Koontz*, although Justice Barrett did mention the Ohio and Illinois cases in a footnote outlining the split of

 

other state decisions between those that have applied *Nollan/Dolan* to legislatively enacted fees, and those which "follow[] California's approach" of not doing so.[34] The Court also did not reject a looser standard for determining "nexus" or "proportionality" for legislatively enacted programs, such as was suggested in *Northern Illinois Homebuilders*, nor did it adopt the more stringent standard imposed by the Ohio decision that placed the burden of proof on the government to demonstrate both. All it did was to indicate that *Nollan* and *Dolan* must be applied to such fee programs, leaving the "how they must be applied" to future decisions. This seemingly leaves room for greater deference to legislative enactments that are calculated at the 10,000-foot level rather than on the ground, but exactly how much leeway will be acceded to broadly-defined fee programs remains to be seen.

### C. How California Courts Are Likely to Evaluate Legislatively-Enacted Development Fee Programs Affecting a Broad Class of Development Projects

Given the propensity of California case law to support governmental regulation of real property at all levels,[35] and governmental mandates for burdensome development conditions in particular,[36] it would be surprising if the California courts did not adopt a looser test to uphold broadly stated legislative impact fee programs than has been enunciated in other states. At least until told otherwise, state courts in California are particularly unlikely to follow the Ohio case (which essentially made the government prove both the "essential nexus" and the "rough proportionality" of any legislative formula as applied to a particular project). Far more likely is that California will attempt to maintain the notion that precise project-level measurements are not required of a legislature addressing broad policy issues, particularly those involving real estate development in an economy ranked larger than all but four or five independent nations in the world. It is also likely that a California court would attempt to place such enactments in the context of broadly stated land use regulations entitled to judicial deference under a rational basis test, rather than of specific exactions subject to judicial scrutiny on a case-by-case evaluation of burdens and benefits.

California precedents evaluating other types of development conditions have often stopped short of applying the *Nollan/Dolan* "essential nexus/rough proportionality" test on the basis that the challenged imposition was not an "exaction" but rather a species of "regulation."[37] A leading example of this is *California Building Industry Assn. v. City of San Jose*, a case involving an

 

inclusionary zoning requirement that a developer of market rate housing include a specified percentage of affordable housing units. The California Supreme Court likened this requirement to rent regulations and other "price controls"; according to the court, the ordinance was not an "imposition" or "exaction," but only a regulation of how much the developer could charge for some of the housing units developed in a project.[38] As such, the court would not second-guess the legislature's determination:

> Rather than being an exaction, the ordinance falls within what we have already described as municipalities' general broad discretion to regulate the use of real property to serve the legitimate interests of the general public and the community at large.[39]

The *City of San Jose* case is loosely based on another California decision that directly compared the *Nollan/Dolan* analysis of "unconstitutional conditions" to other economic regulations in the land use context, *Santa Monica Beach, Ltd. v. Superior Court.*[40] In that case, the court posited that rent control is price regulation and might not be a form of land use regulation, but even if it were, it would be evaluated under the highly deferential standard for review of land use regulations generally:

> We need not decide whether the standard of review for rent control legislation is identical to the rational relationship test employed in other price control schemes. In light of the analysis reviewed above, we believe it is clear at least that the heightened intermediate scrutiny standard articulated in *Nollan* and *Dolan* does not apply in this case. Rather, the standard of review for generally applicable rent control laws must be at least as deferential as for generally applicable zoning laws and other legislative land use controls. Thus, the party challenging rent control must show "that it constitutes an arbitrary regulation of property rights."[41]

The California approach outlined in *Santa Monica Beach* and *City of San Jose* has been limited by the Supreme Court's decision in *Sheetz* only to the extent that California had explicitly renounced the *Nollan/Dolan* test as applied to legislatively imposed regulations. It remains potentially within the narrow holding of *Sheetz* that "reasonable" impact fee enactments may still be allowable, and what is "reasonable" under California case law is emphatically on the side of the legislature.

### D. The Effect of *Sheetz* on Development Fees Complying with the Mitigation Fee Act

The potential impact of the Court's decision on the Mitigation Fee Act depends on which portion of the Act is applicable to a particular development

 

impact fee. The Mitigation Fee Act includes two separate standards governing the reasonableness of a local agency-imposed development impact fee, one for project by project adjudicatory determinations, and the other for legislatively-enacted development fee programs applicable to a broad class of developments. The Third District Court of Appeal in the California decision overruled by the Supreme Court in *Sheetz v. El Dorado County, California,* had upheld the fee as a "legislatively enacted fee program" that was per se exempt from evaluation under the *Nollan/Dolan* test—and did not reach the issue of whether the Mitigation Fee Act's standard for approval of such fee programs satisfies *Nollan* and *Dolan*.[42] The remainder of the court of appeal's decision was simply a statutory construction analysis of whether, considered without regard to *Nollan* and *Dolan*, the fee imposed on Sheetz met the Act's statutory requirements for legislatively-enacted development fee programs applicable to a broad class of development. The court of appeal described the Act as follows:

> [T]here are two ways that a local agency can satisfy the Mitigation Fee Act's "reasonable relationship" requirement for the imposition of development fees. (§ 66001, subds. (a), (b).) Section 66001, subdivision (a) applies to quasi-legislative decisions to impose development impact fees on a class of development projects, whereas section 66001, subdivision (b) applies to adjudicatory, case-by-case decisions to impose a development impact fee on a particular development project. *The difference between these subdivisions is that only* subdivision (b) of section 66001 *requires an individualized more specific determination of reasonableness for each particular project.* [citation omitted].[43]

After pointing out the distinction between subdivisions (a) and (b) of § 66001, the court of appeal went on to emphasize that the development fee at issue would be evaluated not under the site-specific impact analysis required for adjudicatory fee impositions of subdivision (b), but rather under the "class of development" analysis for "quasi-legislative decisions" under subdivision (a):

> As a panel of this court recently explained in the context of development impact fees imposed to fund school facilities to accommodate the increase in students likely to accompany new development: "For a general fee applied to all new residential development, a site-specific showing is not required. Instead, this showing may be derived from districtwide estimations concerning new residential development and impact on school facilities. *The school district is not required to evaluate the impact of a particular development project before imposing fees. Instead, the required nexus is established based on the justifiable imposition of fees on a class of development rather than particular projects*." [citations omitted]. In short, we conclude the trial court properly determined that section 66001, subdivision (b) does not apply to Sheetz's development project.[44] (emphasis added)

The lower court in *Sheetz* thus found the traffic impact fee imposed by the County on Sheetz' development to be one enacted under the second standard, and upheld it under that broad standard as a matter of statutory interpretation, but did not itself examine whether that standard would meet constitutional muster under the *Nollan/Dolan* unconstitutional conditions test, much less whether the other prong of the Mitigation Fee Act, applicable to "adjudicatory" or project-by-project fee impositions, would satisfy *Nollan* and *Dolan*. It was not this part of the court of appeal's opinion that led to the United States Supreme Court's reversal and remand to the state courts for reconsideration; it was only the court of appeal's blanket statement that *Nollan* and *Dolan* categorically did not apply to a legislatively imposed fee program applicable to a broad class of developments that was overturned, and the Supreme Court, as noted, did not prejudge whether or not the fee could be upheld under *Nollan* and *Dolan* as applied to such a legislative fee program.

As should be evident from the description of the statute in the above excerpt from the California court's *Sheetz* opinion, a development fee that is compliant with subdivision (b) of section 66001 should ordinarily be supportable under the *Nollan/Dolan* test, since it requires the local agency to "determine how there is a reasonable relationship between the amount of the fee and the cost of the public facility attributable to the development on which the fee is imposed."[45] The Act further requires that "any fee or exaction imposed as a condition of approval of a proposed development" fee not exceed "the reasonable cost of the service or facilities to be funded by the fee,"[46] and include audit and expenditure reporting to assure the fees actually are used for the purpose intended or else are refunded to the contributing developers.[47] The Act also states, in section 66001, subd. (g), that a fee "shall not include the costs attributable to existing deficiencies in public improvements," although it may include costs "reasonably attributable to the development project" needed to refurbish existing improvements or achieve a level of service called for by the general plan.[48] These provisions are not dissimilar to the provisions of the enabling act found to pass constitutional muster in *Northern Ill. Home Builders Assn. v. County of Du Page* and the specific legislated exaction approved in *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, two of the cases cited in Justice Alito's opinion for the Court in *Koontz*.

Some of the same conceptual limitations that apply to adjudicatory decisions imposing fees on a particular development under subdivision (b) of section

 

66001 also apply to fee programs adopted by local agencies and applicable to a broad class of development under subdivision (a) of that section. This includes section 66001, subd. (g), quoted above, that disallows costs to correct existing deficiencies and allows other costs only to the extent "reasonably related to the development project"[49]—a standard that should foreclose the imposition of fees on new development to solve existing or future community-wide deficiencies rather than those resulting from new development as a category. If any portion of the California statute is vulnerable in this analysis, it is the next clause in subd. (g), allowing imposition of fees to "refurbish existing improvements or achieve a level of service called for by the general plan," since these criteria seem to lump new development impacts with existing deficiencies not attributable to the current development project's impact. However, the Act also expressly prohibits any fee from being "levied, collected, or imposed for general revenue purposes,"[50] again limiting the potential that a fee compliant with the Act will violate the strictures against solving general or preexisting societal needs as distinguished from impacts caused by new development.

The foregoing elements of the Mitigation Fee Act should minimize the chance that a fee adopted in compliance with the Act will necessarily run afoul of *Nollan* and *Dolan*, even when applicable to a broad class of developments, depending on how they are administered. The degree to which "reasonably related to the development project" is deemed to satisfy the "essential nexus" and "rough proportionality" requirements of *Nollan* and *Dolan* for a legislatively enacted program applicable to a broad class of projects will still depend on how much discretion is left to the legislative branch of government to weigh these criteria, and how much deference the Constitutional test will allow for local legislative actions.

### E. The Problem of Line-Drawing and Proportionality for Fee Programs Applicable to Broad Classes of Development with "Reasonable Formulas and Schedules"

An example of how these issues could arise is the school fees case quoted by the court of appeal in the portion of the California court's *Sheetz* opinion above. That case involved a legislatively-enacted fee applicable to a broad class of development that disregarded the specific impact of a particular project so long as it fell within the class. In AMCAL *Chico LLC v. Chico Unified School District,* a developer of college student housing (a private dormitory) challenged a school district's fee imposed on all residential development, regardless of the specific

impact of a project on schools, arguing that its project for college student residents would not add school-age children to the district and could not reasonably be saddled with such a fee.[51] The court of appeal, before reaching the specific question posed under the Mitigation Fee Act for the exaction in question, stated that the District's fee requirement would be evaluated under the usual, highly deferential, test for judicial review of legislative enactments in California:

> In reviewing the adequacy of the District's fee justification study, we review the record to ensure the District has adequately considered all relevant factors *and has demonstrated a rational connection between the factors*, the choice made, and the purposes of the enabling statute. On appeal, *we presume the District's choices were correct* and do not question its wisdom or substitute other choices where the issues are debatable. We uphold the District's conclusion *even if reasonable minds might differ*.[52]

This test is considerably less invasive of legislative discretion than, for example, the Ohio decision requiring the local agency to *prove* the essential nexus between the fee imposed and the impact of the development, as well as the proportionate relationship between the amount of the fee and the amount of the impact of the particular project. The *AMCAL Chico LLC* court had no trouble concluding that the local legislative body, in enacting a fee structure based on the residential character of the development, regardless of the demographic nature of the projected residents of the development, had made a rational choice among categories of development that the court would not second-guess. After first finding, as a matter of statutory construction, that the fee conformed to the Mitigation Fee Act, the court went on to find that the fee also was not a taking that would require a more careful measurement of a particular project's impacts on school resources to uphold the fee.[53] As the court stated,

> Developer fees generally do not constitute a taking if the fee is *reasonably related to the impacts of the type of new residential development* on the school district's school facilities and meets the requirements of the Mitigation Fee Act. . . . . [citing *Erlich*]. Here, the District's fee complied with the Mitigation Fee Act and did not constitute a taking.[54]

The formula expressed by the court in *AMCAL Chico LLC*, "reasonably related to the impacts of the type of new residential development" is not a careful weighting of project-specific impacts to determine the proportionate share of necessary improvements to be borne by a particular development, nor of the actual costs of school facilities necessitated by the particular new development,

 

and in that respect, it would not satisfy the Ohio or Texas cases discussed earlier. It is conceptually not sufficiently tailored to the "essential nexus" / "proportionate share" standard of *Nollan* and *Dolan,* if considered on a project-specific basis, but whether that is the correct test for a legislatively enacted development impact fee applicable to a broad class of development projects remains unclear, and the issue was not addressed or decided in the Supreme Court's decision in *Sheetz*.

*AMCAL Chico LLC* is also an example of the difficult line-drawing problems associated with lumping types of projects together and adopting a formula to cover presumed costs of addressing class wide development impacts without allowing for specific project by project assessment of project-related impacts and project-related responsibility for addressing those impacts. Whether the deferential "rational basis" test the court in *AMCAL Chico LLC* found compliant with the Mitigation Fee Act will satisfy the standards that apply after the Supreme Court's decision in *Sheetz* will depend on how much the Court will acknowledge legislative leeway to address complex fiscal and economic issues with broad legislative solutions rationally enacted to resolve them, rather than to require discrete project-by-project re-weighing of the same issues and solutions in their implementation.

### F. The Problem of Finding an "Essential Nexus" and "Rough Proportionality" for Fee Programs that Seemingly Address Broad Societal Issues at the Expense of New Development

A possibly greater threat to the viability of some legislative fee programs than the line drawing problem posed by the "rough proportionality" standard of *Dolan* is the application of the "essential nexus" standard of *Nollan*. Even under a more deferential standard of review than it would apply to a project-specific ad hoc exaction, a standard that requires "reasonable formulas or schedules *that assess the impact of classes of development*," in Justice Kavanaugh's formulation, requires a definable causal relationship between the new development and the impact to be mitigated. Here, judicial deference to rational choices made by the legislative branch on a macro level may have its limits.

The underlying rationale for validity of land use *exactions* under *Nollan*/*Dolan* is to differentiate a "taking" that the local government could not lawfully impose without just compensation from an exaction the local government can assess as a condition of granting a discretionary permit or approval.[55] Thus, the issue under *Nollan* and *Dolan* was "whether the exactions substantially advanced

the *same* interests that land-use authorities asserted would allow them to deny the permit altogether."[56] Justice O'Connor's opinion in *Lingle v. Chevron U.S.A., Inc.* put it this way:

> As the Court explained in *Dolan,* these cases involve a special application of the "doctrine of 'unconstitutional conditions,' " which provides that "the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government *where the benefit has little or no relationship to the property*." That is worlds apart from a rule that says a regulation affecting property constitutes a taking on its face solely because it does not substantially advance a legitimate government interest.[57]

The *Dolan* formulation would require some cognizable connection between the new development and the purpose for which the fee is imposed. For some types of fees, such as traffic impact fees or school fees, the connection seems fairly clear—increased development and increased populations create a need for additional public facilities or services, so approval of the development can be conditioned on making the new development pay its fair share of the increase. For other types of fees—such as impositions to fund "public art programs" or to "address homelessness" or "climate change"—the causal link between the new development and the problem to be addressed is tenuous, at best, and a fee program to raise funds for these purposes may not be "reasonable" under a *Nollan/Dolan* test, even if it is largely deferential to legislative policy makers.

The leading California case on monetary exactions, *Erlich v. City of Culver City*, exemplifies this distinction. *Erlich* considered the validity of two different fees under *Nollan* and *Dolan*—a fee to defray the cost of adding public recreation facilities as well as a fee to finance art in public places.[58] The California Supreme Court, applying *Nollan/Dolan* to the public recreation fee, found it to be an unconstitutional condition because, as the court put it, the city had failed to demonstrate that the project itself had generated the need for public recreation spaces at the level required by the city:

> This is not to say, however, that *some* type of recreational fee imposed by the city as a condition of the zoning and related changes cannot be justified. The amount of such a fee, however, must be tied more closely to the actual impact of the land-use change the city granted plaintiff.[59]

On the other hand, the court upheld the "public art fee," which was measured as a percentage of the value of the particular development project and deposited into the city's treasury to be used for acquisition of art works city-

 

wide for placement in public places, with the proviso that the developer, in lieu of paying into the city-wide fund, could contribute an art work of equivalent value and in that event, could also elect to place the art work on the project site. Here, the court made no effort to tie the fee imposed to the impacts of the development, characterizing the fee not as a development exaction subject to the *Nollan/Dolan* analysis, but instead as an exercise of the city's police power to regulate the "aesthetics" of a project:

> [T]he requirement to provide either art or a cash equivalent thereof is more akin to traditional land-use regulations imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other *design* conditions such as color schemes, building materials and architectural amenities. Such aesthetic conditions have long been held to be valid exercises of the city's traditional police power, and do not amount to a taking merely because they might incidentally restrict a use, diminish the value, or impose a cost in connection with the property.[60] (emphasis in original)

In short, *Erlich* sustained a fee program earmarked for aesthetic purposes as a regulation of the aesthetic quality of the development, just as *City of San Jose* later sustained an affordable housing exaction as a regulation of prices, and removed the fee altogether from consideration as a "taking" or subject to the *Nollan/Dolan* unconstitutional conditions analysis. This basis for sustaining a legislative development fee program affecting a broad class of development projects may be vulnerable after *Sheetz* if it is subjected to the requirements of *Nollan* and *Dolan* for a demonstrable connection between the purpose of the fee and the measurable impact of the development. The implication of the court's language in *Erlich* equating the fee imposed to aesthetic regulation is that it will be upheld under the traditional rational basis test for land use regulations, which is not consistent with the Supreme Court's view as articulated in *Dolan*:

> We think the "reasonable relationship" test adopted by a majority of the state courts is closer to the federal constitutional norm than either of those previously discussed. But we do not adopt it as such, partly because the term "reasonable relationship" seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.[61]

It is unclear whether the language of the Court's main opinion in *Sheetz,* as

 

well as the formulation of the issue in Justice Kavanaugh's concurrence, reflects a different standard for broadly applicable legislative fee programs, as distinguished from ad hoc impositions on a specific development. If their use of the term "reasonable" signals that less scrutiny will be given to a legislative fee program than to a project-specific imposition, then fee programs to ameliorate diffuse, unquantifiable "impacts" may be upheld. Such fees also might be sustained under the "not a taking" rationale of Justice Sotomayor's opinion, referring to excise taxes and development fees generally—although that is likely a minority view. If the Court's own language in *Dolan* remains the test, however, then it can be expected that after *Sheetz*, legislative programs will be held to a higher standard in assessing and quantifying the "impacts" on public facilities and resources than a mere "rational basis" standard will support, and that "regulations" in the guise of monetary exactions will face stricter scrutiny than *Erlich* or *City of San Jose* would require. That will force local agencies to develop and adopt more rigorous methods and practices to demonstrate and quantify "development impacts," rather than only to define "public needs" to be financed by new development.

## Conclusion

The question left open by *Sheetz*, and underscored by Justice Kavanaugh's concurrence, is essentially this: Does the legislative branch retain some level of discretion to adopt broad programs to address impacts and externalities arising from the development process on a macro basis, and to have its policy choices accepted if they meet the low bar of the traditional rational basis test, or will the Court now require finite project-specific determinations of burdens and benefits, impacts and mitigations, subject to review under a less deferential evidentiary test with the burden of proof borne by the government in every case? If it is the latter, the result will be to force all such decisions to be made on an essentially ad hoc, project by project basis to satisfy *Nollan* and *Dolan*.

Put in that context, however, it seems unlikely the Court will agree with Justice Gorsuch's view that the *Nollan/Dolan* test is the same whether applied in an adjudicatory decision or to a legislative adoption of a broad fee program. So long as a legislative fee program is reasonably, albeit not precisely, calculated to measure the effects of new development and its proportionate share of costs to mitigate such effects, the program ought to pass Constitutional muster even after *Sheetz.* But if the program is using the leverage of the development approval process to saddle new development with costs that are attributable only or

 

mostly to broad societal needs, even a deferential test for "reasonableness" will not save the program from unconstitutionality under *Nollan* and *Dolan.*

Or at least, as Jake Barnes says, "Wouldn't it be pretty to think so?"[62]

**ENDNOTES:**

[1]*Sheetz v. County of El Dorado, California*, 601 U.S. 267, 144 S. Ct. 893, 218 L. Ed. 2d 224 (2024).

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

[3]*Dolan v. City of Tigard*, 512 U.S. 374, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994).

[4]E.g., as summarized in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-547, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[5]E.g., *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

[6]*Sheetz v. El Dorado County, California*, *supra*, 601 U.S. at 279-280, reversing and remanding the decision in *Sheetz v. El Dorado County*, 84 Cal. App. 5th 394 (3rd Dist. 2022).

[7]Gov. Code, §§ 66000 et seq. See *Sheetz v. El Dorado County*, *supra*, 84 Cal. App. 5th at 412-413.

[8]*Sheetz v. El Dorado County, California*, *supra*, 601 U.S. at 281-283 (concurring opinion of Gorsuch, J).

[9]*Sheetz v. El Dorado County, California*, *supra*, 601 U.S. at 283-284 (concurring opinion of Kavanaugh, J).

[10]*Sheetz v. El Dorado County, California*, *supra*, 601 U.S. at 280 (majority opinion of Barrett, J).

[11]*San Remo Hotel L.P. v. City And County of San Francisco*, 27 Cal. 4th 643, 666-670, 117 Cal. Rptr. 2d 269, 41 P.3d 87 (2002).

[12]E.g. *San Remo Hotel, L.P. v. City and County of San Francisco*, *supra*, 27 Cal. 4th at 663; *California Building Industry Assn. v. City of San Jose*, 61 Cal. 4th 435, 449 fn. 11, 189 Cal. Rptr. 3d 475, 351 P.3d 974 (2015).

[13]*Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 50 Cal. Rptr. 2d 242, 911 P.2d 429 (1996).

[14]*San Remo Hotel, L.P. v. City and County of San Francisco*, *supra*, 27 Cal.4th at 666. The *San Remo* court's description of the plurality *Erlich* opinion went on to make clear that this was also the majority view in *Erlich:* "Justice Mosk, concurring, explained that although 'general governmental fees' are 'judged under a standard of scrutiny closer to the rational basis review of the equal protection clause than the heightened scrutiny of *Nollan* and *Dolan*' [citation

 

omitted], 'when a municipality singles out a property developer for a development fee not imposed on others, a somewhat heightened scrutiny of that fee is required to ensure that the developer is not being subject to arbitrary treatment for extortionate motives.' [citation omitted]. Finally, Justice Kennard agreed [in *Ehrlich*] that '[b]ecause the $280,000 recreational mitigation fee was imposed on Ehrlich's development application individually, and not pursuant to an ordinance or rule of general applicability, the constitutionality of this fee is evaluated using the *Nollan-Dolan* "essential nexus" and "rough proportionality" analysis.' " [citation omitted]. (27 Cal.4th at 666).

[15]*San Remo Hotel, L.P. v. City and County of San Francisco*, *supra*, 27 Cal. 4th at 666-667.

[16]*San Remo Hotel, L.P. v. City and County of San Francisco*, *supra*, 27 Cal. 4th at 668.

[17]*San Remo Hotel, L.P. v. City and County of San Francisco*, *supra*, 27 Cal. 4th at 671.

[18]*San Remo Hotel, L.P. v. City and County of San Francisco*, *supra*, 27 Cal. 4th at 672.

[19]*Sheetz v. El Dorado County*, *supra*, 601 U.S. at 280.

[20]*Sheetz v. El Dorado County*, *supra*, 601 U.S. at 283-284 (concurring opinion of Sotomayor, J)

[21]*Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595, 133 S. Ct. 2586, 186 L. Ed. 2d 697 (2013).

[22]*Koontz v. St. Johns River Water Management District*, *supra*, 570 U.S. at 618 (emphasis added).

[23]*Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page*, 165 Ill. 2d 25, 31-32, 208 Ill. Dec. 328, 649 N.E.2d 384, 388-389 (1995).

[24]*Northern Ill. Home Builders Assn. v. County of Du Page, supra*, 649 N.E.2d at 389.

[25]*Northern Ill. Home Builders Assn. v. County of Du Page, supra*, 649 N.E.2d at 390.

[26]*Northern Ill. Home Builders Assn. v. County of Du Page*, *supra,* 649 N.E.2d at 390 (emphasis added).

[27]*Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*, 89 Ohio St. 3d 121, 128, 2000-Ohio-115, 729 N.E.2d 349, 356 (2000).

[28]*Home Builders Assn. v. Beavercreek*, *supra*, 729 N.E.2d at 354-355.

[29]*Home Builders Assn. v. Beavercreek*, *supra*, 729 N.E.2d at 355 (emphasis added).

[30]*Home Builders Assn. v. Beavercreek*, *supra*, 729 N.E.2d at 355 (emphasis added).

[31]*Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d 620

 

(Tex. 2004).

[32]*Town of Flower Mound v. Stafford Estates Ltd. Partnership*, *supra*, 135 S.W.3d at 640.

[33]*See Town of Flower Mound v. Stafford Estates Ltd. Partnership*, *supra*, 135 S.W.3d at 641-642.

[34]*Sheetz v. County of El Dorado, California*, *supra*, 601 U.S. at 273 n.3.

[35]See, e.g., *Agins v. City of Tiburon*, 24 Cal. 3d 266, 157 Cal. Rptr. 372, 598 P.2d 25 (1979), judgment aff'd, 447 U.S. 255, 100 S. Ct. 2138, 65 L. Ed. 2d 106 (1980) (abrogated by, *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005)) and (abrogated by, *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, Cal., 482 U.S. 304, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)).

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

[37]See, e.g., *Erlich v. City of Culver City*, *supra*, 12 Cal. 4th at 886 (plurality opinion).

[38]*California Building Industry Assn. v. City of San Jose*, *supra*, 61 Cal. 4th at 463-464.

[39]*California Building Industry Assn. v. City of San Jose*, *supra*, 61 Cal. 4th at 461.

[40]*Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952, 81 Cal. Rptr. 2d 93, 968 P.2d 993 (1999).

[41]*Santa Monica Beach, Ltd. v. Superior Court*, *supra*, 19 Cal. 4th at 966.

[42]*Sheetz v. El Dorado County*, *supra*, 84 Cal. App. 5th at 406-407.

[43]*Sheetz v. El Dorado County*, *supra*, 84 Cal. App. 5th at 415.

[44]*Sheetz v. El Dorado County*, *supra*, 84 Cal. App. 5th at 415.

[45]Gov. Code, § 66001, subd. (b).

[46]Gov. Code, § 66005, subd. (a).

[47]Gov. Code, §§ 66006, 66008, 66023.

[48]Gov. Code, § 66001, subd. (g).

[49]Gov. Code, § 66001, subd. (g).

[50]Gov. Code, § 66008.

[51] *AMCAL Chico LLC v. Chico Unified School District*, 57 Cal. App. 5th 122, 270 Cal. Rptr. 3d 868 (3d Dist. 2020).

[52]*AMCAL Chico LLC v. Chico Unified School District*, *supra*, 57 Cal. App. 5th at 130.

[53]*AMCAL Chico LLC v. Chico Unified School District*, *supra*, 57 Cal. App. 5th at 134.

[54]*AMCAL Chico LLC v. Chico Unified School District*, *supra*, 57 Cal. App. 5th at 135.

 

[55]*Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546-547, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005).

[56]*Lingle v. Chevron U.S.A., Inc.*, *supra*, 544 U.S. at 547.

[57]*Lingle v. Chevron U.S.A., Inc.*, *supra*, 544 U.S. at 547-548, quoting *Dolan v. City of Tigard*, *supra*, 512 U.S. at 385.

[58]*Erlich v. City of Culver City*, *supra*, 12 Cal. 4th at 861-862.

[59]*Erlich v. City of Culver City*, *supra*, 12 Cal. 4th at 884 (plurality opinion).

[60]*Erlich v. City of Culver City*, *supra*, 12 Cal. 4th at 886 (plurality opinion) (emphasis added).

[61]*Dolan v. City of Tigard*, *supra*, 512 U.S. at 391.

[62]E. Hemingway, *The Sun Also Rises.*

 

## *CASE BRIEFS:*

# ALTERNATIVE DISPUTE RESOLUTION

### CALIFORNIA LAW REQUIRING WAIVER OF ARBITRATION IF ARBITRATION FEES ARE NOT TIMELY PAID WAS IN CONFLICT WITH AND THEREFOR PREEMPTED BY FEDERAL ARBITRATION ACT WHERE AGREEMENT TO ARBITRATE STATED IT WAS GOVERNED BY THE FAA, AND STATE LAW ORDER WAS APPEALABLE AS "FUNCTIONAL EQUIVALENT" OF DENIAL OF PETITION TO COMPEL ARBITRATION.

*Hernandez v. Sohnen Enterprises, Inc.*, 102 Cal. App. 5th 222, 321 Cal. Rptr. 3d 283 (2d Dist. 2024), review filed, (June 28, 2024)

Massiel Hernandez was an employee of Sohnen Enterprises, working as a product handler from February 2015 to August 2020. Upon employment, she signed an arbitration agreement, which stated: "This Agreement is governed by the Federal Arbitration Act ('FAA'), 9 U.S.C.A. [section] 1, et seq." The agreement required Sohnen to pay "the entire cost of the arbitration filing fee and the arbitrator's initial deposit (or any similar request, including any fees or costs that are unique to the arbitration) on or before any deadline specified by the arbitrator to do so[.]" Hernandez sued Sohnen for disability discrimination in July 2021, and the parties stipulated to stay the proceedings while arbitrating pursuant to their agreement. However, although the Judicial Arbitration and Mediation Services, Inc. (JAMS) sent a notice on April 7, 2022, indicating that filing fees of $1750 were due upon receipt, Sohnen did not pay the fees until May 13, 2022.

In response, Hernandez filed a motion to withdraw from the arbitration and vacate the state court proceedings based on Civ. Proc. Code, § 1281.97. Sohnen opposed the motion, arguing that the Federal Rules of Civil Procedure, not California's Code of Civil Procedure, applied to the arbitration, and that the FAA preempts § 1281.97. Hernandez argued that there was no arbitration to which procedural rules would apply, since Sohnen had not paid the fee, and that the FAA did not preempt § 1281.97 because that section facilitated arbitration by requiring prompt payment of arbitration expenses. The trial court granted Hernandez's motion, finding that the FAA did not preempt § 1281.97, and that federal procedural rules did not apply to the trial court's rulings in advance of the arbitration proceeding, including the court's order that Sohnen pay the arbitration de-

 

posit on or before the arbitrator's deadline. Sohnen timely appealed.

The court of appeal first reviewed California law governing failure to pay arbitration fees, noting that even in the absence of § 1281.97, an employer's failure to perform an obligation under an arbitration agreement could constitute a material breach that would avoid enforcement. *Pry Corp. of America v. Leach*, 177 Cal. App. 2d 632, 639, 2 Cal. Rptr. 425 (2d Dist. 1960). However, unless time is of the essence in the contract, "a payment made within a reasonable time after the specified due date will usually constitute substantial compliance." *Magic Carpet Ride LLC v. Rugger Investment Group, L.L.C.*, 41 Cal. App. 5th 357, 364, 254 Cal. Rptr. 3d 213 (4th Dist. 2019).

Sections 1281.97, 1281.98, and 1281.99 were added to the California Arbitration Act in 2019 "to assist consumers and employees who find themselves in 'procedural limbo' because they are required to submit a dispute to arbitration, but the entity enforcing the arbitration agreement has not paid the arbitration fees required to proceed." Citing Stats. 2019, ch. 870, s 4; *Gallo v. Wood Ranch USA, Inc.*, 81 Cal. App. 5th 621, 629, 633-634, 297 Cal. Rptr. 3d 373 (2d Dist. 2022). While one goal of the statute is to preempt circumstances of strategic nonpayment, the statute is strictly applied. *Espinoza v. Superior Court*, 83 Cal. App. 5th 761, 777, 299 Cal. Rptr. 3d 751 (2d Dist. 2022). Section 1281.97 specifically addresses the failure to pay fees to initiate arbitration, which is defined as a material breach as a matter of law if fees are not paid within 30 days after the due date. A party in such material breach waives it right to compel arbitration, and allows an employee or consumer to withdraw from arbitration and proceed in court.

Next, the court addressed the appealability of the § 1281.97 order to withdraw from arbitration, observing that while "[n]o statute expressly states that orders under section 1281.97 are appealable, . . . California courts have concluded orders that are the 'functional equivalent' of denying a petition to compel arbitration are appealable under section 1294, subdivision (a)." The "functional equivalent" concept was announced in *Henry v. Alcove Investment, Inc.*, 233 Cal. App. 3d 94, 98, 284 Cal. Rptr. 255 (2d Dist. 1991), the case that led the Legislature to amend the statute because *Henry* took so long to resolve that it defeated the purpose of the arbitration agreement. The court here also cited *Williams v. West Coast Hospitals, Inc.*, 86 Cal. App. 5th 1054, 302 Cal. Rptr. 3d 803 (6th Dist. 2022) and

*Gallo v. Wood Ranch USA, Inc.*, 81 Cal. App. 5th 621, 297 Cal. Rptr. 3d 373 (2d Dist. 2022) for the proposition that a § 1281.97 order "is not simply an order lifting a stay of court proceedings," but rather "operates as a complete defense to enforcement of the parties' arbitration agreement, which is the functional equivalent of an order denying a petition to compel arbitration." *Williams v. West Coast Hospitals, Inc.*, 86 Cal. App. 5th at 1065. The court also presumed that the legislature was "aware of the case law construing orders that are functionally equivalent to denying a motion to compel arbitration to be appealable," yet did not include language to address that when enacting § 1281.97. Because the court found § 1281.97 to be appealable, it found that the trial court properly applied that section.

Finally, the court addressed federal preemption, considering first which statutory scheme applied to the parties' agreement. Recounting the legislative purpose of the FAA as being "to override judicial hostility to enforcing arbitration agreements," the court acknowledged that "the FAA does not expressly preempt state law, nor does it reflect an intent by Congress to occupy the entire field of arbitration." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 477, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989). However, the FAA does preempt state law where "state law actually conflicts with federal law or operates as an obstacle to accomplishing the purposes of the FAA." *Ibid.* The court also noted that preemption is avoided where parties expressly agree to apply state substantive law, procedural law, or both. Conversely, where the parties agreed to federal procedural provisions, "state arbitration procedures do not apply and there is no preemption issue." *Cronus Investments, Inc. v. Concierge Services*, 35 Cal. 4th 376, 394, 25 Cal. Rptr. 3d 540, 107 P.3d 217 (2005).

Here, the arbitration agreement "plainly state[d] 'this agreement is governed by the FAA' and made no mention of California law. Thus, the court found that the parties had intended for both substantive and procedural federal law to govern. It disagreed with Hernandez that the agreement's statement that it "fully complies" with the requirements of *Armendariz v. Foundation Health Psychcare Services, Inc.*, 24 Cal. 4th 83, 99 Cal. Rptr. 2d 745, 6 P.3d 669 (2000) meant that it incorporated California's arbitration law, since *Armendariz* addressed California's minimum requirements for a fair arbitral forum but did not require parties to arbitrate under the CAA. However,

 

the court found that even if § 1281.97 applied, it would still reverse the order because "the FAA preempts the portion of section 1281.97 that requires findings of material breach and a waiver of the right to arbitrate as a matter of contract law." Addressing whether this portion of the CAA conflicted with or obstructed the purpose of the FAA, the court found that § 1281.97 "violates the equal-treatment principle because it mandates findings of material breach and waiver for late payment that do not apply generally to all contracts or even to all arbitrations." It disagreed with other California courts that have "concluded section 1281.97 furthers the goals of the FAA by encouraging or facilitating arbitration." See, e.g., *Gallo v. Wood Ranch USA, Inc.*, 81 Cal. App. 5th at 642; *Espinoza v. Superior Court*, 83 Cal. App. 5th at 783. Rather, the court here found that § 1281.97 "limits the enforceability of certain types of arbitration agreements by allowing consumers and employees to elect to avoid arbitration even in cases of minor, inadvertent, or inconsequential delay." This higher standard for enforcement of arbitration agreements conflicts with the FAA policy of ensuring arbitration agreements as enforceable as other contracts, and frustrates "the FAA's objective of cheaper, more efficient resolution of disputes by increasing the overall cost of litigation and wasting resources already invested toward arbitration."

Thus, the court found that "unless the parties have expressly selected California's arbitration provisions to apply to their agreement, the FAA preempts the portion of section 1281.97 that dictates findings of material breach and waiver as a matter of law." Accordingly, the order finding material breach by Sohnen had to be reversed. The court also found that the trial court erred by finding that Sohnen had violated the trial court's order to pay fees on or before the deadline specified by the arbitrator, because the trial court had set no such deadline and the arbitration invoice was ambiguous as to when payment was due.

The dissent first suggested that the appeal may not have been properly before the court, disagreeing that the "functional equivalent" doctrine should be applied to § 1281.97. After inviting the Legislature to clarify its intent, the dissent acknowledged that from a statutory construction standpoint, it had to proceed as though the appeal was proper. However, it disagreed that the FAA preempted § 1281.97 because it did not find that the section conflicted with the FAA's purpose, and it disagreed that the equal treatment principle had been violated because "[d]iffer-

ent treatment for contracts that have salient differences cannot offend the equal treatment principle."

>> *See Miller & Starr, California Real Estate 4th, Ch. 45, Alternative Dispute Resolution, §§ 45:9, 45:14, 45:23, 45:36.*

## PETITION TO CONFIRM THE ARBITRATION AWARD WAS PROPER WHERE PETITION TO VACATE WAS UNTIMELY DUE TO SUPPORTING DECLARATIONS AND EVIDENCE BEING PRESENTED AFTER THE 10-DAY DEADLINE, AND EXCLUSION OF EVIDENCE WAS PROPER WHERE DEFENDANTS WILLFULLY FAILED TO COMPLY WITH THE DISCOVERY REQUESTS.

*Valencia v. Mendoza*, 103 Cal. App. 5th 427, 322 Cal. Rptr. 3d 903 (2d Dist. 2024)

Armando Mendoza, Coastal Holdings, LLC, and Class A Realty, Inc. (the Mendoza defendants) purchased a home in 2016 with the intention to "flip" it. The seller informed Mendoza that he had done work on the house without necessary permits and that the home was not in compliance with building codes. The previous owner also disclosed water intrusion issues, chipping stucco, and improperly installed windows to Mendoza. Mendoza performed a significant amount of work using unlicensed contractors before he obtained permits, so when the building inspector came for a code inspection, the inspector could not see the prior work but determined the rest of the work to be unpermitted. Upon completion, Mendoza sold the home to Miguel and Lizette Valencia, listing the property as " 'completely remodeled' with 'no expense spared.' " He did not disclose the issues the previous owner informed him of or the unpermitted work he did using unlicensed contractors, so the Valencias purchased the home believing it was in move-in condition.

The Valencias filed suit on October 2, 2018, against the Mendoza defendants for fraudulent concealment of defects, to which the Mendoza defendants moved to compel arbitration. After both parties agreed to a stipulation for binding arbitration and a stay of the court action, the Valencias asserted eight claims in the arbitration against the Mendoza defendants: violation of state contractor licensing laws, breach of contract, breach of statutory duty of disclosure, fraud, negligent misrepresentation, negligence, violation of the common law duty of disclosure, and fraudulent concealment. The arbitration hearing took place over five days in June 2021. The arbitrator found the Valencias' cause of ac-

 

tion fell into the categories of negligence and failure to disclose, and issued a final arbitration award for the Valencias on August 23, 2022. The arbitrator found clear and convincing evidence that Mendoza "made false representations and failed to disclose known defects with knowledge of the falsity" and "intended to defraud the Valencias."

The Valencias filed a petition to confirm the arbitration award on September 2, 2022. On September 14, the Mendoza defendants filed an opposition stating they were in the process of drafting a petition to vacate, arguing, without any declarations or evidence, that the arbitrator refused to consider a building inspection card and an expert testimony that were two items of evidence that constituted grounds to vacate the award. The Valencias argued the Mendoza defendants' unfiled petition was untimely under Civ. Proc. Code, § 1290.6 because it was not served within 10 days after service of the Valencias' petition to confirm. The Valencias' petition to confirm the arbitration award was granted. The trial court denied the Mendoza defendants' petition to vacate the arbitration award on the grounds that the petition was untimely and that there were no statutory provisions for refusal to hear evidence, which is required to establish grounds for vacating an arbitration award. The Mendoza defendants appealed, asserting the trial court erred in finding the petition to vacate was untimely and the arbitrator committed a legal error by excluding key evidence from the arbitration hearing.

The court of appeal examined the standard of review of arbitration awards. The California Arbitration Act (Civ. Proc. Code, §§ 1280 et seq.) limits the grounds for judicial review, as courts generally cannot review arbitration awards for "errors of fact or law, even when those errors appear on the face of the award or cause substantial injustice to the parties." *Richey v. AutoNation, Inc.*, 60 Cal. 4th 909, 916, 182 Cal. Rptr. 3d 644, 341 P.3d 438 (2015). However, the general rule limiting judicial review does not apply when both parties " 'have agreed to "limit the arbitrators' authority by providing for review of the merits in the arbitration agreement." '" *Harshad & Nasir Corp. v. Global Sign Systems, Inc.*, 14 Cal. App. 5th 523, 535, 222 Cal. Rptr. 3d 282 (2d Dist. 2017); accord *Cable Connection, Inc. v. DIRECTV, Inc.*, 44 Cal. 4th 1334, 1361, 82 Cal. Rptr. 3d 229, 190 P.3d 586 (2008). In *Cable Connection*, the arbitration agreement between the parties stated, " ' "The arbitrators shall not have the power to commit errors of law or legal reasoning, and the award may

 

be vacated or corrected on appeal to a court of competent jurisdiction for any such error." ' " *Cable Connection, Inc. v. DIRECTV, Inc.* 44 Cal. 4th at 1361. The Supreme Court held an arbitrator's powers are set by the terms of the parties' arbitration agreement, so this agreement allowing judicial review for legal error was enforceable. *Cable Connection, Inc. v. DIRECTV, Inc.* 44 Cal. 4th at 1355.

Here, the court found the arbitration award was reviewable for legal error, because the parties expressly invoked *Cable Connection* and included language identical to the language approved by the Supreme Court. Therefore, the court reviewed the trial court's orders for substantial evidence to confirm or deny an arbitration award based on the disputed factual issues, and the Mendoza defendants carried the burden of establishing the claim of invalidity.

The court of appeal found the trial court was correct in finding the petition to vacate was untimely. According to Civ. Proc. Code, §§ 1288 and 1288.2, "a petition to vacate an award" or "a response requesting that an award be vacated" must be served and filed "not later than 100 days after the date of the service of a signed copy of the award on the petitioner." However, appellate courts have consistently held this 100-day limit applies only when the other party to the arbitration does not file a petition to confirm the award. When a petition for confirmation of an arbitration award is filed, a response challenging the confirmation needs to be "served and filed within 10 days after service of the petition." Civ. Proc. Code, § 1290.6. When a party files both a response to a petition to confirm and a petition to vacate the award, both the 100-day and 10-day deadline apply. *Law Finance Group, LLC v. Key*, 14 Cal. 5th 932, 946-47, 309 Cal. Rptr. 3d 796, 531 P.3d 326 (2023).

Although the Mendoza defendants filed a timely response to the petition to confirm the award, they failed to submit evidence in that opposition as they were in the process of drafting a formal petition to vacate. Supporting declarations and evidence were presented well after the 10-day deadline, in the Mendoza defendants' formal petition to vacate the award. On this issue, the court found there is no material difference between a request to vacate filed as a response to a petition to confirm and a standalone petition to vacate, making the 10-day deadline control. Therefore, the court also determined the trial court did not have to consider the additional evidence presented in the untimely petition to vacate.

Although the 10-day deadline

 

could be extended by a written agreement between the parties or for good cause by order of the court, the standard for determining whether there is good cause for extension is based on if there was "an abuse of discretion." *Robinson v. U-Haul Co. of California*, 4 Cal. App. 5th 304, 327, 209 Cal. Rptr. 3d 81 (1st Dist. 2016). The Mendoza defendants did not submit any evidence, reasons why they were unable to submit evidence, or a developed argument to support their opposition in the initial response. Additionally, the Mendoza defendants did not request an order extending the deadline to respond under § 1290.6. Based on these factors, the court of appeal agreed with the trial court that there was not a good cause for relief from the 10-day deadline. Accordingly, the court disregarded the evidence presented in the petition to vacate.

The court also found the Mendoza defendants did not show that the arbitrator erred by excluding evidence, specifically the annotated inspection card and the expert witness testimony. The court found the arbitrator reasonably concluded there was sufficient evidence the Mendoza defendants willfully failed to comply with the discovery requests, because they had previously claimed it was not in their possession and only produced the card the night before the arbitration. In addition, the Valencias submitted excerpts of the Mendoza defendants' expert deposition where the expert stated he had not been asked to give an opinion on the topic the defendants wanted included in the evidence. An expert opinion at trial may be excluded "*if* the opposing party has no notice or expectation that the expert will offer the new testimony, or *if* notice of the new testimony comes at a time when deposing the expert is unreasonably difficult." *Dozier v. Shapiro*, 199 Cal. App. 4th 1509, 1523-1524, 133 Cal. Rptr. 3d 142 (2d Dist. 2011). Thus, the court found the arbitrator correctly excluded the testimony.

Accordingly, the court of appeal confirmed the arbitration award and affirmed the trial court's judgment.

>> *See Miller & Starr, California Real Estate 4th, Ch. 25, Building Codes, §§ 25:23, 25:30; Ch. 33, Defective Construction, § 33:27; Ch. 45, Alternative Dispute Resolution, §§ 45:28; 45:30, 45:41, 45:42.*

# BUILDING CODES

## THERE IS NO PRIVATE RIGHT OF ACTION FOR VIOLATION OF A MUNICIPAL ORDINANCE UNDER GOV. CODE, § 36900, SUBD. (a), WHICH IS LIMITED TO ACTIONS BROUGHT BY "CITY AUTHORITIES," OVERRULING *RILEY V. HILTON HOTELS CORP.* (2002) 100 CAL. APP. 4TH 599.

*Cohen v. Superior Court*, 102 Cal. App. 5th 706, 322 Cal. Rptr. 3d 62 (2d Dist. 2024), review filed, (July 8, 2024)

Charles and Katyna Cohen owned a home in Los Angeles across the street from Thomas and Lisa Schwartz, who alleged that the Cohens interfered with the Schwartzes' use and enjoyment of their land by violating the Los Angeles Municipal Code (LAMC) through planting trees and plants that exceeded height limits and removing trees and plants from the parkway fronting the property without proper permits to replace with non-compliant landscaping. The Schwartzes sued the Cohens, asserting causes of action for nuisance, violation of LAMC's landscaping height limits, violation of LAMC's restrictions on a non-compliant trees and plants, and declaratory relief. The Cohens demurred to each of the causes of action. The trial court sustained the demurrer to the nuisance and declaratory relief causes of action because the Schwartzes lacked specific facts describing how the Cohens' conduct interfered with their use and enjoyment of their property. However, the trial court overruled the demurrer to the LAMC violation actions, based on *Riley v. Hilton Hotels Corp.*, 100 Cal. App. 4th 599, 123 Cal. Rptr. 2d 157 (2d Dist. 2002) (overruled by, Cohen v. Superior Court of Los Angeles County, 102 Cal. App. 5th 706, 322 Cal. Rptr. 3d 62 (2d Dist. 2024)).

In *Riley*, Kathleen Riley sued Hilton Hotels Corporation and Hilton Hotels U.S.A., Inc., on behalf of a class of persons, asserting the defendants had violated the Beverly Hills Municipal Code's requirement that attendants and operators of a vehicle parking facility have "clearly visible" signage listing the fees and rates for parking before motorists from the streets entered the facility. *Riley v. Hilton Hotels Corp.*, 100 Cal. App. 4th at 602. The plaintiffs alleged that the defendants operated a vehicle parking facility that charged a fee but did not provide the notice required by the Municipal Code. When the defendants argued there was an absence of a private right of action under the Municipal Code, the court found that Gov. Code, § 36900, subd. (a) " 'expressly per-

 

mits violations of city ordinances to be "redressed by civil action." '" *Riley v. Hilton Hotels Corp.*, 100 Cal. App. 4th at 607.

The "trial court declined the Cohens' invitation to depart from *Riley*," holding that in the absence of authority to the contrary, the Schwartzes may assert private causes of action for violations of the LAMC. The Cohens then filed a petition for writ of mandate and the court of appeal issued an order directing the trial court to show cause whether § 36900, subd. (a) permits a private right of action to enforce municipal ordinances and whether the court should decline to revisit *Riley* based on the doctrine of stare decisis.

Initially, the Schwartzes moved to dismiss the Cohens' writ petition on the grounds the case was moot because they intended to dismiss their case and the court lacked jurisdiction to grant the writ review and disregard *Riley*. However, the court found the Schwartzes' intention to dismiss their case against the Cohens alone was insufficient to moot the case, because they had yet to do so. Moreover, the court found the question to be an issue of significant public interest that was likely to recur, as it involved whether *all* private citizens, or only city authorities, may "seek redress for alleged violations of municipal ordinances in the past and therefore may continue to do so in the future." Therefore, the court found the writ petition was not moot regardless of whether the Schwartzes had dismissed their case.

Regarding whether a reexamination of *Riley* was appropriate in accordance with the principles of stare decisis, the court acknowledged the doctrine of stare decisis is "based on the assumption the certainty, predictability, and stability in the law are major objectives of the legal system." *Moradi-Shalal v. Fireman's Fund Ins. Companies*, 46 Cal. 3d 287, 296, 250 Cal. Rptr. 116, 758 P.2d 58 (1988). However, it found the "age of the precedent, the nature and extent of . . . reliance on it, and its consistency or inconsistency with other related rules of law" were stare decisis concerns that would not arise, because *Riley* had not been widely relied upon, having been cited in only 20 cases in state and federal courts, only two of which were published court of appeal decisions, and its reasoning had not been closely scrutinized in any of those cases. See *People v. Hardin*, 15 Cal. 5th 834, 850, 318 Cal. Rptr. 3d 513, 543 P.3d 960 (2024). The court also emphasized that the doctrine of stare decisis should not shield errors from correction.

The court found *Riley*'s interpretation of § 36900 should be reexamined because the opinion lacked anal-

ysis of the context or legislative intent of the phrase "redressed by civil action." For example, there was no discussion of § 36900, subd. (a) when the defendants asserted "the absence of a private right of action under the Municipal Code." *Riley*, 100 Cal. App. 4th at p. 607. Instead, the *Riley* court simply used that phrase as the justification for its conclusion that there is a private right of action and did not elaborate any further. Therefore, the court here determined stare decisis concerns did not apply.

Using the California Supreme Court's framework in *Lu v. Hawaiian Gardens Casino, Inc.*, 50 Cal. 4th 592, 113 Cal. Rptr. 3d 498, 236 P.3d 346 (2010) to determine whether a private right of action exists under a statute, the court examined whether the statute "manifested . . . intent to create such a private cause of action" in "the language . . . and its legislative history." *Ibid.* First, the court examined the language of the statute in § 36900, subd. (a), which states, "Violation of a city ordinance is a misdemeanor unless by ordinance it is made an infraction. The violation of a city ordinance may be prosecuted by city authorities in the name of the people of the State of California, *or redressed by civil action.*" Gov. Code, § 36900 (italics added by court). The Schwartzes argued that because the second clause did not explicitly mention "city authorities," the statute did not intend to restrict the right to simply those authorities but also to the people. However, the court found the second clause could reasonably be interpreted as confining the right to civil action to the same "city authorities" mentioned as the sole actor in the statute's first sentence and first clause of the second sentence. Therefore, the court found the language of the statute to be ambiguous, requiring an analysis of the statute's legislative history.

The relevant legislative history shows that § 36900's predecessor statutes, Sections 769 and 867 of the Municipal Incorporation Act of 1883, explicitly granted only city authorities the right to redress ordinance violations by civil action: "the violation of any ordinance of such city . . . may be prosecuted by the authorities of such city . . ., or may be redressed by civil action, *at the option of said authorities.*" Stats. 1883, ch. 49 § 769, p. 256; Stats. 1883, ch. 49 § 867, p. 272 (italics added). When these predecessor statutes were used to draft Senate Bill No. 750, which enacted § 36900, the contemporaneous reports, memoranda, and letters to the Governor confirmed that § 36900 was added "to consolidate" the law with "no substantive

 

changes in existing law," indicating there was no intention to create a private right of action to enforce city ordinances through § 36900.

The Schwartzes argued that case law recognizes a private right of action if an individual (1) suffers a special injury to themselves different from that suffered by the general public, or (2) "is 'a member of the community for whose particular welfare the ordinance was enacted,' " not merely for the general public. *Pacifica Homeowners' Assn. v. Wesley Palms Retirement Community*, 178 Cal. App. 3d 1147, 1152-1153, 224 Cal. Rptr. 380 (4th Dist. 1986). The court found this case law did not apply to the Schwartzes, because they did not meet either of the requisite conditions. The trial court found the Schwartzes failed to present facts of how the Cohens' actions injured them, indicating they did not suffer a special injury. Further, they did not show the ordinance was enacted for the welfare of a specific community and not the general public, and that they were a part of that specific community. The Schwartzes also asserted public policy arguments supporting their interpretation of a right to private action, stating the City's limited resources make the City authorities unreliable in the enforcement of the ordinances and that the right to private action would encourage compliance with the laws, reduce the potential for abuse of prosecutorial discretion, and more efficiently redress violations. However, the court dismissed these public policy arguments due to a lack of evidence or legal authority for them, emphasizing its duty to interpret statutes rather than create policy.

Based on the statutory language and legislative history of § 36900, subd. (a), the court found the Legislature did not intend to give the public the right to redress violations of local ordinances by filing civil suit but rather intended to simplify and restate existing law by granting only city authorities the right to redress violations of ordinances by filing civil suits. Therefore, the court overruled *Riley* and found the Schwartzes had not shown they were authorized to pursue their claims against the Cohens' alleged LAMC violations. Accordingly, the court of appeal issued an order that the Cohens' demurrer be sustained.

>> *See Miller & Starr, California Real Estate 4th, Ch. 19, Landowners' Liability, § 19:20; Ch. 21, Land Use, §§ 21:1, 21:2; Ch. 25, Building Codes, §§ 25:54, 25:57.*

### PETITION TO CONFIRM CONSTRUCTION DEFECT ARBITRATION AWARD WAS PROPER WHERE PETITION TO VACATE WAS UNTIMELY DUE TO SUPPORTING DECLARATIONS AND EVIDENCE BEING PRESENTED AFTER THE 10-DAY DEADLINE, AND EXCLUSION OF EVIDENCE WAS PROPER WHERE DEFENDANTS WILLFULLY FAILED TO COMPLY WITH THE DISCOVERY REQUESTS.

*Valencia v. Mendoza*, 103 Cal. App. 5th 427, 322 Cal. Rptr. 3d 903 (2d Dist. 2024)

For a summary of this case see ALTERNATIVE DISPUTE RESOLUTION

>> *See Miller & Starr, California Real Estate 4th, Ch. 25, Building Codes, §§ 25:23, 25:30; Ch. 33, Defective Construction, § 33:27; Ch. 45, Alternative Dispute Resolution, §§ 45:28; 45:30, 45:41, 45:42.*

## CEQA

### AMENDMENT TO CEQA EXPRESSLY PROVIDING THAT NOISE GENERATED BY PROJECT RESIDENTS IS NOT A SIGNIFICANT EFFECT ON THE ENVIRONMENT IS BROADLY INTERPRETED TO INCLUDE LONG-RANGE DEVELOPMENT PLANS AND, COUPLED WITH ELIMINATION OF THE REQUIREMENT THAT UNIVERSITIES CONSIDER ALTERNATIVE PROJECT LOCATIONS FOR STUDENT HOUSING, DISPOSED OF PLAINTIFF'S CLAIMS THAT EIR WAS INADEQUATE.

*Make UC a Good Neighbor v. Regents of University of California*, 16 Cal. 5th 43, 321 Cal. Rptr. 3d 409, 548 P.3d 1051 (2024)

This case involved the EIR for the University of California, Berkeley's long-range campus development plan ("LRDP") and a controversial housing development project at People's Park. A LRDP is required to provide guidance for physical development, land use designations, building locations, and infrastructure systems over its time horizon, though it does not mandate specific levels of enrollment or growth. One goal of the LRDP is to "[i]mprove the existing housing stock and construct new student beds and faculty housing units in support of the Chancellor's Housing Initiative." Thus, the 2021 LRDP for UC Berkeley anticipated

 

the addition of 11,730 new student beds, and the Regents approved a plan to redevelop People's Park with student housing, affordable and permanent supportive housing for low income or homeless individuals, and 1.7 acres of open space for public use. An EIR for the project was certified in 2021 and included both a program EIR (CEQA Guidelines § 15168) for the LRDP and a project EIR (Guidelines § 15161) for two specific development projects, including "Housing Project No. 2" at People's Park.

Make UC a Good Neighbor (Good Neighbor) filed a petition for writ of mandate against the Regents and others claiming the EIR " 'fails to lawfully assess or mitigate the Project's effects on noise pollution' and '[f]ails to analyze a range of reasonable alternatives,' " and asked the court to void approvals of the 2021 LRDP and Housing Project No. 2 as well as certification of the EIR. The noise Good Neighbor alleged was "student party and pedestrian noise disturbances." The Regents argued there was no legal requirement to study such noise, and the trial court agreed, finding Good Neighbor's claims to be based on speculation. However, the court of appeal reversed, finding that CEQA includes noise as part of the environment, and adding thousands of students would make noise problems worse. That court also found the EIR failed to consider and analyze a reasonable range of alternatives, concluding that "absent a viable explanation for declining to consider alternative locations, the range of alternatives in the [2021] EIR was unreasonable." *Make UC A Good Neighbor v. Regents of University of California*, 88 Cal. App. 5th 656, 675, 683, 304 Cal. Rptr. 3d 834 (1st Dist. 2023).

After the California Supreme Court granted the Regents' petition for review, the California Legislature passed urgency legislation (Assembly Bill No. 1307 (2023-2024 Reg. Sess.)), which amended Pub. Resources Code, § 21085 in two ways. First, it now provides that "the effects of noise generated by project occupants and their guests on human beings is not a significant effect on the environment for residential projects for purposes of CEQA." Second, it provides that "institutions of public higher education, in an EIR for a residential or mixed-use housing project, are not required to consider alternatives to the location of the proposed project if certain requirements are met" (such as that the project is located on an urban site not exceeding five acres, and that the project was already evaluated in an EIR for the most recent campus long-range development plan). Good

Neighbor conceded that AB 1307 applied to the facts of this case, but argued that it did not entirely dispose of the issues.

After reciting the state policy underpinning CEQA, the Court stated that "no matter how important its original purpose, CEQA remains a legislative act, subject to legislative limitation and legislative amendment." *Napa Valley Wine Train, Inc. v. Public Utilities Com.*, 50 Cal. 3d 370, 376, 267 Cal. Rptr. 569, 787 P.2d 976 (1990), overturned due to legislative action in 1990 Cal. Legis. Serv. 1654. The court then considered Good Neighbor's argument that the 2021 LRDP did not constitute a residential project within the meaning of AB 1307's amendment. The court noted that while the term "residential projects" is not defined in § 21085, the term "project" is defined in § 21065, and the court found it to govern here. However, the term "residential" is not defined in CEQA, so the court presumed the Legislature meant it to have its ordinary meaning. Accordingly, the Court found the term "residential projects" to encompass "public agency activities that relate to residence or residences that may have a significant effect on the environment."

Even so, the court found the term to be ambiguous because it could mean either "plans to add residential units to a specific location," or land use planning in general as it relates to residential development. Good Neighbors argued that a narrower definition should apply because the Legislature could have included a specific reference to LRDP's but did not do so. The court rejected that argument because Good Neighbor "failed to establish that the 2021 LRDP is outside the scope of section 21085's reference to 'residential projects.' Rather, the Court found a broader interpretation to better fit the Legislature's intent, which would mean application of § 21085 to any residential component of an LRDP while allowing for consideration of the noise impacts of the nonresidential components of an LRDP.

Looking to the legislative history of the CEQA amendment, the Court found it critical that the Legislature very clearly intended to abrogate the *Make UC* decision. It found this fact to support inclusion of the residential aspects of the 2021 LRDP because those were evaluated in the EIR that was the subject of the *Make UC* decision, and discussed extensively by the Legislature in its consideration of the CEQA amendment. The Court also pointed to the absence of legislative history indicating an intent to exclude the LRDP. In addition, the Court found that

policy considerations supported this interpretation. It found it "untenable that the Legislature would preclude the consideration of social noise impact under CEQA only for projects designed to add residential units to a specific location (such as Housing Project No. 2) while potentially requiring the same analysis of social noise when an agency makes broader land use planning decisions (such as the 2021 LRDP) that encompass the specific projects."

Next, the court rejected Good Neighbor's argument that LRDPs should be excluded because they include enrollment-driven population increases that are not a residential project. The court found this argument to be at odds with the court of appeal's holding that the "EIR was not deficient for 'failing to analyze an alternative to the development plan that would limit student enrollment' " because setting enrollment levels is a process separate from the LRDP. *Make UC*, 88 Cal. App. 5th at 668. Further, enrollment increases are exempted from the definition of a project under CEQA.

Accordingly, the court found that, due to the amendment of § 21085, "the 2021 EIR was not inadequate for failing to have considered whether the impact of social noise on neighboring residences potentially caused by future students at UC Berkeley constituted a significant effect on the environment with respect to either Housing Project No. 2 or the residential aspects of the 2021 LRDP," and that the judgment below must therefore be reversed.

Finally, regarding the court of appeal's holding that the EIR was faulty for failing to consider alternative locations, the court rejected Good Neighbor's contention that the amendment of § 21085 "mooted" its alternative sites claim, but that the court should address the issue anyway because "it raises issues of broad public interest that are likely to recur." First, the court found the mootness doctrine to be inapplicable: " 'A case becomes moot when events " 'render[] it impossible for [a] court, if it *should decide the case in favor of plaintiff*, to grant him any effect[ive] relief.' " ' " *In re D.P.*, 14 Cal. 5th 266, 276, 303 Cal. Rptr. 3d 388, 522 P.3d 645 (2023). By contrast, the court here could not find in favor of Good Neighbor because "section 21085.2 makes clear that Good Neighbor is not entitled to relief." Second, the court found "[t]he question of how section 21085.2 might apply to future housing projects—other than the People's Park project—is simply not before us and we do not render advisory opinions on such issues." Thus, the court

 

reversed the judgment on this issue as well.

>> *See Miller & Starr, California Real Estate 4th, Ch. 26, CEQA, §§ 26:17, 26:18, 26:19.*

## COMMON INTEREST DEVELOPMENTS

### THE REQUIREMENT IN CIV. CODE, § 5655 THAT HOMEOWNER PAYMENTS BE APPLIED FIRST TO OUTSTANDING ASSESSMENTS BEFORE COLLECTION FEES AND COSTS MAY NOT BE CONTRACTUALLY WAIVED IN LIGHT OF THE PUBLIC PURPOSE OF THE DAVIS-STIRLING ACT, AND A PRE-NOTICE OF DEFAULT LETTER SENT BY COLLECTION AGENCY VIOLATED FAIR DEBT COLLECTION PRACTICES ACT BY THREATENING FORECLOSURE PREMATURELY.

*Doskocz v. ALS Lien Services*, 102 Cal. App. 5th 107, 321 Cal. Rptr. 3d 476 (1st Dist. 2024)

Teresa Doskocz owns a townhouse that is part of the Danville Green Homeowners Association, Inc. (Danville Green). Danville Green hired ALS Lien Services (ALS) to collect delinquent homeowners' association payments from Doskocz, who at the time owed $1,239.08. ALS sent Doskocz its standard "pre-lien letter," advising that she could request a payment plan, which she did, after ALS recorded a lien against her townhouse. The payment plan included an express waiver of Civ. Code, § 5655, subd. (a), which requires that homeowner payments first be applied to assessments until they are paid in full, before applying payments to fees and costs such as collection, attorney's fees, late charges, and interest. As a result, ALS applied only a portion of Doskocz's payments to her outstanding debt, applying the rest to its own collection fees and costs.

Doskocz made five payments but was unable to make the sixth. When she requested a new payment plan, ALS told her that her balance was $1074.90, but proposed a new three-month payment plan that totaled $2033.19. Doskocz did not accept this proposal but instead attempted to satisfy the total balance by sending two monthly payments of $537.45. ALS responded with a pre-notice of default letter (pre-NOD) stating that she owed $830.73, and that if she did not pay, ALS would "record a Notice of Default," although ALS subsequently closed the collection account and billed Danville Green for the remaining fees and costs.

Doskocz filed a class action in federal court alleging violations of the Fair Debt Collection Practices

 

Act (15 U.S.C.A. §§ 1692 et seq.) (FDCPA), and California's Unfair Competition Law (Bus. & Prof. Code, §§ 17200 et seq.) (UCL). ALS moved for summary judgment on the basis that there was no violation of the FDCPA because Doskocz had waived § 5655. The federal court rejected that argument, finding the waiver "void as a matter of public policy." Subsequently, the parties stipulated to dismiss the federal case and refile in state court, subject to the federal court's summary judgment ruling. After Doskocz re-filed in state court, the court granted class certification, and then allowed her to file an amended complaint adding allegations that the SwedelsonGottlieb law firm and individuals Sandra Gottlieb and David Swedelson (collectively, the SG defendants) were alter egos of ALS. Upon ALS's motion for summary judgment arguing that Doskocz had waived § 5655(a), the trial court declined to reconsider the federal court's ruling.

Shortly before trial, the court granted Doskocz's motion to bifurcate and held a bench trial on her UCL cause of action. There, Doskocz alleged two violations of the FDCPA to support the UCL cause of action: "(1) ALS's application of homeowner payments contrary to section 5655(a); and (2) ALS's pre-lien and pre-NOD letters as improper threats of foreclosure contrary to Civil Code section 5720, which limits collection of delinquent assessments through foreclosure until the amount owed is at least $1800 or more than 12 months delinquent." The trial court agreed that ALS had violated the FDCPA in both respects and that the SG defendants were alter egos of ALS. Thereafter, Doskocz dismissed her FDCPA cause of action and judgment was entered in her favor on the UCL cause of action, with ALS and the SG defendants being held jointly and several liable for $156,753 in restitution to the class, as well as injunctive relief against ALS relating to application of homeowner payments and other issues. ALS and the SG defendants both appealed.

On appeal, ALS argued the trial court erred in adopting the federal court's ruling on § 5655(a) and in finding that ALS's pre-lien and pre-NOD letters violated the FDCPA. It also argued that the trial court abused its discretion in allowing Doskocz to bifurcate and proceed first on the UCL cause of action. The SG defendants argued that substantial evidence did not support the alter ego findings, and that the trial court abused its discretion in allowing Doskocz to amend her complaint and also by awarding attorney's fees to class counsel.

 

Beginning with the federal court's § 5655(a) ruling, the court of appeal noted that the federal court "recognized that '[t]he California Supreme Court does not appear to have addressed this issue, and neither party has identified a case directly on point.' " Thus, that court cited *DeBerard Properties, Ltd. v. Lim*, 20 Cal. 4th 659, 669, 85 Cal. Rptr. 2d 292, 976 P.2d 843 (1999), in explaining that Civ. Code, § 3513 "bars the waiver of a statutory right when the 'public benefit [of the statute] is one of the primary purposes.' " (Cleaned up.) The federal court had determined that there was no question of the "public purpose and benefit inherent in the Davis-Sterling Act and section 5655(a)," which is to protect homeowner equity by ensuring that delinquent assessments are paid down first so as to prevent foreclosure over small delinquencies and to stem the "cascade of late fees and collection costs likely to lead to defaults and foreclosures." The federal court found that allowing a contractual waiver of § 5655(a) "would flout the very purpose of the section and the Davis-Sterling Act generally," and it therefore found such a provision "must be voided as against public policy."

Reviewing the federal court's interpretation of § 5655 de novo, the court of appeal examined that section in conjunction with § 3513, noting that a prohibition on waiver can be express or implied. It disagreed with ALS that § 5655 was adopted for a "narrow, very private interest" that precluded finding an implied prohibition of a waiver. Rather, since 1996, when the requirement to prioritize application of payments to unpaid assessments was first codified, the court of appeal found that the requirement has always been mandatory: "it affords no discretion to HOAs to decline prioritization." However, because the court did not find the requirement to be "evident from the statutory text alone," it looked at the legislative history, which it found to show that "[t]he prioritization requirement was [] intended to protect homeowners from abuses by collection firms and 'insensitive and overzealous associations who adopt unnecessarily adversarial tactics in collecting past due assessments.' " Sen. Com. on Judiciary, Analysis of Assem. Bill No. 1317 (1995-1996 Reg. Sess.) as amended August 21, 1995, p. 7. The court also disagreed that HOA standards for payment plans could "contravene the prioritization requirement" in § 5655(a), and it found ALS's argument that it was merely acting as an agent of the HOA to be forfeited.

Next, with respect to the FDCPA

 

rulings, the federal court had found, under a "least sophisticated consumer standard," that ALS's pre-lien letter had improperly threatened foreclosure by stating "IMPORTANT NOTICE: IF YOUR SEPARATE INTEREST IS PLACED IN FORECLOSURE BECAUSE YOU ARE BEHIND IN YOUR ASSESSMENTS, IT MAY BE SOLD WITHOUT COURT ACTION." The federal court's decision was based on the fact that a notice of default is "a necessary step in perfecting the right to hold a foreclosure sale," and that the prohibition on collection through foreclosure "means not only a foreclosure sale but also the commencement and perfection of the foreclosure process leading up to a sale, including recording a Notice of Default." The court of appeal focused on § 5720, subd. (b), which prohibits an HOA from collecting a delinquent assessment that is less than $1800 or more than 12 months old. It then concluded that "[w]hen ALS sent its pre-lien and pre-NOD letters, Doskocz's delinquent assessment had not yet met this $1,800 or 12-month threshold." While the court expressed some doubt about whether "the pre-lien letter [could] reasonably be characterized as threatening foreclosure before the delinquent assessment reached this statutory threshold," it also found it did not need to make this determination because the pre-NOD letter could be so characterized and sufficed to uphold the judgment. The court also agreed with the federal court that a foreclosure sale includes steps in the foreclosure process, and that such an interpretation was supported by the legislative history. Accordingly, it affirmed the trial court's judgment. The remainder of the opinion, relating to alter ego allegations, was unpublished.

>> *See Miller & Starr, California Real Estate 4th, Ch. 28, Common Interest Developments, §§ 28:97, 28:98; Ch. 35, Lender Liability, § 35:1; Ch. 36, Mortgage Lending, § 36:1, 36:23.*

### HOMEOWNERS PUT ON EXTRAVAGANT CHRISTMAS PROGRAM WERE NOT ADVERSELY IMPACTED WHERE CC&RS PROHIBITING NUISANCE WERE NOT ENFORCED, AND EVIDENCE DID NOT SUPPORT THAT HOA PREFERRED A NON-RELIGIOUS PURCHASER, BUT JURY COULD HAVE FOUND HOA WAS MOTIVATED BY ANTI-RELIGIOUS DISCRIMINATORY PURPOSE, INFRINGING THE RIGHT TO PURCHASE AND ENJOY ONE'S HOME FREE FROM DISCRIMINATION.

*Morris v. West Hayden Estates First Addition Homeowners Association, Inc.*, 104 F.4th 1128 (9th Cir. 2024)

For a summary of this case see DISCRIMINATION

>>*See Miller & Starr, California Real Estate 4th, Ch. 28, Common Interest Developments, §§ 28:107, 28:108, 28:111; Ch. 38, Discrimination, §§ 38:26, 38:27.*

## DEFECTIVE CONSTRUCTION

### PETITION TO CONFIRM CONSTRUCTION DEFECT ARBITRATION AWARD WAS PROPER WHERE PETITION TO VACATE WAS UNTIMELY DUE TO SUPPORTING DECLARATIONS AND EVIDENCE BEING PRESENTED AFTER THE 10-DAY DEADLINE, AND EXCLUSION OF EVIDENCE WAS PROPER WHERE DEFENDANTS WILLFULLY FAILED TO COMPLY WITH THE DISCOVERY REQUESTS.

*Valencia v. Mendoza*, 103 Cal. App. 5th 427, 322 Cal. Rptr. 3d 903 (2d Dist. 2024)

For a summary of this case see ALTERNATIVE DISPUTE RESOLUTION

>>*See Miller & Starr, California Real Estate 4th, Ch. 25, Building Codes, §§ 25:23, 25:30; Ch. 33, Defective Construction, § 33:27; Ch. 45, Alternative Dispute Resolution, §§ 45:28; 45:30, 45:41, 45:42.*

 

## DISCRIMINATION

### HOMEOWNERS WHO PUT ON EXTRAVAGANT CHRISTMAS PROGRAM WERE NOT ADVERSELY IMPACTED WHERE CC&RS PROHIBITING NUISANCE WERE NOT ENFORCED, AND EVIDENCE DID NOT SUPPORT THAT HOA PREFERRED A NON-RELIGIOUS PURCHASER, BUT JURY COULD HAVE FOUND HOA WAS MOTIVATED BY ANTI-RELIGIOUS DISCRIMINATORY PURPOSE, INFRINGING THE RIGHT TO PURCHASE AND ENJOY ONE'S HOME FREE FROM DISCRIMINATION.

*Morris v. West Hayden Estates First Addition Homeowners Association, Inc.*, 104 F.4th 1128 (9th Cir. 2024)

Jeremy and Kristy Morris hosted a Christmas program at their home in the Grouse Meadows neighborhood of Hayden, Idaho in 2014. Over the course of eight nights, 20 to 100 families stopped by nightly to see their decorations (including thousands of lights), enjoy hot chocolate, characters in costume, caroling, and a live camel named Dolly. Shortly thereafter, the Morrises decided to move to West Hayden Estates, and with the Christmas program in mind, obtained a copy of the CC&Rs to determine whether there would be any problem. Jeremy also contacted the president of the HOA and asked her to meet with the board to discuss it. At the Board meeting, Board members saw YouTube videos of the Morrises' Christmas program and became concerned about the scale of the event.

The Board decided to send the Morrises a letter advising them that the Christmas program would likely violate the CC&Rs. The letter identified three areas of potential violation, including not using a property for a purpose other than single-family residential, not creating a nuisance or noise that would "interfere with the quiet enjoyment of any" neighbor, and a requirement that exterior lighting be "restrained in design" and avoid "excessive brightness." The letter also expressed concern about traffic and expensive litigation, and stated that the author was "somewhat hesitant in bringing up the fact that some of our residents are devout atheists and I don't even want to think of the problems that could bring up." The original version of the letter referenced "the riff-raff you seemed to attract" at their former residence, but the final version of the letter stated, "[w]e have worked hard to keep our area peaceful, quiet, and clean. Neighbors respect the CC&R's and show common courtesy to those around them. These are the reasons why people want to live here."

Undeterred, as the court put it, the Morrises purchased the home in West Hayden Estates, and Jeremy and his lawyer met with the Board. The Board then sent a letter to all HOA members announcing a meeting to discuss the Morrises' Christmas program, which they stated would be "from 5-10 days during the month of December . . . produce in excess of 900 additional vehicles traveling through the neighborhood with up to 80 volunteers directing traffic . . . a speaker/PA system from 6 pm-9 pm nightly . . . [and] a camel and various other amenities to attract attention to his display. . . ." After this notice but before the meeting, Jeremy sent a letter to all HOA members asserting that the Board had "engaged in discriminatory violations of the Fair Housing Act, and ha[d] rebuffed my attempts to resolve the situation quietly. My only desire is to exercise my rights as a homeowner, while respecting the rights of others, in the spirit of community, by celebrating my own Christian message which includes decorating for Christmas and raising money for charity," and indicating that he found nothing in the CC&Rs prohibiting the event. The HOA members voted that they did not want the Christmas program to take place but no formal action was taken.

The Morrises went forward with their Christmas program in 2015 with 200,000 lights, 30 volunteers, costumed characters including Clifford the Big Red Dog, musical guests, children's choir, charity tables, security personnel, a live nativity scene with Dolly the camel, four commercial buses carrying visitors, and traffic supervisors directing traffic. The 2016 event was even larger, with five buses and 48 volunteers. Relations between the Morrises and their neighbors deteriorated, with neighbors alleging instances of nuisance and the Morrises alleging threats against themselves. In January 2017, the Morrises filed suit in federal court alleging violations of the Fair Housing Act's prohibition on religious discrimination in access to housing, and the HOA counterclaimed, seeking to enjoin the Christmas program. The district court denied summary judgment, finding that the January 2015 letter to the Morrises "may have been an attempt to offer some sort of conciliation or recognition of sensitivity to others' religious beliefs," but that "a jury could reasonably view that letter 'as evidencing a discriminatory intent.' "

After a six-day trial, the jury found for the Morrises on each of their claims, finding that the HOA " 'discriminated against [the Morrises] at

least in part due to their religion' both during and after the purchase of their home," that the letter expressed a preference for non-religious purchasers, and the HOA "threatened, intimidated, or interfered with [the Morrises'] purchase or enjoyment of their home." It awarded $60,000 in compensatory and $15,000 in punitive damages. However, the trial court granted the HOA's motion for judgment as a matter of law (JMOL), finding that an ordinary reader would not view the letter as discriminating on the basis of religion, and that the HOA had been unfairly prejudiced by evidence of alleged threats and harassment targeting the Morrises. It also found that the Christmas program violated HOA rules, and it granted an injunction barring the Morrises from hosting a program that violated the CC&Rs. The Morrises appealed.

The court of appeals began with the JMOL decision, first assessing whether the Morrises had been subjected to discriminatory treatment and interference. The FHA prohibits religious discrimination "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities and connection therewith." 42 U.S.C.A. § 3604(b). Because the court found the CC&Rs to be facially neutral, it focused on whether they had a disparate impact. The HOA relied on a three-stage burden-shifting test in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-804, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), in arguing that the Morrises failed to prove a prima facia disparate treatment claim. The court noted, however, that the Morrises could also prevail by " ' "produc[ing] direct or circumstantial evidence demonstrating that a discriminatory reason more likely than not motivated" ' " the HOA's actions. *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142, 1158 (9th Cir. 2013). Further, a discriminatory purpose need not be the only purpose as long as it is a motivating factor. *Avenue 6E Investments, LLC v. City of Yuma, Ariz.*, 818 F.3d 493, 504 (9th Cir. 2016).

Addressing whether the Morrises were "adversely affected" by the Board's conduct, the court found that "the HOA's actions regarding the CC&Rs and the Morrises' Christmas event did not constitute 'enforcement' of its rules, discriminatory or otherwise," because the only evidence was the January 2015 letter advising the Morrises that their program would most likely violate the CC&Rs, as well as the Board's letter to residents emphasizing the disruptive nature of the program. These actions did not prevent the Morrises

 

from purchasing, moving into, or enjoying their home, nor were they prevented from holding their Christmas event or using and enjoying West Hayden Estates' common areas. Thus, the court distinguished *Bloch v. Frischholz*, 587 F.3d 771 (7th Cir. 2009), *Harris v. Itzhaki*, 183 F.3d 1043 (9th Cir. 1999), and *Pacific Shores Properties, LLC v. City of Newport Beach*, 730 F.3d 1142 (9th Cir. 2013), in each of which the plaintiff suffered a practical impact. The court found that "to support a disparate treatment claim, plaintiffs must be able to point to *some* concrete adverse impact suffered as a result of the defendant's behavior." Finding no such evidence here, the court affirmed the grant of JMOL as to that claim.

Next, the court examined § 3617 of the FHA, which prohibits the "coer[cion], intimidat[ion], threaten-[ing], or interfere[nce] with any person in the exercise or enjoyment of" rights protected under the FHA. This section "reach[es] all practices which have the effect of interfering with the exercise of rights under the federal fair housing laws," and does not require the person "who is interfered with to capitulate to the interference." *U.S. v. City of Hayward*, 36 F.3d 832, 835 (9th Cir. 1994). Thus, the court found that if there was evidence to support the jury's determination that the Board " 'threatened, intimidated, or interfered with' the Morrises' right to purchase and enjoy their home free from religious discrimination," the verdict must be upheld, even if a contrary conclusion could also be drawn. *Johnson v. Paradise Valley Unified School Dist.*, 251 F.3d 1222, 1227 (9th Cir. 2001).

Here, the court found evidence of such threats, intimidation, or interference because the January 15 letter stated that the Christmas event was prohibited by the CC&Rs and because the Board organized a meeting at which the HOA members voted not to allow the Christmas event. Both the letter and the meeting referenced possible litigation, and the court found the letter could be read as threatening litigation if the Morrises held their Christmas event. In addition, a § 3617 claimant must show that the right to be free from discrimination based on religion was infringed. The court found this to be the case based on two pieces of evidence: 1) the January 15 letter had expressed a concern about the Morrises pressing their beliefs on the community, and 2) the HOA Board president was recorded stating that "somebody in this association doesn't like Christmas." The court reiterated that discrimination need not be the sole purpose of the challenged ac-

 

tion, but rather only a motivating factor, and it found that the jury could have found that the Board was "*actually motivated*, at least in part, by an anti-religious discriminatory purpose."

The Morrises next claimed that the HOA tolerated threats and harassment in violation of § 3604 of the FHA. While the court agreed that "pervasive harassment linked to a protected category" is forbidden, it did not find sufficient evidence here to hold the HOA responsible. Before addressing the Morrises' claim in detail, the court first clarified the scope of the FHA's anti-discrimination provisions, holding that in addition to applying to conduct occurring both before and after the sale or rental of a home, "§ 3604(b) of the FHA prohibits the creation of a hostile housing environment based on" a protected class. The court then looked to the discrimination analysis in Title VII of the Civil Rights Act of 1964 (42 U.S.C.A. §§ 2000e-2000e-17) as applied to hostile work environment claims to address FHA claims. It held that "a plaintiff may establish that he suffered a hostile housing environment by showing that he was subjected to (1) severe or pervasive harassment (2) that was based on a protected characteristic, here religion, and (3) that the defendant is responsible for the resulting hostile housing environment." See *Christian v. Umpqua Bank*, 984 F.3d 801, 809 (9th Cir. 2020).

The Morrises alleged that the HOA had some responsibility for harassing behavior of West Hayden Estates residents. *Wetzel v. Glen St. Andrew Living Community, LLC*, 901 F.3d 856, 861 (7th Cir. 2018). However, "[t]he power to address discriminatory conduct against a resident by a third party 'depends upon the extent of the [defendant's] control or any other legal responsibility the [defendant] may have with respect to the conduct of' that third-party." 24 C.F.R. § 100.7(a)(iii). Unlike the *Wetzel* case, where the defendant was a landlord that could evict harassing tenants, the HOA here had no such power over the homeowners. While the court did not hold that an HOA can never bear responsibility for discriminatory harassment, it found the evidence did not support liability in this case.

As to the January 15 letter, which the Morrises alleged demonstrated a discriminatory preference based on religion, the court adopted an "ordinary reader" standard whereby "a plaintiff need not present evidence that the defendant harbored a discriminatory purpose. Rather, a statement violates § 3604(c) if 'an ordinary listener would believe that [it]

 

suggests a preference, limitation, or discrimination based on a protected status." *Corey v. Secretary, U.S. Dept. of Housing & Urban Development ex rel. Walker*, 719 F.3d 322, 326 (4th Cir. 2013) (citing *White v. U.S. Dept. of Housing and Development*, 475 F.3d 898, 905-906 (7th Cir. 2007)). In other words, "the scope of § 3604(c) liability is defined by the statement's impact on the reader, viewer, or listener, not by the subjective motivations of the speaker." However, the mere mention of a protected status does not necessarily convey such "preference, limitation, or discrimination," and the statement must be read in light of all the circumstances.

On this basis, the court found that the January 15 letter was "not concerned with the Morrises' personal religiosity," and that a reasonable jury could not have concluded that the HOA preferred a non-religious person purchase the Morrises' home. Rather, the letter was concerned with the size and raucousness of the holiday program and whether it would disturb the neighbors. Thus, it found JMOL to be appropriate on this claim. Finally, the court upheld the district court's alternative grant of a new trial, finding that the district court's determination that the admission of disturbing harassment evidence might have unfairly prejudiced the jury against the HOA was not "illogical, implausible, or without support in the inferences that may be drawn from the record." However, the court of appeal vacated the injunction issued by the district court preventing the Morrises from hosting another Christmas program, based on the grant of a new trial to the HOA, and the possibility that the jury still might find discriminatory conduct by the HOA.

There were two concurring and dissenting opinions in this case that took opposite positions on the majority's decision. The first, by Judge Tashima, would have granted JMOL on all of the Morrises' claims, finding that "the evidence permits only one reasonable conclusion: the HOA was concerned about the Morrises' holiday events because of the size and scale of the events, not because of the Morrises' religion." Judge Tashima disagreed that any evidence of " 'threaten[ing], intimidat[ing], or interfer[ing]' with the Morrises during the purchase and enjoyment of their home" was on account of a protected ground or that the HOA was motivated by a discriminatory purpose. The second, by Judge Collins, would have reversed the JMOL on all of the Morrises' claims based on the fact that a jury could have found selective enforcement of the CC&Rs and that "the HOA ginned

 

up significant opposition to the Morrises among their neighbors through false and misleading communications," either of which the jury could have concluded was "motivated by the Morrises' religion and their outward expression of it."

◆ **Comment:** Interestingly, and addressed only in Judge Collins's concurring/dissenting opinion, is the fact that Jeremy Morris apparently offered not to sue the HOA in exchange for them de-annexing him from the HOA or signing "a contract exempting him personally from payment of HOA dues, exempting his Christmas event from the CC&Rs, and requiring the resignation of any board members involved in the current dispute."

>>*See Miller & Starr, California Real Estate 4th, Ch. 28, Common Interest Developments, §§ 28:107, 28:108, 28:111; Ch. 38, Discrimination, §§ 38:26, 38:27.*

## INVERSE CONDEMNATION

### STIPULATED JUDGMENT WAS APPEALABLE, PRIVATELY OWNED UTILITY WAS A "PUBLIC ENTITY" FOR INVERSE CONDEMNATION PURPOSES REGARDLESS OF WHETHER IT COULD RAISE UTILITY RATES, AND COMPLAINT SUFFICIENTLY ALLEGED SUBSTANTIAL CAUSATION, INHERENT RISK, AND PUBLIC USE.

*Simple Avo Paradise Ranch, LLC v. Southern California Edison Company*, 102 Cal. App. 5th 281, 321 Cal. Rptr. 3d 305 (2d Dist. 2024), review filed, (July 2, 2024)

The 2017 Thomas Fire in Southern California triggered hundreds of lawsuits, which were coordinated in proceedings involving three plaintiff groups, one of which included individual plaintiffs. Lead counsel for each plaintiff group filed a master complaint against Southern California Edison Company (SCE) and its parent company Edison International alleging tort and inverse condemnation causes of action. The one filed on behalf of individual plaintiffs alleged that SCE was "a 'public entity' that is granted an exclusive franchise by the State of California to operate a monopoly or quasi-monopoly for the distribution of electricity to the residents and businesses of Central, Coastal, and Southern California." It also alleged that the Thomas Fire was sparked by unsafe electrical infrastructure owned, operated, and maintained by SCE, that SCE had the ability but chose not to de-energize its lines in high fire threat areas the day of the fire, and that SCE's infrastructure had previously caused fires due to SCE's "failure to mitigate the risks associated with its 'ineffective vegetation management programs, unsafe equipment, and/or aging infrastruc-

 

ture,' " resulting in millions of dollars in fines levied by the California Public Utilities Commission (CPUC).

The defendants demurred on the basis that neither of them "was a public entity able to spread its losses as a matter of right, as, for example, a municipality could by raising taxes," and cited a 2017 CPUC decision that rejected a different utility's request to raise rates after a similar fire. In opposition, plaintiffs cited *Barham v. Southern Cal. Edison Co.*, 74 Cal. App. 4th 744, 751, 88 Cal. Rptr. 2d 424 (4th Dist. 1999), and *Pacific Bell Telephone Co. v. Southern California Edison Co.*, 208 Cal. App. 4th 1400, 146 Cal. Rptr. 3d 568 (2d Dist. 2012), which addressed and rejected SCE's precise argument, and in both of which SCE was itself the defendant. The trial court found *Barham* and *Pacific Bell* to be binding, and rejected that a utility's ability to raise rates, alone, could determine potential liability for inverse condemnation.

Several months after the trial court overruled the demurrer, Simple Avo Paradise Ranch, LLC ("Simple Avo") filed a short form complaint that incorporated the master complaint, and agreed to be bound by any rulings in the coordinated proceedings. Simple Avo then settled with SCE for $1.75 million on its inverse condemnation claim. The final stipulated judgment stated that it resolved "all the claims in this case [] without prejudice to the rights of SCE to appeal the final judgment, including [. . . the order denying SCE's demurrer]." Once the trial court entered the stipulated judgment, SCE appealed.

The first part of the court of appeal's opinion addressed the appealability of the stipulated judgment. The court expressed serious reservations but found that to effectuate the parties' intent, the stipulated judgment must be appealable. Next, the court addressed the "continued viability of *Barham* and *Pacific Bell*." The principle underlying an inverse condemnation claim is that "a public entity must pay the owner just compensation when it takes or damages private property for public use." *City of Oroville v. Superior Court*, 7 Cal. 5th 1091, 1102, 250 Cal. Rptr. 3d 803, 446 P.3d 304 (2019). SCE contended that Simple Avo's inverse condemnation claim failed because SCE was not a "public entity." The court of appeal disagreed. It noted that *Barham*, which "expressly held that 'SCE may be liable in inverse condemnation as a public entity,' " relied on *Gay Law Students Assn. v. Pacific Tel. & Tel. Co.*, 24 Cal. 3d 458, 470, 156 Cal. Rptr. 14, 595 P.2d 592 (1979), which found that

 

"the nature of the California regulatory scheme demonstrates that the state generally expects a public utility to conduct its affairs more like a governmental entity than like a private corporation," and that therefore " 'a public utility may not properly claim prerogatives of "private autonomy" that may possibly attach to a purely private business enterprise.' " *Ibid.*

*Pacific Bell* similarly rejected SCE's private entity argument, citing *Breidert v. Southern Pac. Co.*, 61 Cal. 2d 659, 39 Cal. Rptr. 903, 394 P.2d 719 (1964), which held that a railroad was a proper party to an inverse condemnation case. *Pacific Bell* rejected that the railroad in *Breidert* was only liable due to its joint participation with the CPUC. *Pacific Bell* also relied on *Eachus v. Los Angeles Consolidated Elec. Ry. Co.*, 103 Cal. 614, 37 P. 750 (1894), in which it found the dispositive factor to be " 'the quasi-monopolistic authority and delegated power given to the defendant . . .' in determining whether a privately-held company could be held liable for inverse condemnation." *Pacific Bell*, 208 Cal. App. 4th at 1407. As in *Pacific Bell*, the court here rejected SCE's argument that "the policy behind inverse condemnation was not met because it could not raise rates without the CPUC's approval," with the court pointing out that if municipally owned utilities were placed under the regulation of the CPUC, they would not be immunized from inverse condemnation liability.

Reviewing the master complaint, the court found it identified SCE as a privately owned public utility with monopolist or quasi-monopolistic power, which it found sufficient to allege a claim for inverse condemnation. Further, it found "no authority that disapproves, overrides, or even disagrees with *Barham* or *Pacific Bell*," and it rejected SCE's reliance on *Oroville* because that case did not consider "whether a private entity may be treated as a public entity for purposes of inverse condemnation." However, the court did consider *Oroville* in detail to determine whether the master complaint complied with *Oroville's* requirement that "the inherent risks associated with the [public improvement]—as deliberately designed, constructed, or maintained—were the substantial cause of the damage to the private property." *Oroville*, 7 Cal. 5th at 108.

*Oroville* involved a group of dentists that sued the city for inverse condemnation when a sewer back up damaged their office, ostensibly because the sewer system failed to function as intended. The city disputed that, arguing that the dentists' failure

 

"to install a legally-required backwater valve that would have prevented the sewage from entering their building" was the actual cause. The trial court found the primary cause of the blockage and back up to be root intrusion, with a secondary cause being failure to install the backwater valve, and that under those circumstances the city was liable, and the court of appeal affirmed. The California Supreme Court reversed, holding that damage "substantially caused by an inherent risk presented by the deliberate design, construction, or maintenance of the public improvement" includes risks from maintenance or continued upkeep of the public work. It then concluded that root intrusion being the primary cause was not sufficient, as it found that "[s]ewage backup was not an inherent risk of the city's sewer system as deliberately designed and constructed." Rather, the system was deliberately designed to include the backwater valve, which "would have significantly reduced the risk of invasion."

Based on these principles, the court here noted that the master complaint "alleged that SCE knew that its infrastructure was old and improperly maintained for safety, yet failed to properly assess and remediate these known risks." Further, SCE chose not to power down its electrical infrastructure despite hazardous conditions. The court found these allegations sufficient to find substantial causation, and it rejected that SCE's own negligence could absolve it of inverse condemnation liability, as that argument was expressly rejected by *Oroville*. As to inherent risk, the court found that the master complaint alleged that SCE chose to follow a "wait until it breaks" maintenance plan despite knowing about "the significant risk of wildfires from its ineffective vegetation management programs, unsafe equipment, and/or aging infrastructure." Finally, as to public use, SCE argued that liability for inverse condemnation exists "only if the damage itself, rather than the public improvement, furthers the public use," and that the fire did not further public use. The court again disagreed, quoting *Barham*: "[G]enerally, condemning private property for the transmission of electrical power is a public use and inverse condemnation will apply." *Barham v. Southern Cal. Edison Co.*, 74 Cal. App. 4th at 752. The court distinguished *Cantu v. Pacific Gas & Electric Co.*, 189 Cal. App. 3d 160, 234 Cal. Rptr. 365 (1st Dist. 1987) because in that case a utility trench installed within a subdivision "did not benefit the public at large but [was] for the private use of the plaintiffs and their neighbors."

 

Thus, the court found that "the master complaint sufficiently allege[d] a cause of action for inverse condemnation," though it did not rule on SCE's liability. It also noted that the 2017 CPUC decision regarding a utility's ability to spread its losses through rate increase presented a potential factual issue not appropriate for resolution on demurrer. Accordingly, the judgment and order were affirmed.

>>*See Miller & Starr, California Real Estate 4th, Ch. 23, Inverse Condemnation, §§ 23:1, 23:2.*

## LAND USE

### HOMEOWNERS ASSOCIATION'S DECLARATORY RELIEF ACTION WAS PROPERLY DISMISSED WHERE HOA HAD NOT EXHAUSTED ADMINISTRATIVE REMEDIES, CONTROVERSY WAS NOT RIPE WHERE COASTAL COMMISSION HAD NOT ISSUED A FINAL DECISION AND HOA HAD THE ABILITY TO TRIGGER A HEARING, AND FUTILITY EXCEPTION DID NOT APPLY BECAUSE NO ADVERSE DECISION HAD BEEN ISSUED.

*Casa Blanca Beach Estates Owners' Association v. County of Santa Barbara*, 102 Cal. App. 5th 1303, 322 Cal. Rptr. 3d 316 (2d Dist. 2024)

In 1990, the County of Santa Barbara approved a 12-lot oceanfront subdivision in Carpinteria. Approval was subject to a number of conditions, including that the homeowners association " 'provide an irrevocable offer to dedicate a lateral access easement five feet in width' . . . for public beach access and to construct a concrete walkway along the entire easement length within 180 days after acceptance of the offer to dedicate." Accordingly, the homeowners association recorded an Irrevocable Offer to Dedicate Easement that included those terms and clarified that the walkway would be constructed within "[180] days after the last to occur of the following: [¶ ] (i) recordation of said Notice of Acceptance, or [¶ ] (ii) issuance of any required land use permit or other governmental approval needed to permit construction of the accessway, including approval by the State Lands Commission, if required."

The County accepted the offer in 2011, and sent a notice of violation in 2017 when the walkway had not been constructed. The successor-in-interest homeowners association, Casa Blanca Beach Estates Owners' Association, then submitted walkway construction plans to the County, but was told it must first obtain a coastal development permit from the Coastal Commission. Casa Blanca submitted an application that was

 

deemed incomplete, and its and the Commission's efforts to complete the permit application were unsuccessful. In September 2018, Casa Blanca filed a petition for writ of mandate and complaint for declaratory relief, seeking a determination of the deadline for completion of the walkway and other relief and alleging it had exhausted all administrative remedies. During this litigation, Casa Blanca also appealed the Commission's determination that its application was incomplete, although it withdrew that request to study two alternatives that it ultimately decided were not feasible. The trial court granted the County's motion for summary judgment on the ground that Casa Blanca had failed to exhaust administrative remedies.

Meanwhile, the Commission issued a "Notice of Intent to Record Notices of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Administrative Civil Penalty Action Proceedings," in response to which Casa Blanca filed a Statement of Defense and Objections to Recordation of Notices of Violation. Thereafter, the State Lands Commission indicated that portions of the proposed walkway encroached on tidal lands, the Commission rescinded portions of its notice of intent, and the court stayed proceedings to allow Casa Blanca to exhaust administrative remedies. The litigation stay was lifted in November 2020, and Casa Blanca filed a second amended complaint, to which the trial court sustained a demurrer without leave to amend. Casa Blanca appealed.

The court of appeal began with the exhaustion of administrative remedies doctrine, which requires an administrative remedy be sought before legal action is taken. *Redevelopment Agency v. Superior Court*, 228 Cal. App. 3d 1487, 1492-1493, 279 Cal. Rptr. 558 (4th Dist. 1991). The court noted that exhaustion is distinct from but similar to ripeness, which determines "whether a controversy is 'definite and concrete.' " *Pacific Legal Foundation v. California Coastal Com.*, 33 Cal. 3d 158, 171, 188 Cal. Rptr. 104, 655 P.2d 306 (1982). "An administrative decision is final, i.e., ripe, 'when the agency has exhausted its jurisdiction and possesses "no further power to reconsider or rehear the claim." ' " *Long Beach Unified Sch. Dist. v. State of California*, 225 Cal. App. 3d 155, 169, 275 Cal. Rptr. 449 (2d Dist. 1990). The court determined that both ripeness and exhaustion needed to be addressed here.

Casa Blanca argued that the controversy was ripe because it had been threatened with fines and penalties

 

for delayed construction of the walkway. The court disagreed, finding that no final decision had been made about whether to actually impose such fines or penalties. It also distinguished *Sackett v. E.P.A.*, 566 U.S. 120, 127, 132 S. Ct. 1367, 182 L. Ed. 2d 367 (2012), cited by Casa Blanca, on the basis that the case involved "a compliance order [that] was a final decision, subject to no further agency review, and from which the Sacketts were legally obligated to take specified actions." The court also disagreed that unreasonable delay by the Commission or refusal to set a hearing on the permit application excused Casa Blanca from obtaining a final administrative decision, finding that "the Commission is not obligated to schedule a hearing on the application until Casa Blanca completes it." Further, Casa Blanca only needed to appeal the incompleteness determination for a required hearing to be set. Cal. Code Regs. tit. 14, § 10365, subd. (d).

Next, Casa Blanca argued that the futility exception to the exhaustion requirement applied here. That exception "requires a party to affirmatively state 'the [agency] has declared what its ruling will be on a particular case.' " *Coachella Valley Mosquito & Vector Control Dist. v. California Public Employment Relations Bd.*, 35 Cal. 4th 1072, 1080-1081, 29 Cal. Rptr. 3d 234, 112 P.3d 623 (2005). Although Casa Blanca asserted that "the Commission's decision 'is certain to be adverse,' " the court found no evidence to support that contention. Rather, the Commission had engaged in "ongoing efforts to resolve the application's deficiencies."

Finally, the court rejected that Casa Blanca was entitled to relief as a matter of law under Civ. Proc. Code, § 1060. That provision " 'authorizes a party " 'who desires a declaration of [their] rights or duties with respect to another' " to bring an original action' " and for "the court to issue a 'binding declaration of these rights or duties.' " *Tejon Real Estate, LLC v. City of Los Angeles*, 223 Cal. App. 4th 149, 154, 166 Cal. Rptr. 3d 837 (2d Dist. 2014). However, the court pointed out that a party "may not evade the exhaustion requirement by filing an action for declaratory or injunctive relief." *Contractors' State License Bd. v. Superior Court*, 28 Cal. App. 5th 771, 780, 239 Cal. Rptr. 3d 501 (1st Dist. 2018). Accordingly, the judgment was affirmed.

>>*See Miller & Starr, California Real Estate 4th, Ch. 21, Land Use, §§ 21:38, 21:41, 21:46.*

### THERE IS NO PRIVATE RIGHT OF ACTION FOR VIOLATION OF A MUNICIPAL ORDINANCE UNDER GOV. CODE, § 36900, SUBD. (a), WHICH IS LIMITED TO ACTIONS BROUGHT BY "CITY AUTHORITIES," OVERRULING *RILEY V. HILTON HOTELS CORP.* (2002) 100 CAL. APP. 4TH 599.

*Cohen v. Superior Court*, 102 Cal. App. 5th 706, 322 Cal. Rptr. 3d 62 (2d Dist. 2024), review filed, (July 8, 2024)

For a summary of this case see BUILDING CODES

>>*See Miller & Starr, California Real Estate 4th, Ch. 19, Landowners' Liability, § 19:20; Ch. 21, Land Use, §§ 21:1, 21:2; Ch. 25, Building Codes, §§ 25:54, 25:57.*

### CONSTRUCTION OF NEW HOSPITAL FULFILLED UNIVERSITY'S EDUCATIONAL MISSION EVEN IF IT ALSO PROMOTED PROPRIETARY ACTIVITIES, AND REGENTS WERE THEREFORE IMMUNE FROM LOCAL BUILDING CODES AND ZONING RESTRICTIONS THAT INTERFERED WITH THEIR DISCRETION TO FULFILL EDUCATIONAL MISSION.

*Regents of University of California v. Superior Court of City and County of San Francisco*, 102 Cal. App. 5th 852, 322 Cal. Rptr. 3d 114 (1st Dist. 2024), review filed, (July 23, 2024)

This case concerns the University of California San Francisco (UCSF) Parnassus Heights campus. In 2021, the Regents of the University of California approved a plan to construct a larger hospital on an existing site. This approval was met by a complaint filed against the Regents by a group of nearby property owners called Parnassus Neighborhood Coalition seeking to enjoin construction and alleging nuisance *per se* based on alleged violations of the City's height and bulk restrictions. The Regents demurred on the basis that "constructing the New Hospital is for patient care, scientific research, and teaching, thus furthering its educational purpose." The Coalition responded that the construction "would promote the continued expansion of UCSF's proprietary activities as a healthcare provider rather than exclusively advancing its educational and patient needs," and that as such, it was not exempt from local building codes and zoning restrictions. The trial court agreed with the Coalition, finding that "whether the hospital, as currently proposed, is a proprietary activity subject to local regulations" was a question of fact not appropriate for resolution on demurrer. Further, the court found that an exemption based on sovereign immunity "only applies when a project is *solely* for educa-

 

tional purposes." The Regents petitioned for writ of mandate.

After determining that writ review was warranted, the court of appeal engaged in an overview of relevant law, explaining "[t]he California Constitution establishes the Regents as a 'public trust . . . with full powers of organization and government,' including 'the legal title and the management and disposition' of university property and 'of property held for its benefit.' " Cal. Const., art. IX, § 9, subds. (a), (f); *City and County of San Francisco v. Regents of University of California*, 7 Cal. 5th 536, 545, 248 Cal. Rptr. 3d 352, 442 P.3d 671 (2019) (*Hastings*). Thus, the Regents are a virtually autonomous arm of the state, immune "from local regulation unless the state, through statute or provision of the California Constitution, has [expressly] consented to waive such immunity." *Laidlaw Waste Systems, Inc. v. Bay Cities Services, Inc.*, 43 Cal. App. 4th 630, 635, 50 Cal. Rptr. 2d 824 (4th Dist. 1996). However, the court recognized that "municipal regulation of [a state] entity's activities may be authorized in situations where its conduct bears no relation to its governmental functions." *Hastings*, 7 Cal. 5th at 553-554. See, e.g., *Board of Trustees v. City of Los Angeles*, 49 Cal. App. 3d 45, 49, 122 Cal. Rptr. 361 (2d Dist. 1975) (California State University not "immune from a municipal permitting requirement regarding a circus being held on its property").

Here, the court found that "the Regents are exempt from the City's planning code provisions at issue" because the Coalition could not "allege that construction of the New Hospital has no relation to the Regents' governmental functions of providing medical education and other educational purposes." See *Board of Trustees v. City of Los Angeles*, 49 Cal. App. 3d at 50. Indeed, the Coalition conceded that the hospital would advance the Regents' educational mission, which the court found to be fatal to the Coalition's argument. Further, the regulatory requirements here interfered with the Regents' discretion about how to carry out their educational mission. More important, according to the court, was the fact that an increase in UCSF's revenue did "not constrain the Regents' state sovereignty." *Bame v. City of Del Mar*, 86 Cal. App. 4th 1346, 1357-1358, 104 Cal. Rptr. 2d 183 (4th Dist. 2001) (consumer-oriented events like conventions fell within agricultural district's "broad purposes 'to educate or inform consumers of California's products, industries or resources' "). While not expressly included in the Constitution, the court found construction

 

such as for the hospital to be encompassed in the purpose of advancing UCSF's academic needs. It also found this function not to be "trivial or peripheral when compared with [UCSF's] proprietary function."

The court rejected that construction must be *solely* for educational purposes in order to be exempt from local regulation, distinguishing *Regents of University of California v. City of Santa Monica*, 77 Cal. App. 3d 130, 143 Cal. Rptr. 276 (2d Dist. 1978) on the basis that the court there "did not purport to address a situation where a project squarely within the Regents' government function might also serve some proprietary interest." In addition, the coalition failed to cite any authority for its "assertion that by providing healthcare, the Regents, through UCSF, are acting in a purely proprietary capacity not entitled to immunity." It distinguished *Beard v. City and County of San Francisco*, 79 Cal. App. 2d 753, 180 P.2d 744 (1st Dist. 1947) on the basis that in that case there was a dispute as to which entity was engaging in activity and therefore entitled to immunity, while there was no such dispute in this case.

Finally, the court disagreed that "the issue of the Regents' immunity presents a question of fact not suitable for resolution on demurrer," given the Coalition's admission that the hospital is necessary for teaching new medical professionals and therefore falls within the Regents' educational purpose. It found no issue of fact as to the Regents' status as a state entity, nor whether the complaint itself alleged "facts sufficient to invoke the Regents' immunity from compliance with the planning code without reference to other facts supported by an affidavit." Compare *Pianka v. State*, 46 Cal. 2d 208, 212, 293 P.2d 458 (1956). The court denied leave to amend because it found the facts were not in dispute, the nature of the claim was clear, and it found no liability under the substantive law. See *Traverso v. Department of Transportation*, 87 Cal. App. 4th 1142, 1144-1145, 105 Cal. Rptr. 2d 179 (1st Dist. 2001). Thus, the court found the Regents to be exempt from the regulations at issue, and it issued a peremptory writ of mandate requiring the demurrer to be sustained.

>>*See Miller & Starr, California Real Estate 4th, Ch. 21, Land Use, §§ 21:2, 21:41.*

## COMMERCIAL KITCHEN QUALIFIED AS A "MANUFACTURING INDUSTRIAL ACTIVITY" UNDER MUNICIPAL CODE DEFINITION, AND CHALLENGE TO APPROVAL OF KITCHEN FAILED BECAUSE IT WAS BROUGHT UNDER MUNICIPAL CODE SECTION FOR PUBLIC COMPLAINTS REGARDING EXISTING VIOLATIONS AS OPPOSED TO PREVIOUS DECISIONS.

*San Pablo Avenue Golden Gate Improvement Association, Inc. v. City Council of City of Oakland*, 103 Cal. App. 5th 233, 322 Cal. Rptr. 3d 870 (1st Dist. 2024)

In September 2020, CloudKitchens sought to convert an existing Oakland woodshop into a 14,000 square foot facility containing "[c]ompartmentalized commercial kitchens for takeout services only." The application required a zoning clearance to verify that the proposed business was permitted by the location's zoning. Here, the zoning was "Housing and Business Mix-1 Commercial Zone," (HBX-1 zone), "which permits by right certain industrial activities classified as 'Light Manufacturing,' " including "the production or assembly of [¶ ] . . . [¶ ] (D) [b]everages (including alcoholic) and food . . . with more than ten thousand (10,000) square feet of floor area." Oakland Municipal Code ("OMC") § 17.10.560, subd. (D). The Planning Department issued a zoning clearance followed by a building permit allowing renovations.

In June 2021, San Pablo Avenue Golden Gate Improvement Association, Inc., and Oakland Neighborhoods for Equity (referred to by the court collectively as "Neighbors") contacted the City Administrator, "request[ing] that the City reconsider its approval of CloudKitchens as qualifying for HBX-1 classification," to which the City's zoning manager responded that the decision was proper. Neighbors then filed a formal complaint requesting a revocation review, alleging that "CloudKitchens will [b]ecome a [n]uisance" due to traffic, pollution, and noise, and alleging that the commercialized kitchen was essentially a fast food restaurant not permitted in the HBX-1 zone. The Planning Department denied the request, confirming that CloudKitchens' proposed use qualified as "manufacturing industrial activity" because it involved "manufacturing of food in a facility that exceeds 10,000 square feet" and was therefore permitted as of right. Moreover, the Planning Department found that revisiting the zoning determination was beyond the scope of OMC chapter 17.152 because that section "enforces against violative uses and existing nuisances, not zon-

 

ing decisions." The Planning Department therefore refused to reconsider its zoning determination, but on the merits found no substantial evidence to initiate revocation proceedings based on staff visits to the site to observe any violations.

Neighbors then appealed, pursuant to section 17.152.080, to an independent City hearing officer who affirmed the decision based on the fact that chapter 17.152 is designed to address public complaints regarding *existing* violations as opposed to previous decisions. In addition, "the hearing officer found sufficient evidence support[ing] the light manufacturing use classification," even though it acknowledged some similarities to a fast food restaurant. Upon Neighbors' petition for writ of mandate, the trial court affirmed, "holding that chapter 17.152 'does not create a legal basis to challenge a prior zoning determination made by the City.' " Because Neighbors appealed based on the use classification and zoning clearance, the trial court found that the hearing officer lacked jurisdiction to reach the complaint's merits.

On appeal, Neighbors argued that "the OMC requires the hearing officer to grant an appeal and set a revocation hearing where a petitioner presents sufficient evidence of a zoning violation—as opposed to upholding a decision supported by substantial evidence, as the hearing officer did here." They also argued that "the hearing officer erred by deferring to the Planning Department's interpretation of the use classifications and that the evidence contradicted the department's determination." However, the court of appeal declined to address those assertions, finding that chapter 17.152 provides no legal basis to challenge the Department's determinations regarding zoning regulations. Rather, the court found that under § 17.10.090, appeals of use classification determinations are governed by chapter 17.132. Specifically, § 17.10.090 states that if there is "uncertainty as to the classification of use, the Director of City Planning shall classify said use, subject to the right of appeal from such determination *pursuant to the administrative appeal procedure in [c]hapter 17.132*." (Italics by the court). Moreover, even if § 17.10.090 did not reference chapter 17.132, "[t]he express purpose of chapter 17.132 is to 'prescribe the procedure' for appealing '*any* determination or interpretation made by the Director of City Planning under the zoning regulations.' " OMC § 17.132.010 (italics by the court). The court found the applicability of chapter 17.132 to Neighbors' claim to be fatal because they filed it after the statute of limitations.

 

The court also rejected Neighbors' contention that the Planning Department failed to adhere to classification rules in chapter 17.10, finding that Neighbors forfeited this argument by failing to raise it during the administrative process. *Hagopian v. State of California*, 223 Cal. App. 4th 349, 371, 167 Cal. Rptr. 3d 221 (2d Dist. 2014). Further, Neighbors cited no "ordinance or case law supporting their contention that a zoning clearance issued by Planning Department staff does not constitute a determination under chapter 17.10." *Temple of 1001 Buddhas v. City of Fremont*, 100 Cal. App. 5th 456, 483, 319 Cal. Rptr. 3d 181 (1st Dist. 2024). The court also disagreed that a zoning clearance is not a "determination" merely because it is also required to obtain a business permit, noting that the application form requires the zoning clearance to verify the type of business being proposed.

Finally, Neighbors argued that the Enforcement Regulations controlled over chapter 17.132, because those regulations "empower any member of the public to file a complaint regarding 'violations of the zoning regulations.' " OMC § 17.152.010. Again, the court disagreed, finding that this argument "ignore[d] the dictate that the Enforcement Regulations 'shall not be deemed exclusive' in ensuring compliance with the zoning regulations." Moreover, § 17.152.010 is more general than chapter 17.132, and the more specific ordinance controls. *Ross v. California Coastal Com.*, 199 Cal. App. 4th 900, 928, 133 Cal. Rptr. 3d 107 (2d Dist. 2011). The court concluded that "Neighbors did not bring an appeal under the correct chapter of the OMC; and no zoning violation has been found." The court rejected that its interpretation undermined the ability to "abate activities that contravene the HBX-1 zones permitted uses or cause a nuisance," finding that the Enforcement Regulations simply do not "allow members of the public to challenge use classifications or zoning determinations outside the procedures prescribed in chapter 17.132." Accordingly, the order denying the petition for writ of mandate was affirmed.

>>*See Miller & Starr, California Real Estate 4th, Ch. 21, Land Use, §§ 21:3, 21:8, 21:45.*

# LANDLORD AND TENANT

## ACTUAL OR POTENTIAL PRESENCE OF COVID-19 VIRUS ON AN INSURED'S PREMISES GENERALLY DOES NOT CONSTITUTE "DIRECT PHYSICAL LOSS OR DAMAGE TO PROPERTY" FOR PURPOSES OF COMMERCIAL PROPERTY INSURANCE COVERAGE, AND NO DIRECT PHYSICAL LOSS OCCURS WHEN DEPRIVATION OF PROPERTY IS CAUSED BY A GOVERNMENT ORDER, RATHER THAN A PHYSICAL EVENT.

*Another Planet Entertainment, LLC v. Vigilant Insurance Company*, 15 Cal. 5th 1106, 320 Cal. Rptr. 3d 843, 548 P.3d 303 (2024)

Another Planet Entertainment, LLC operates venues for live entertainment, which were forced to close during the COVID-19 pandemic. It submitted a claim to its insurance provider, Vigilant Insurance Company, for business losses. The policy covered two types of losses, for building and personal property, and for business income and extra expenses. The first category included "direct physical loss or damage to [a building or personal property] caused by or resulting from a peril not otherwise excluded. . . ."

The second category included "business income loss you incur due to the actual impairment of your operations; and [¶ ] extra expenses you incur due to the actual or potential impairment of your operations, [¶ ] during the period of restoration . . . . [¶ ] This actual or potential impairment of operations must be caused by or result from direct physical loss or damage by a covered peril to property, unless otherwise stated." The policy stated that the "period of restoration" would "continue until your operations are restored . . . to the level which would generate the business income amount that would have existed if no direct physical loss or damage occurred, including the time required to: [¶ ] . . . repair or replace the property." Also relating to the second category, the policy applied to "actual impairment of your operations, directly caused by the prohibition of access to [your premises or a dependent business premises] by a civil authority" where the prohibition of access is "the direct result of direct physical loss or damage to property away from such premises" within a specified distance.

Another Planet alleged that the "presence or potential presence of the COVID-19 virus caused a 'distinct, demonstrable, physical alteration to the property,' and its presence or potential presence prevented or impaired the use of Another Planet's

 

property," causing Another Planet to suffer more than $20 million in losses. Vigilant denied coverage on the basis that Another Planet "had not shown 'physical loss or damage that would implicate coverage in this matter.' "

Another Planet then sued Vigilant in federal court for breach of contract, tortious breach of the implied covenant of good faith and fair dealing, and fraud, "alleging that the actual or potential presence of the COVID-19 virus at its venues or nearby properties caused direct physical loss or damage to property and triggered coverage under its insurance policy." The district court dismissed, finding that "the closure orders [by state and local public health authorities]—and not [the] virus's alleged presence at Another Planet's facilities—caused it to shut down," and that the "closure orders were not passed as a direct result of property damage at nearby properties." Another Planet appealed, and the Ninth Circuit, finding conflicting decisions in California's lower courts, certified the following question to the California Supreme Court: "Can the actual or potential presence of the COVID-19 virus on an insured's premises constitute 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy?" *Another Planet Entertainment, LLC v. Vigilant Insurance Company*, 56 F.4th 730, 734 (9th Cir. 2022).

The California Supreme Court began with a review of general principles of property insurance and segued into a discussion of the requirement of tangible or physical harm. It concluded by quoting *MRI Healthcare Center of Glendale, Inc. v. State Farm General Ins. Co.*, 187 Cal. App. 4th 766, 780, 115 Cal. Rptr. 3d 27 (2d Dist. 2010), where the court held that "[f]or there to be a 'loss' within the meaning of the policy, some *external force* must have acted upon the insured property to cause a *physical change* in the condition of the property, i.e., it must have been 'damaged' within the common understanding of that term." California courts deciding insurance claims arising from the COVID-19 pandemic have split as to whether the presence or potential presence of the COVID-19 virus constitutes direct physical damage or loss.

In *United Talent Agency v. Vigilant Insurance Company*, 77 Cal. App. 5th 821, 832, 838, 293 Cal. Rptr. 3d 65 (2d Dist. 2022), for example, the court found that a talent agency's inability to use its insured locations, which resulted in the cancellation of live events and motion picture and television productions, constituted

mere loss of use rather than direct physical loss or damage because even if the virus was completely eradicated from the premises, "[the insured] would *still* have continued to incur a suspension of operations because the [closure] Orders would *still* have been in effect and the normal functioning of society *still* would have been curtailed." The court also rejected that the presence of the virus itself constituted physical damage, finding that "the presence of the virus does not render a property useless or uninhabitable, even though it may affect how people interact with and within a particular space."

By contrast, the court in *Marina Pacific Hotel and Suites, LLC v. Fireman's Fund Insurance Company*, 81 Cal. App. 5th 96, 111-112, 296 Cal. Rptr. 3d 777 (2d Dist. 2022) found that the plaintiff had alleged direct physical loss or damaged property under *MRI Healthcare* by contending that the virus "bond[ed] to surfaces through physiochemical reactions involving cells and surface proteins, which transform the physical condition of the property," and that the presence of COVID-19 caused their suspension of operations. Although the policy in *Marina Pacific* was different from Another Planet's because it provided coverage for losses caused by a "communicable disease event," defined as "an event in which a public health authority has ordered that a location be evacuated, decontaminated, or disinfected due to the outbreak of a communicable disease at such location," the policy still required "direct physical loss or damage" to the property caused by the communicable disease event. Recognizing that its decision conflicted with most others considering pandemic-related business losses, many of which were decided in federal courts, the court of appeal in *Marina Pacific* pointed out that the pleading rules in federal court are different from a trial court order sustaining a demurrer, and that it therefore accepted plaintiff's allegations—"however improbable"—as true. Further, other cases relied on government closure orders rather than the presence of the virus itself. Finally, the policy at issue included coverage for communicable diseases. Thus, the court found that "[c]onstruing the policy provisions together . . . precludes the interpretation that direct physical loss or damage categorically cannot be caused by a virus."

While most California decisions followed *United Talent Agency* (e.g., *Starlight Cinemas, Inc. v. Massachusetts Bay Insurance Company*, 91 Cal. App. 5th 24, 308 Cal. Rptr. 3d 31 (2d Dist. 2023), *Tarrar Enterprises, Inc. v. Associated Indemnity Corp.*, 83

 

Cal. App. 5th 685, 299 Cal. Rptr. 3d 698 (1st Dist. 2022) and *Apple Annie, LLC v. Oregon Mutual Ins. Co.*, 82 Cal. App. 5th 919, 298 Cal. Rptr. 3d 886 (1st Dist. 2022)), a couple of cases have followed *Marina Pacific* (e.g., *Shusha, Inc. v. Century-National Insurance Company*, 303 Cal. Rptr. 3d 100 (Cal. App. 2d Dist. 2022) and *JRK Property Holdings, Inc. v. Colony Ins. Co.*, 313 Cal. Rptr. 3d 895 (Cal. App. 2d Dist. 2023), ordered not citable July 10, 2024). *Shusha* even extended *Marina Pacific*'s holding to policies that did not include coverage for communicable disease events. Subsequent courts have expressed opinions ranging from dismissive "except when the policy explicitly includes loss of use due to a virus as qualifying for coverage" (*Endeavor Operating Co., LLC v. HDI Global Ins. Co.*, 96 Cal. App. 5th 420, 434, 313 Cal. Rptr. 3d 746 (2d Dist. 2023)), to sympathetic if a plaintiff could show "that the virus *actually caused* physical damage *to its property*" (*Santa Ynez Band of Chumash Mission Indians of Santa Ynez Reservation California v. Lexington Insurance Company*, 90 Cal. App. 5th 1064, 1072, 307 Cal. Rptr. 3d 724 (2d Dist. 2023)).

Turning to the parties' positions in this case, Another Planet asserted that "the presence of the COVID-19 virus causes direct physical loss to property because it renders property unusable for its intended use," while Vigilant contended that " 'because viral particles resting on inert physical property do not cause any structural alteration to the property, the temporary presence of such particles does not qualify as "direct physical damage or loss" to property.' " The Court here noted that the phrase "direct physical loss or damage" was used several times in Another Planet's insurance policy but was not defined. However, it found "direct" and "physical" to apply to "damage" as well as to "loss." Thus, it concluded that "direct physical loss" and "direct physical damage" must have somewhat different meanings even if they overlap, and it proceeded to examine each phrase.

Finding a relative consensus in case law for the individual terms "direct," "physical," and "damage," the Court concluded that "for direct physical damage to property to occur, the property itself must have been physically harmed or impaired." See *Starr Surplus Lines Insurance Co. v. Eighth Judicial District Court in and for County of Clark*, 535 P.3d 254, 263, 139 Nev. Adv. Op. No. 32 (Nev. 2023) Based on the plain meaning of "physical damage," the Court found it evident that "distinct, demonstrable, physical change or alteration to property" is required.

 

While the "change or alteration need not be visible to the naked eye to constitute direct physical damage to property," the change or alteration must cause harm or injury to the property itself in order to constitute direct physical damage.

With respect to the term "direct physical loss," the Court found the pairing of the words "physical" and "loss" to indicate a requirement that there "be some *physicality* to the loss. . . ." This interpretation was reinforced by the policy's reference to a "period of restoration" to "repair or replace the property," which indicates that mere loss of use would not suffice. The Court noted that "[e]ven cases finding the possibility of coverage have assumed this description applies" (see, e.g., *San Jose Sharks, LLC v. Superior Court of Santa Clara County*, 98 Cal. App. 5th 158, 168, 316 Cal. Rptr. 3d 393 (6th Dist. 2023)), but it also agreed that "an invisible substance or biological agent may, in some cases, be sufficiently harmful and persistent to cause a distinct, demonstrable, physical alteration to property," as long as such substance could not be easily removed from the property.

Accordingly, the Court disagreed with Another Planet "that direct physical loss of property may be found anytime property may not be used as intended" because "[a] property insurance policy does not cover a particular intended use; it covers the property itself." See *Simon Marketing, Inc. v. Gulf Ins. Co.*, 149 Cal. App. 4th 616, 622-623, 57 Cal. Rptr. 3d 49 (2d Dist. 2007). The Court distinguished *Hughes v. Potomac Ins. Co. of District of Columbia*, 199 Cal. App. 2d 239, 18 Cal. Rptr. 650 (1st Dist. 1962)—a case involving a property where the soil slid out from beneath the house, leaving it overhanging a 30-foot cliff—on the basis that the structure there could no longer be considered a "dwelling" due to the severe damage. By contrast, the government orders at issue here had "only intangible or incorporeal effects—uses and rights—not physical ones." Therefore, the Court found that "[w]here the deprivation of property is caused by a government order, rather than a physical event, no direct physical lost property has occurred."

The Court rejected that the allegedly broader definition of "property damage" in Another Planet's commercial general liability (CGL) policy provided the basis for "a more expansive interpretation of direct physical loss or damage to property," because both the nature and scope of coverage in a CGL policy is materially different than first party property insurance. The Court was similarly unsympathetic to Another

 

Planet's contention that the ambiguity of the policy warranted the introduction of extrinsic evidence, finding the insurance industry documents relied upon by Another Planet to be unpersuasive. Finally, the Court acknowledged that it could not and did not "decide whether the COVID-19 virus can *ever* constitute direct physical loss or damage to property," but found "Another Planet's allegations [to be] insufficient to meet the definition of direct physical loss or damage to property under California law." It therefore found that *United Talent*, but not *Marina Pacific*, was correctly decided. The court explained that "[t]o constitute direct physical damage to property under California law a tangible alteration of the property is *necessary* but not *sufficient*. An insured must allege, and later prove, that the alteration caused physical harm to the property. The alteration itself is not enough." On this basis, the Court found that an allegation of microscopic bonding of the virus to the property "does not involve damage or harm to *property*."

The Court noted that its decision was framed by the question posed by the Ninth Circuit, and "should not be interpreted to downplay other circumstances that might be dispositive in this case or others." Accordingly, the Court answered that "No, the actual or potential presence of the COVID-19 virus on an insured's premises generally does not constitute 'direct physical loss or damage to property' for purposes of coverage under a commercial property insurance policy."

>>*See Miller & Starr, California Real Estate 4th, Ch. 34, Landlord and Tenant, §§ 34:107, 34:110.*

## LANDOWNERS' LIABILITY

### THERE IS NO PRIVATE RIGHT OF ACTION FOR VIOLATION OF A MUNICIPAL ORDINANCE UNDER GOV. CODE, § 36900, SUBD. (a), WHICH IS LIMITED TO ACTIONS BROUGHT BY "CITY AUTHORITIES," OVERRULING ***RILEY V. HILTON HOTELS CORP.*** (2002) 100 CAL. APP. 4TH 599.

*Cohen v. Superior Court*, 102 Cal. App. 5th 706, 322 Cal. Rptr. 3d 62 (2d Dist. 2024), review filed, (July 8, 2024)

For a summary of this case see BUILDING CODES

>>*See Miller & Starr, California Real Estate 4th, Ch. 19, Landowners' Liability, § 19:20; Ch. 21, Land Use, §§ 21:1, 21:2; Ch. 25, Building Codes, §§ 25:54, 25:57.*

 

## TRAIL IMMUNITY APPLIED WHERE INJURY OCCURRED AT ENTRANCE TO A TRAIL LEADING TO RECREATIONAL BEACH AREA AND WOODEN POSTS ON EITHER SIDE OF TRAIL ENTRANCE WITH CABLE STRUNG ACROSS TO PREVENT VEHICULAR ACCESS WERE INTEGRAL PART OF TRAIL DESIGN BECAUSE THEY FACILITATED PEDESTRIAN SAFETY.

*Helm v. City of Los Angeles*, 101 Cal. App. 5th 1219, 321 Cal. Rptr. 3d 57 (4th Dist. 2024)

In July 2020, Brady Helm parked near the day-use area of Diaz Lake in the City and County of Los Angeles, and chose one of three paths to access the beach. He described the one he chose as the best option because it was the least steep and overgrown, and "had a more pronounced kind of a trail outline. . . ." The entry to the pathway had a wooden post on each side connected by a wire cable designed to keep cars from driving beyond that point. As he walked his dogs toward the path, he saw the wooden posts but did not see the cable, and he tripped on it and injured himself. Despite the fact that his small dog had walked underneath the cable, he described it as "two inches off the ground."

Helm filed suit against the City, County, and State of California for dangerous conditions of public property, premises liability, and negligence. The defendants moved for summary judgment arguing that trail immunity applied, that the wooden poles and cable did not constitute a dangerous condition, and that they had no notice of any dangerous condition. The trial court granted the motion, specifically finding that the path he fell on was a "trail," and that the wooden poles and wire cable were part of the design of that trail. Helm appealed.

On appeal, Helm argued that there was a disputed issue of material fact as to whether he tripped while walking on a trail, as well as whether the wooden poles and wire cable were part of that trail. The trail immunity statute provides that a public entity "is not liable for an injury caused by a condition of (a) Any unpaved road which provides access to fishing, hunting, camping, hiking, riding, including animal and all types of vehicular riding, water sports, recreational or scenic areas; or (b) Any trail used for the above purposes." Gov. Code, § 831.4, subds. (a) and (b). Immunity applies to trails providing access to recreation as well as trails upon which recreation occurs. *Lee v. Department of Parks & Recreation*, 38 Cal. App. 5th 206, 211, 250 Cal. Rptr. 3d 456 (1st Dist. 2019). The purpose of the im-

 

munity statute is to encourage recreational use on public property without "the burden and expense of putting such a property in a safe condition and the expense of defending claims for injuries. . . ." *Loeb v. County of San Diego*, 43 Cal. App. 5th 421, 431, 255 Cal. Rptr. 3d 860 (4th Dist. 2019). Thus, "the state is absolutely immune from liability for injuries caused by a physical defect of a trail." *Treweek v. City of Napa*, 85 Cal. App. 4th 221, 227, 101 Cal. Rptr. 2d 883 (1st Dist. 2000).

Whether a particular property is considered a "trail" depends on "(1) the accepted definitions of the property, (2) the purpose for which the property is designed and used, and (3) the purpose of the immunity statute." *Lee v. Department of Parks & Recreation*, 38 Cal. App. 5th at 211. The court of appeal noted that Helm did not address these factors in his appellate brief, then it turned to the evidence. Specifically, it cited Helm's deposition testimony and opening brief identifying the path where he fell as a "trail." The court rejected his later attempts to characterize the area in which he fell as a roadway *adjacent* to a trail, finding that characterization to ignore his prior testimony. Thus, the court found Helm to be accessing a trail, and it further found that "the pathway was designed for recreational use," as evidenced by Helm's own intention to use the path to access the beach. Finally, the court found that this trail was designed to facilitate people engaging in water-based recreational activities.

Next, the court considered "whether the wooden poles and wire cable were integral parts of" the trail. Reiterating the purpose of § 831.4, which "is to encourage public entities to open their property for public recreational use" by eliminating the burden and expense of making such properties safe or defending claims for injuries, the court found that "trail immunity covers claims arising not just from a trail's physical condition but also its design and location, which are ' " 'integral feature[s] of a trail.' " ' " *Nealy v. County of Orange*, 54 Cal. App. 5th 594, 603, 268 Cal. Rptr. 3d 621 (4th Dist. 2020). Like the trial court, the court of appeal relied on *Prokop v. City of Los Angeles*, 150 Cal. App. 4th 1332, 59 Cal. Rptr. 3d 355 (2d Dist. 2007), a case in which plaintiff collided with a chain link fence as he exited a bikeway while ignoring a "WALK BIKE!" message painted on the pavement. The *Prokop* court disagreed that "trail immunity did not apply because the accident did not occur on the bikeway itself," finding instead that the "gateway to or from a bike path is patently an integral part of the bike

 

path." *Prokop v. City of Los Angeles* (2007) 150 Cal. App. 4th at 1342 (citing *Amberger-Warren v. City of Piedmont*, 143 Cal. App. 4th 1074, 1084, 1085, 49 Cal. Rptr. 3d 631 (1st Dist. 2006)).

Helm tried to distinguish *Prokop* on the basis that the bike path, chain-link fence, and gateway were all part of an integrated design of that trail, while the cable wire in this case was not part of such a design because it was merely designed to prevent vehicles from entering the pathway. The court rejected Helm's argument, finding the wooden poles and cable to be integral to the trail because they facilitated pedestrian safety. The court did distinguish *Toeppe v. City of San Diego*, 13 Cal. App. 5th 921, 220 Cal. Rptr. 3d 608 (4th Dist. 2017), where the plaintiff was injured by a falling tree branch, because in that case there was a factual dispute as to whether the plaintiff was on the trail at the time she was injured. Finding no such factual dispute here, and rejecting Helm's sudden reference to the area he fell as a "parking lot," the court affirmed the judgment.

>>*See Miller & Starr, California Real Estate 4th, Ch. 19, Landowners' Liability, §§ 19:67, 19:69, 19:73.*

## LENDER LIABILITY

### THE REQUIREMENT IN CIV. CODE, § 5655 THAT HOMEOWNER PAYMENTS BE APPLIED FIRST TO OUTSTANDING ASSESSMENTS BEFORE COLLECTION FEES AND COSTS MAY NOT BE CONTRACTUALLY WAIVED IN LIGHT OF THE PUBLIC PURPOSE OF THE DAVIS-STIRLING ACT, AND A PRE-NOTICE OF DEFAULT LETTER SENT BY COLLECTION AGENCY VIOLATED FAIR DEBT COLLECTION PRACTICES ACT BY THREATENING FORECLOSURE PREMATURELY.

*Doskocz v. ALS Lien Services*, 102 Cal. App. 5th 107, 321 Cal. Rptr. 3d 476 (1st Dist. 2024)

For a summary of this case see COMMON INTEREST DEVELOPMENTS

>>*See Miller & Starr, California Real Estate 4th, Ch. 28, Common Interest Developments, §§ 28:97, 28:98; Ch. 35, Lender Liability, § 35:1; Ch. 36, Mortgage Lending, §§ 36:1, 36:23.*

 

## MORTGAGE LENDING

### THE REQUIREMENT IN CIV. CODE, § 5655 THAT HOMEOWNER PAYMENTS BE APPLIED FIRST TO OUTSTANDING ASSESSMENTS BEFORE COLLECTION FEES AND COSTS MAY NOT BE CONTRACTUALLY WAIVED IN LIGHT OF THE PUBLIC PURPOSE OF THE DAVIS-STIRLING ACT, AND A PRE-NOTICE OF DEFAULT LETTER SENT BY COLLECTION AGENCY VIOLATED FAIR DEBT COLLECTION PRACTICES ACT BY THREATENING FORECLOSURE PREMATURELY.

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## TITLE INSURANCE

### *OVERHOLTZER* DID NOT PRECLUDE VALUATION BASED ON HIGHEST AND BEST USE, AND AS IN EMINENT DOMAIN CASES, HIGHEST AND BEST USE CONSTITUTED AN APPROPRIATE BASIS FOR DETERMINING "ACTUAL LOSS" IN ORDER TO CALCULATE DIMINUTION IN VALUE UNDER A TITLE INSURANCE POLICY.

*Tait v. Commonwealth Land Title Insurance Company*, 103 Cal. App. 5th 271, 322 Cal. Rptr. 3d 877 (1st Dist. 2024)

Martin and Jane Tait, and Bry-Mart, LLC (collectively, the Taits) purchased residential property in Danville for $1.25 million in 2016. As part of that transaction, they obtained title insurance from Commonwealth Land Title Insurance Company. The policy insured against "actual loss" arising from covered risks. Commonwealth's liability for an unknown easement was limited to the lesser of the "actual loss" or the policy limit of $1.25 million. In this case, the policy excepted from coverage "building subdivision restrictions" and "a recorded irrevocable offer of dedication of a drainage easement," but did not exclude coverage against easements not so excepted. The Taits intended to subdivide the property into two lots, and

therefore began discussions with Danville's development services coordinator, Fred Korbmacher. Town staff were supportive of the plan, and apparently recommended eliminating or modifying the offer of dedication of drainage easement and building restrictions in order to allow the subdivision. Korbmacher believed that if the Taits had submitted an application, it would have been approved.

The Taits did, in fact, complete an application for a tentative map, but never submitted it because in February 2017 they learned of a 1988 maintenance easement that covered the same area as the drainage easement but that was not excluded from coverage in the policy. Believing that the newly discovered easement would impact the marketability and value of the property and also interfere with development, the Taits tendered a claim to Commonwealth. Commonwealth had AGI Valuations prepare an appraisal of the diminution in value caused by the maintenance easement. Applying the standard in *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal. App. 2d 113, 253 P.2d 116 (1st Dist. 1953), AGI "analyzed the highest and best use of the property on the date of loss," and assumed both that the building restrictions and offer of dedication of the drainage easement would have been extinguished, but that the maintenance easement would prohibit development. Accordingly, it determined a diminution in value of $200,000 based on a property value of $1.3 million without the maintenance easement and $1.1 million with it. However, Commonwealth asked AGI to prepare an appraisal without those assumptions, which resulted in a property value of $1.3 million without the maintenance and $1,256,000 with it, for a diminution in value of $43,500.

Commonwealth sent the Taits a check in that amount, but the Taits obtained their own appraisal from Valbridge Property Advisors. Like AGI, Valbridge calculated the diminution in value pursuant to *Overholtzer*, but in addition to the assumptions made by AGI, Valbridge valued the property without the maintenance easement as two separate developable parcels for a value of $2.08 million, or with the maintenance easement as only one parcel for a value of $1.38 million. Thus, it estimated a diminution in value of $700,000. When Commonwealth refused the Taits' request that it pay them the additional $656,500, the Taits sued for breach of contract. However, the trial court granted Commonwealth's motion for summary judgment, finding that "the legal standard for title insurance

 

losses did not permit consideration of a property's highest and best use, only its actual use as vacant residential land." The Taits appealed.

In describing title insurance, the court of appeal observed that it "is not a guarantee as to the state of the property's title," or a protection against future loss, but rather offers indemnification "against many losses arising from title defects not disclosed in the title policy or report, as well as errors by the entity performing the title search." *Villanueva v. Fidelity National Title Co.*, 11 Cal. 5th 104, 112-113, 276 Cal. Rptr. 3d 209, 482 P.3d 989 (2021). Here, the question was what losses the Tait's policy covered. While the term "actual loss" was not defined, both parties agreed that "*Overholtzer* established that an owner's actual loss when there is a cloud on title is measured by the diminution in market value caused by the existence of the cloud." What they disagreed on was how the depreciation in market value should be calculated under *Overholtzer*.

In *Overholtzer*, the title insurance policy missed a water pipe easement on agricultural property purchased by the insureds, which was not discovered until the insureds had already built a lumber mill on the property. Due to a dispute with the easement owner, the insureds sued their insurer for damages. However, while the trial court found the easement caused a $15,000 diminution in property value, it instead awarded $1,000, which was the difference between the $3,000 purchase price and the $2,000 value of the property for agricultural purposes subject to the easement on the date of purchase. The court of appeal reversed, finding that the diminution in value should be calculated "as of the time of the discovery of the defect measured by the use to which the property is then being devoted." *Overholtzer v. Northern Counties Title Ins. Co.*, 116 Cal. App. 2d at 130. The trial court here took that language literally, using the property's use on the date the Taits discovered the easement to measure the diminution in value.

The court of appeal agreed with the Taits that the *Overholtzer* opinion "merge[d] two separate valuation concepts, the date of valuation and the use being valued," pointing out that this was likely a function of the facts of the case since the lumber mill had already been built. As a result, the *Overholtzer* court "had no reason to discuss whether the property should have been valued according to its highest and best use, much less to reject that standard." *Helms v. Old Republic National Title Insurance Company*, 2018 WL 708123, at *4 (D. Neb. 2018). Accordingly, the

court of appeal here found that "*Overholtzer* does not address how to calculate a property's market value and does not foreclose the use of the highest and best use standard."

Commonwealth conceded that *Overholtzer* did not address appraisal methodology, but it argued "that *Overholtzer*'s resolution of the date of valuation precludes consideration of a property's highest and best used when valuing a property," because to find otherwise would "make[] the date of discovery all but meaningless." The court of appeal found Commonwealth to be improperly merging the concepts of date of valuation and the use being valued, noting that a property's value can change dramatically even in a short period of time due to external market factors. Moreover, the court found that none of the cases relied upon by Commonwealth "viewed *Overholtzer* as precluding consideration of a highest and best use method of measuring the depreciation of a property's value."

Finding *Overholtzer* not dispositive meant that the court still had to determine whether "actual loss" should be measured based on the property's highest and best use or merely its current use. Finding the term "actual loss" in the policy to be ambiguous, the court turned to eminent domain law for guidance. In that context, the government is required to pay the owner the fair market value when taking private property. "Fair market value" is the "highest and most profitable used to which the property might be put in the reasonably near future, to the extent that the probability of such a prospective use affects the market value." *Metropolitan Water Dist. of So. California v. Campus Crusade for Christ, Inc.*, 41 Cal. 4th 954, 965, 62 Cal. Rptr. 3d 623, 161 P.3d 1175 (2007) (cleaned up). The court also found *Overholtzer* to be consistent with this approach, since that court's "concern with future losses based on existing title defects applies just as much to the loss of the ability to develop after the date of the policy as to the loss of an actual development." While the loss of the potential to develop may be smaller in magnitude than the completed improvement in *Overholzer*, the court found the expectations and reliance of both types of insured to be similar.

The court disagreed with Commonwealth that this would amount to awarding compensation for speculative uses of property, since highest and best use is considered "to the extent that the probability of such a prospective use affects the market value." *City of San Diego v. Neumann*, 6 Cal. 4th 738, 743-744, 25 Cal. Rptr. 2d 480, 863 P.2d 725 (1993).

Thus, an owner is compensated for a property's potential, not as though it had already been improved. "In short," the court concluded, "if the highest and best use is sufficiently definite to make it just for a government entity to compensate a property owner for its loss, it is sufficiently definite to constitute a basis for determining the 'actual loss' under a title insurance policy."

Finally, assessing the Taits' evidence of value based on highest and best use, the court acknowledged the building restrictions and offer of dedication but found it undisputed that the Town could eliminate them, along with certain zoning restrictions. As in condemnation proceedings, the court found the key to be whether the Taits could show a reasonable probability of a zoning change. Although the trial court did not rule on the sufficiency of the evidence, the court of appeal found the Taits' evidence to easily meet the reasonable probability standard, given that the Town's staff supported the plan and Korbmacher's testimony that it was "very, very rare" for the planning commission not to approve a subdivision supported by staff.

The court rejected Commonwealth's contention that the policy's exclusion of losses "resulting from" building restrictions and the offer of dedication meant that the property had to be valued as-is, including those restrictions: "The Taits are not seeking compensation for a loss of value *caused by* these restrictions, but rather compensation for a loss of value *despite* these restrictions." (Emphasis by the court.) Commonwealth also argued that the Taits could not show a reasonable probability because they never submitted an application. The court found this to point only to a dispute of material fact about whether the Taits could ultimately subdivide the property, which could "not preclude, as a matter of law, a finding of a reasonable probability that the building restrictions would be relaxed." Accordingly, the judgment was reversed.

>>*See Miller & Starr, California Real Estate 4th, Ch. 7, Title Insurance, §§ 7:50, 7:127, 7:252.*

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**DEFECTIVE CONSTRUCTION**

Petition to confirm construction defect arbitration award was proper where petition to vacate was untimely due to supporting declarations and evidence being presented after the 10-day deadline, and exclusion of evidence was proper where defendants willfully failed to comply with the discovery requests. (p. 45)

**DISCRIMINATION**

Homeowners who put on extravagant Christmas program were not adversely impacted where CC&Rs prohibiting nuisance were not enforced, and evidence did not support that HOA preferred a non-religious purchaser, but jury could have found HOA was motivated by anti-religious discriminatory purpose, infringing the right to purchase and enjoy one's home free from discrimination. (p. 46)

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Homeowners association's declaratory relief action was properly dismissed where HOA had not exhausted administrative remedies, controversy was not ripe where Coastal Commission had not issued a final decision and HOA had the ability to trigger a hearing, and futility exception did not apply because no adverse decision had been issued. (p. 56)

There is no private right of action for violation of a municipal ordinance under Gov. Code, § 36900, subd. (a), which is limited to actions brought by "city authorities," overruling *Riley v. Hilton Hotels Corp.* (2002) 100 Cal. App. 4th 599. (p. 59)

 

Construction of new hospital fulfilled university's educational mission even if it also promoted proprietary activities, and Regents were therefore immune from local building codes and zoning restrictions that interfered with their discretion to fulfill educational mission. (p. 59)

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Actual or potential presence of COVID-19 virus on an insured's premises generally does not constitute "direct physical loss or damage to property" for purposes of commercial property insurance coverage, and no direct physical loss occurs when deprivation of property is caused by a government order, rather than a physical event. (p. 65)

**LANDOWNERS' LIABILITY**

There is no private right of action for violation of a municipal ordinance under Gov. Code, § 36900, subd. (a), which is limited to actions brought by "city authorities," overruling *Riley v. Hilton Hotels Corp*. (2002) 100 Cal. App. 4th 599. (p. 70)

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**LENDER LIABILITY**

The requirement in Civ. Code, § 5655 that homeowner payments be applied first to outstanding assessments before collection fees and costs may not be contractually waived in light of the public purpose of the Davis-Stirling Act, and a pre-Notice of Default letter sent by collection agency violated Fair Debt Collection Practices Act by threatening foreclosure prematurely. (p. 73)

**MORTGAGE LENDING**

 

The requirement in Civ. Code, § 5655 that homeowner payments be applied first to outstanding assessments before collection fees and costs may not be contractually waived in light of the public purpose of the Davis-Stirling Act, and a pre-Notice of Default letter sent by collection agency violated Fair Debt Collection Practices Act by threatening foreclosure prematurely. (p. 74)

**TITLE INSURANCE**

*Overholtzer* did not preclude valuation based on highest and best use, and as in eminent domain cases, highest and best use constituted an appropriate basis for determining "actual loss" in order to calculate diminution in value under a title insurance policy. (p. 74)

 

# CROSS-REFERENCES TO
## Miller & Starr California Real Estate 4th



 

 