THE MARIN COUNTY BAR ASSOCIATION
REAL PROPERTY SECTION

2019
SIGNIFICANT DEVELOPMENTS IN CALIFORNIA REAL PROPERTY LAW

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SALES, CONVEYANCES & REAL ESTATE BROKERS

Prepared by Len Rifkind (Rifkind Law Group)

LEGISLATION:

AB 38. **Wildfire and Home Hardening Disclosures**. Beginning January 1, 2021, for properties located in high or very high fire hazard severity zones built before 2010, this law requires delivery of required statutory notice to buyers. Civ. Code §§1102.6f, 1102.19; Pub. Res. Code §4123.7; Gov. Code Secs. 51182 and 51189. Effective date January 1, 2020.

Defensible Space. The new law requires sellers located in designated hire fire areas to disclose to buyers that the property complies with local law related to defensible space or vegetation management requirements**.** If sellers are not in compliance with either local or state laws, then the parties must agree in writing that buyer agrees to obtain documentation of legal compliance after close.

Home Hardening. Requires delivery of disclosure of hardening improvements for properties in designated high fire areas built before 2010. Seller must list specified retrofits. If a new property completed after January 1, 2020, inspection report or information on how to obtain regarding home hardening must be provided On or after July 1, 2025, must disclose if the property contains features making it vulnerable to wildfire and flying embers: Eave, soffit and roof ventilation where vents have openings in excess of one-eighth of an inch or are not flame/ember resistant; roof coverings made of untreated wood shakes, combustible landscaping within five feet of the home, single pane windows, missing roof flashing, rain gutters without noncombustible covers. These disclosures apply to all properties subject to RETDS disclosure requirements and cancellation rights.

AB 892. **Applicability of When Agency Disclosure Form, RETDS, NHD and AVID are Required**. Civ. Code §§1088,1101.4, 1102, 1102.2, 1102.3,1102.155,1102.6, 1103.1, 2079,2079.13, and 2079.14.Bus. & Prof. Code §11345.2. Effective July 1, 2020.

Agent Visual Inspection Disclosure. This law clarifies that a buyer has no right to cancel based on receipt a visual inspection when the seller is unrepresented. However, if the seller is represented by an agent in the transaction then a cancellation can be based upon completion and delivery to the buyer or buyer's agent of the results of the seller's agent's visual inspection.

RETDS and NHD. This law confirms that the Transfer Disclosure Statement and Natural Hazard Disclosure Statement are not required to be delivered for a lease no matter how long the leasing period. Except that, these documents must be provided for a lease option and for a ground lease coupled with improvements involving residential one to four unit property.

Agency Disclosure. This law confirms that the Agency Disclosure form is required to be delivered for any lease involving residential one to four property of more than one year's duration and for personal property mobile homes. This law creates a record keeping requirement for a Multiple Listing Service. Previously there was no such requirement. Now an MLS must retain and make accessible on its computer system, all listing and other information placed in the MLS by an agent or appraiser for no less than three years form the date the listing was placed. This law does not alter the obligations of a broker to retain documents for three years.

AB 5. **Agent Employment Status**. **Real estate agents are independent contractors not employees.** Labor Code §§ 3351 and 2750.3; Unemployment Insurance Code §§ 606.5 and 621; Bus. & Prof. Code §10032. Effective January 1, 2020. The test for independent contractor status for real estate licenses is set forth in Business and Professions Code 10032, provided all the following are true: 1. Agent holds a real estate license; 2. Substantially all income is directly related to sales, not hours worked; 3. Broker and agent have a written contract providing agent will be not be treated as an employee for state tax purposes.

AB 2371. **Water Efficiency Landscape Irrigation**. Landscape contractors and home inspectors are required to implement and evaluate water conservation measures for in-ground landscape irrigation systems, and local ordinances to include water conservation landscape requirements. Bus. & Prof. Code §§ 7065.06, 7195.5; Gov. Code §§ 65592, 65596, 65596.5, and 65596.7

CASE LAW:

No expert witness necessary to prove professional negligence obvious to the layman.
Ryan v. Real Estate of the Pacific, Inc. (2019) 32 Cal.App.5th 637.

Facts. At an open house the next door neighbor told the listing agent that his intended remodel would permanently obstruct the property's ocean view, and have a significant impact on the property: (1) move the footprint within five feet of the common boundary, (2) create two-story wing with large windows overlooking the seller's pool area, (3) take two years to complete and (4) require extensive excavation. The listing agent never informed his sellers of this information. The house sold for $3.86 million and listing agent received a $96,500 commission. The day after COE, buyers learned from their neighbor his plans to remodel.

Arbitration. Buyer sued seller in an arbitration and obtained rescission of the purchase agreement. The arbitrator further ordered seller to pay damages and costs in excess of $1M. The broker was not a party to the arbitration.

Trial Court. Seller then sued the listing agent and broker for failure to disclose. The sellers' attorney introduced no expert evidence on the standard of care, in part relying on the arbitrator's findings in the previous trial and in part believing that the broker's liability was so evident that no expert testimony was needed. The fact that the broker knew about the neighbors' plan was not disputed. The issue boiled down to whether the Ryans could meet their burden of proof on their causes of action against the brokers without the testimony of an expert witness on the standard of care. With regard to standard of care evidence, one of two contradictory rules applies. One rule is that without expert testimony, the jury cannot decide what is the standard of care. The other rule is that no evidence is needed for this issue to get to a jury when the liability is quite evident.

Discussion. The traditional approach for trial lawyers is to hire a standard of care expert. The standard for brokers is stated in Civil Code §§2079, 2079.3. Only by an expert's opinion proving the applicable standard of care can a jury determine if that standard was breached and whether damages were caused by that breach. Most trial lawyers will not take the risk of a malpractice claim and therefore play it safe and name an expert to testify at trial. Ryan contended, however, that expert testimony was not required because the issue in the their case was an issue of "common knowledge" of ordinary care, not an issue requiring expert testimony.

In *Jorgensen v. Beach 'N' Bay Realty, Inc.* (1981) 125 Cal.App.3d 155, a case with similar facts, the court concluded that no expert testimony was needed because the material facts the defendants failed to disclose were not beyond the realm of a lay juror's understanding or common knowledge. "The correct rule on the necessity of expert testimony has been summarized by Bob Dylan: 'You don't need a weatherman to know which way the wind blows.'" *Id*. at 163. So how does a plaintiff's attorney decide whether he has a case requiring expert testimony? There are significant cost considerations to retaining an expert. Hiring an

expert when one is not needed is a waste of the client's money.

Holding. The trial court disagreed, holding expert testimony was required. Seller's then made a motion for new trial and lost that motion as well. Next the sellers appealed. One has to wonder if it would have been less expensive to just name the standard of care expert than file and lose post judgment motions and an appeal. The court of appeal reversed, holding that the nondisclosure of the upcoming loss of view did not meet the standard of care by common knowledge. No expert was needed because "anyone who hired a real estate broker to sell her home, would expect that broker to share information that would adversely impact the value of the home."

Take Away. It appears the decision whether the broker's act is common knowledge or not is guesswork, and the prudent decision is to hire the expert after explaining the costs, and risks to the client.

Interfere with your neighbor's sale without basis and you will get sued.
Workman v. Colichman (2019) 33 Cal.App.5th 1039.

This is the anti-*Ryan* case where the broker *properly* disclosed the neighbor's inter-meddling, which proved to be false information, but cost the seller a sale nonetheless. In *Ryan*, the neighbor's view blocking information was true; yet it was false in *Workman*. How is a broker to know truth from fiction? Answer: the broker cannot and simply acts as a conduit to disclose information received to the peril of his/her client.

Facts. Defendant/neighbor told the listing agent at an open house that they were *considering* a second story and roof top deck on their residence, and wrote an email to the listing agent that they planned to construct an addition to their house that would interfere with views from seller's house. The listing agent dutifully communicated the information to his seller. Listing agent disclosed the email to a prospective buyer who was in contract for $3M and backed out of the sale after buyer's broker tried to gain more information from the neighbor on the proposed remodel. Seller subsequently received an offer from a second buyer for $2.2M, who seller suspects were conspiring with the defendant/neighbor. Ultimately, the property sold for $2.6M.

Trial Court. Seller sued the neighbors claiming tortious interference. The neighbors responded with a motion to strike the claim, an anti-SLAPP motion, claiming their email involved a matter of public interest related to false advertising materials touting the views from seller's house.

Held: Views from a private house are not a public issue. Therefore, the trial court denied the SLAPP motion and that neighbor's contention of false advertising of views from a private residence would be "absurd." The neighbors not having enough by interfering with a sale and creating $400K in damages and losing a SLAPP motion filed a frivolous appeal. On appeal, the court of appeal awarded attorney's fees and sanctions against the neighbors.

LANDLORD/TENANT

Prepared by Neusha Ghaedi (DeMartini, Walker, & Ghaedi LLP)

LEGISLATION:

AB 1482 – **Rent Caps and "Just Cause" Termination**. AB 1482 specifically provides for the authority of a local government to adopt or maintain rent controls or price controls consistent with the Costa-Hawkins Act but does not allow rents in violation of that statute. Both provisions of AB 1482, i.e. the "Just cause" termination statute and the "rent increase cap" statute remain in effect until January 1, 2030.

CIVIL CODE § 1946.2 THE "JUST CAUSE" AND "NO FAULT" EVICTION LIMITATIONS OF AB 1482. This code sets forth the procedure and standards whereby a landlord can terminate a residential tenancy and evict the tenant.

Applicability: "Residential real property", all dwellings intended for human habitation. The "just cause" termination or nonrenewal provisions of § 1946.2 apply only after a tenant has "continuously and lawfully occupied a residential real property for 12 months." If there have been additional adult tenants added to the lease before an existing tenant had continuously occupied the property for 24 months, however, then these just cause provisions apply only if (1) all of the tenants have continuously and lawfully occupied the unit for 12 months or more, or (2) one or more of them have continuously occupied the property for 24 months or more.

Exemptions: (1) Mobile homes; (2) Tourist hotels; (3) Hospitals and residential care facilities; (4) College and K-12 school dormitories; (5) Housing shared with an owner occupant who shares bathroom or kitchen facilities, maintains a single family residence in which the owner-occupant rents or leases no more than two units or bedrooms (including, but not limited to, an accessory dwelling unit or a junior accessory dwelling unit), or duplex in which the owner occupies one of the units as the owner's principal place of residence at the beginning of the tenancy and continues in occupancy; (6) Housing that has been issued a Certificate of Occupancy within the previous 15 years; (7) Deed restricted affordable housing; (8) Property separately alienable from the title to any other dwelling unit i.e. single family homes or an attached unit that may be separately conveyed in compliance with the Subdivision Map Act and applicable local ordinances (unless it is owned by a real estate investment trust, a corporation, or a limited liability company of which at least one member is a corporation).

Tenants must have been provided a written notice that the property is exempt from the restrictions of the Civil Code (see code for specific language). If the tenancy is commenced or renewed on or after July 1, 2020, the notice must be included in the rental agreement.

Termination for "At Fault Just Cause": The "just cause" in any case "shall be stated in the written notice to terminate tenancy." If the just cause for termination is a "curable lease violation," the owner must first give notice of the violation to the tenant with an opportunity to cure the violation pursuant to paragraph (3) of § 1161 of the Code of Civil Procedure. Thereafter, if the violation is not cured within the time frame set forth in the notice, a three-day notice to quit without an opportunity to cure may thereafter be served to terminate the tenancy if a tenant has not left the premises voluntarily.

Terminations for "No Fault Just Cause": *If an owner intends to occupy the residential real property for him or herself, their spouse, domestic partner, children, grandchildren, parents, or grandparents, termination for "no fault just cause" can be entered. For leases entered into effect on or after July 1, 2020, "no fault just cause" clause shall only apply if the tenant agrees in writing to the termination, or if a provision of the lease allows an owner to evict based on "no fault just cause". Other "no fault just cause" terminations include: (1)* Withdrawal of the residential real property from the rental market; (2) An order issued by a government agency or court relating to habitability that necessitates vacating the residential real property; (3) A local ordinance that necessitates vacating the residential real property; and or (4) Intent to demolish or to substantially remodel the residential real property. Note, none of the foregoing grounds for termination "without fault" includes the mere lapse or termination of an existing lease.

Compensation and Further Notification Requirements for "No Fault" Just Cause Termination: Relocation assistance equal to one month of the tenant's rent**.** Direct payment within 15 days of notice of termination or expressly waive in writing the payment of rent for the final month, the notice of termination must state amount of rent waived and not due for the final month of the tenancy, if the landlord has proceeded in compliance with the statute for a valid "no fault" just cause termination reason allowed by the statute, and the tenant then does not vacate after expiration of the notice to terminate, then the actual amount of any relocation assistance or rent waiver provided by the landlord is recoverable as damages in the landlord's action to recover possession. Any relocation or rent waiver that is required under the statute also may be credited against any other relocation assistance required by any other law.

If There Is A Local "Just Cause Eviction" Ordinance in Effect in the Local Jurisdiction: If there was a local just cause ordinance in place on or before September 1, 2019, the local ordinance, rather than § 1946.2, is solely applicable—a residential real property cannot be subject to both a local ordinance requiring just cause for termination and the state law. If the local ordinance is adopted after September 1, 2019, however, then a more complicated evaluation must be made as to whether it will apply. The local ordinance must be "more protective" than § 1946.2 to apply. To be considered more protective, all three must be met: (i) the local ordinance must be consistent with this section; (ii) the local ordinance further limits the reasons for termination, provides higher relocation assistance amounts, or provides additional tenant protections; and (iii) the local government has made *a finding within their local ordinance that the ordinance is more protective than the provisions of this section.*

CIVIL CODE § 1947.12 THE RENT INCREASE LIMITATIONS OF AB 1482. This code sets forth the procedure and standards whereby a landlord can increase the rent of a residential tenant.

Rent Cap: Owner of residential real property shall not, over the course of any 12-month period, increase the rent more than 5% plus CPI or 10%, whichever is lower. The rent cap excludes any rent discounts, incentives, concessions or credits offered by the owner of the unit and accepted by the tenant. A landlord must provide notice of rent increase in accordance with Civil Code § 827.

Applicability: "Residential real property" includes all dwellings intended for human habitation. Exemptions: (1) Mobile homes; (2) Rent-restricted affordable housing; (3) Higher education dormitories owned and operated by the educational institution; (4) Housing subject to more restrictive local ordinances; (5) Housing that has been issued a Certificate of Occupancy within the previous 15 years; (6) Owner-occupied duplexes (place of residence at the beginning of the tenancy); (7) Separately alienable from the title to any other dwelling unit i.e. single family homes or an attached unit that may be separately conveyed in compliance with the Subdivision Map Act and applicable local ordinances (unless it owned by a real estate investment trust, a corporation, or a limited liability company of which at least one member is a corporation).
Tenants must have been provided a written notice that the property is exempt from the restrictions of the Civil Code (see code for specific language). If the tenancy is commenced or renewed on or after July 1, 2020, the notice must be included in the rental agreement.

CIVIL CODE § 1947.13 – Provides relief from Civil Code 1947.12 for owners of an assisted housing developments and deed-restricted housing units.

AB 1946.8 – Law Enforcement and Emergency Assistance. Lease agreement for a dwelling unit must not prohibit or limit the tenant's, resident's or other persons right to summon law enforcement or emergency assistance in case of an emergency. Any such prohibition or limitation shall be void as contrary to public policy.

SB 234 – Health and Safety. **Family daycare homes with up to 14 children are to be treated as residential use for purposes of all local ordinances (**local ordinances can no longer make the determination). Under prior law, a small family daycare home, (care for up to 8 children), was considered a residential use of property for purposes of all local ordinances.

This new law strengthens legal protections for family daycare homes by prohibiting a property owner or manager from refusing to sell, lease, negotiate for the sale, or otherwise make unavailable a dwelling unit for

residential use to a person because that person is a family daycare provider. It also makes void any attempt to deny, restrict, or encumber the conveyance, leasing, or mortgaging of real property for use or occupancy as a family daycare home and a restriction related to the use or occupancy of the property as a family daycare home. Also, it clarifies that a family daycare home includes a detached single-family dwelling, a townhouse, a dwelling unit within a dwelling, or a dwelling unit within a covered multifamily dwelling. Thus, family daycare homes may operate in multi-family dwellings such as apartments.

AB 1188 – Persons at Risk of Homelessness. Effective January 1, 2020. **The legislation creates protections for both landlords and tenants to provide housing to a person at risk of homelessness by allowing the person at risk of homelessness to be removed from the premises on short notice with the assistance of the police.** The legislation provides for relaxed rules on the terms of the lease or rental agreement during the period of occupation. It authorizes an owner or landlord to adjust the rent payable under the lease during the time the person who is at risk of homelessness is occupying the dwelling unit, as compensation for the occupancy of that person, and would require the terms regarding the rent payable in those circumstances to be agreed to in writing by the owner or landlord and the tenant. If the landlord has served the tenant with a three-day notice to cure or quit the property pursuant to paragraph (3) of Section 1161 of the Code of Civil Procedure, then the person at risk of homelessness' right to occupy shall terminate 24 hours after the tenant provides notice in writing to the person at risk of homelessness that specifies the date and time by which the person at risk of homelessness must vacate the premises. Or, the person at risk of homelessness' right to occupy the premises may be terminated immediately, without notice, if that person has engaged in criminal conduct on the premises. Upon termination of the person at risk of homelessness' right to remain in the dwelling unit, the person at risk of homelessness may be removed from the premises pursuant to Section 602.3 of the Penal Code, as though the person at risk of homelessness were a lodger. This law requires that the landlord give 7 days' notice to the tenant in order to evict a person at risk of homelessness from the unit, unless specified exceptions apply, but it gives the tenant an opportunity to cure any violations cited by the landlord for evicting the person at risk of homelessness.

SB 330 – Housing Crisis Act. This law became effective January 1, 2020 and will be in effect for a five-year period. It is intended to increase the supply of housing in California and combat the housing supply crisis. The Housing Crisis Act creates: (1) a statewide housing development application and development standards; (2) a 30 day limit to review the developer's submission of the housing development application (any incomplete items not identified by the city or county within the 30-day period shall be waived and the application deemed complete); (3) Limitation for the time to approve applications, where an environmental impact report (EIR) is required, to a maximum of 90 days from the certification of the EIR (60 days for low income developments); (4) limitation of five public hearings for housing developments disapproving projects without specifying a reason for the disapproval. The act further prohibits cities and counties from changing zoning or entitlements affecting any housing development after the housing development application is submitted.

San Francisco Ordinance 296-19 – Extends Rent Board jurisdiction, Rent Board fees, just cause requirements, and just cause relocation benefits to ALL units in San Francisco.

CCP § 1161.3 – Protects victims of domestic violence, sexual assault, stalking, human trafficking, and abused elders (and their household members) from being evicted. The act(s) must have been documented in accordance with the code. The alleged perpetrator cannot be a tenant of the same dwelling unit as the tenant or household member. The protection does not apply if the victim allows the perpetrator to visit the property or if the landlord reasonably believes the alleged perpetrator poses a physical threat to other tenants, invitees, or licensees so long as the landlord first provides a cure-quit notice to the tenant.

CASE LAW:

Landlords refusal to comply with discovery demands prevented landlord from challenging punitive damages award for tenants' failure to introduce evidence of landlord's net worth to the courts.
Garcia v. Myllyla (2019) Cal.App.5th, 2019 WL 4894132.

Issue: Whether a tenant seeking punitive damages must introduce evidence of a landlord's net worth to obtain punitive damages award, despite landlord's refusal to provide such records.

Holding: No, the court concludes that landlords who improperly deprive tenants the opportunity to meet their burden of proof on the issue cannot assert or complain about the absence of such evidence.

Facts: The Court of Appeal affirmed a judgment against defendants, following a jury trial, awarding nine former tenants economic damages in the form of rent abatement to each plaintiff ranging from $0 to $7,000, noneconomic damages for each plaintiff of either $10,000 or $15,000, and punitive damages for each plaintiff of $95,000. Plaintiffs alleged numerous claims including breach of the implied warranty of habitability. Although the building was a duplex, defendants illegally rented it as 12 separate units. Only two units had kitchens and there were only two community rest rooms. There were numerous problems with the building, including openings that permitted rodents and vermin to enter, steps with dry rot that were close to collapsing, illegal electrical work, and dead and live cockroaches throughout the building and dirty bathrooms. The defendant-landlord failed to comply with notices to attend trial and produce documents regarding his net worth. There was substantial evidence supporting both the punitive damage awards and the noneconomic damage awards.

The Decision: The punitive damages award was proper because the defendant-landlord forfeited any argument that plaintiffs had failed to introduce evidence of his net worth when he failed to comply with notices to attend trial and produce documents regarding his net worth.

Why this Case is Important: Landlords who avoid providing information of their net worth are stopped from asserting that evidence of net worth was not provided to support a punitive damage claim.

Tenant's failure to comply with a court order requiring preparation of proposed jury instructions and other trial documents and not "meeting and conferring" with Landlord's counsel does not meet grounds for a jury waiver.
Chen v. Lin (2019) Cal.App.5th Supp., 2019 WL 6341283.

Issue: Whether a tenant in an eviction action can be deprived of the right to jury for failing to comply with a court order requiring preparation of proposed jury instructions and other trial documents and not "meeting and conferring" with the landlord's lawyer.

Holding: No, CCP §631 sets forth that there are exclusive grounds for a jury waiver and failing to prepare for trial does not meet the grounds for a jury waiver.

Facts: The Appellate Department of the Los Angeles Superior Court reversed the trial court's ruling that defendant had waived her right to a jury trial, and its later judgment for plaintiff following a bench trial.
The Decision: The court ruled that a tenant in an eviction action cannot be deprived of their right to jury for failing to comply with a court order requiring preparation of proposed jury instructions and other trial documents. Unless jury is waived pursuant to statute, the tenant will be afforded their right to a jury trial.

Why this Case is Important: Courts who enter judgement stripping a party of their right to trial by jury is a reversable error per se and the party will be afforded their right to trial by jury.

Landlord seeking to recover possession of a unit for purposes of occupying it as their primary residence.
Reynolds v. Lau (2019) Cal.App.5th, 2019 WL 4392511.

Issue: Whether a Landlord can be barred from enjoying the benefits of an apartment in their possession that they wish to occupy as their primary residence after being sued by a tenant for wrongful eviction.

Holding: No, the court concludes that because the apparent purpose of the eviction was for the landlord to use the property as their long-term primary residence, so long as the landlord intends to recover possession of the property to occupy the unit as their principal residence for at least 36 continuous months.

Facts: The landlord evicted tenants notwithstanding there was an unoccupied rental available in the same building into which the landlord could have moved. Plaintiffs prevailed in a jury trial and were awarded $600,000 in damages on a claim that defendant, their former landlord, violated the owner move-in provisions of the San Francisco Residential Rent Stabilization and Arbitration Ordinance when he instigated eviction procedures against them. The Court of Appeal ruled that the "good faith," "without ulterior reason," and "honest intent" requirements of the Ordinance do not trigger a wide-ranging inquiry into the general conduct and motivations of an owner who seeks to recover possession of a unit. The Court of Appeal affirmed the trial court's order granting a motion for judgment notwithstanding the verdict.
The Decision: The court of appeal concluded that Landlord may not be barred from recovering the unit to occupy as his primary residence.

Why this Case is Important: It prevents a wide range inquiry into the motivation of a landlord who seeks to recover a unit for his/her primary residence.

Landlord seeking an Ellis Act Unlawful Detainer action.
Hilaly v. Allen (2019) Cal.App.5th Supp., 2019 WL 2500495.

Issue: Whether a completed residential rental questionnaire is an "instrument" under Evidence Code §622 and if that bars the tenant from asserting or proving facts arguably inconsistent with the questionnaire answers.

Holding: A tenant is not barred from asserting or proving facts inconsistent with the residential questionnaire because the court deemed the questionnaire was not a contract and the answers were not a binding instrument under Evidence Code §622.

Facts: As part of any Ellis Act eviction process: (1) the tenants must be notified of the intent to withdraw the unit, (2) the tenants must have sufficient move out time (one year in the case of an eligible or disabled tenant), and (3) during the notice period, the tenancy must continue on the same terms and conditions as existed prior to the notice of removal from the rental market. In *Hilaly*, Allen, a tenant, had use of a garage and driveway at the property. During the Hilaly's purchase of the property, a questionnaire was issued to Allen with no explanation of its significance. The questionnaire included a question whether parking was included at the property and if so, what was the space number. Allen stated no to the question because, although she had driveway and garage rights, she didn't have the right to a numbered parking space. The Hilalys thereafter closed on the property and later issued this Ellis Act eviction notice to the tenants. During the one-year notice period (as to Allen's lease due to age and disability), the Hilalys started using the driveway and blocked Allen's access to use the same. Allen set out to defeat the Ellis Act eviction on the premise that the owner changed a tenancy term when they blocked Allen's access to the driveway and garage. The Hilalys argued that the Ellis Act confers a landlord with the unfettered right to leave the residential rental business and the requirement to maintain the tenancy on the exact same terms contradicts settled law which bars habitability defenses to an Ellis Act eviction. As such, the removal of the driveway rights, even if it made the premises less habitable, did not negate her right to possession and was not a defense to the Ellis Act eviction. The Court agreed with the premise that a withdrawing owner is relieved of affirmative repair obligations during the notice period, but agreed with Allen and found that the owners unlawfully changed a term of Allen's tenancy during the one-year notice period, and as such, allowed for an affirmative defense to the eviction. The Court of Appeal affirmed the trial court's judgment for defendant following a jury trial.

The Decision: The court of appeal found that the landlord changed the tenant's term of tenancy during the Ellis Act notice period. Furthermore, the answers provided in the questionnaire were not a legal binding instrument under Evidence Code §622.

Why this Case is Important: The Hilaly case illustrates that a landlord must conform to very strict procedures to ensure an Ellis Act eviction will not be defeated, including that any term of the lease must remain the same during the required notice period. Further, the Court in Hilaly confirmed that an informal "estoppel" in a residential context carries less weight than an estoppel in a commercial context and that a residential tenant may not be held accountable for statements made within said estoppel.

Tenant seeking to recover attorney fees pursuant to the guaranty.
Orozco v. WPV San Jose, LLC (2019) Cal.App.5th, 2019 WL 2498402.

Issue: Whether a tenant who reasonably relied on a landlord's representative misrepresentations regarding restaurants with competing concepts or products were being considered for remaining unfilled leases in the same shopping center as the tenant's leased space can recover attorney fees pursuant to the guaranty.

Holding: Yes, the guaranty includes a provision entitling a prevailing party in "an action against the other arising our of or in connection with this Guaranty" the right to recover attorney fees and costs.

Facts: Plaintiff Orozco, a successful restauranteur was looking to open a gourmet hot dog stand, Pauly's, in a San Jose shopping center known as The Plant. Solid was formed as the LLC which signed the lease for Pauly's. Orozco signed a guarantee for the lease. Orozco knew that Five Guys had opened in The Plant and was serving hot dogs but did not consider the "ancillary" business as competitive. Orozco repeatedly asked if there other competing restaurants being considered and was told that there were not. The landlord failed to disclose that Al's Beef had just signed a lease. Al's Beef opened 6 months later and Pauly's business declined by 30%. Orozco sued for intentional fraud and fraudulent concealment.
The lease contained an integration clause, several disclaimers that the landlord made no representations about existing or future tenants, and no exclusivity provision for the benefit of Pauly's. The Court of Appeal affirmed the damages awarded to plaintiffs of $872,141 ($676,967 for lost profits; $129,462 for operational losses; and $65,712 for startup costs for opening the restaurant in another location). Attorney's fees were not awarded to Solid or Orozco based on the lease agreement because, the court held, the causes of action were not in contract. However, the appellate court found that the trial court erred in denying plaintiff Oroczo the right to rescind his personal lease guaranty and reversed the trial court's order denying attorney fees to Orozco based on the guarantee because the guarantee had an expansive attorney's fees provision.
The Decision: The Court of Appeal reversed the trial court's order denying attorney fees to any party, finding that tenant had prevailed in part by obtaining rescission of the guaranty and was therefore entitled to attorney fees.

Why this Case is Important: A party can enforce the attorney's fees provision of a contract that they are rescinding.

Landlord seeing to recover moneys awarded to tenants for loss of goodwill under the Condemnation Clause.
Thee Aguila v. Century Law Group (2019) Cal.App.5th, 2019 WL 2754712.

Issue: Whether the Condemnation clause in a lease entitles a landlord to recover moneys awarded to tenants for loss of goodwill.

Holding: No, the Condemnation clause in a lease does not entitle a landlord to recover moneys awarded to tenants for loss of goodwill.

Facts: The Court of Appeal affirmed the judgment entered by the trial court, following a bench trial, ruling that plaintiff's lease with defendants for the operation of the El Parral Restaurant did not give plaintiff any interest in money awarded to defendants in an earlier eminent domain proceeding, and the eminent domain judgment collaterally estopped plaintiff from litigating any of its claims to the money awarded to defendants

in the eminent domain judgment.
The Decision: The court ruled that the condemnation clause in a lease did not entitle the landlord to recover moneys awarded to tenant for loss of goodwill and that the collateral estoppel precluded the landlord from pursuing claims for goodwill, unpaid rent, and key money.

Why this Case is Important: The Condemnation clause in a lease does not entitle a landlord to recover moneys awarded to tenants for loss of goodwill. A lessee's leasehold interest is distinguishable from the lessee's interest in goodwill "as owner of a business. Under Code Civ. Proc. §1263.510, a business owner's goodwill for a business operated on property taken by eminent domain is compensable separate and apart from the parties' interests in the property taken.

Landlord seeking to recover possession of a unit in bad faith, failing to comply with the Rent Ordinance and misrepresenting the cause of eviction.
DeLisi v. Lam (2019) Cal.App.5th, 2019 WL 3718031.

Issue: Is a Rent Ordinance's "good faith" standard unconstitutionally vague?

Holding: No, the court found that the Rental Ordinance was not unconstitutionally vague and that the landlords did not evict tenants with good-faith intentions of having a relative move into the unit.

Facts: Plaintiffs purchased a four-unit building in San Francisco and gave a lower unit tenant an eviction notice based on their intent to move in. Six months later they gave another tenant an eviction notice stating that they intend their brother to move into that unit. The later tenant sued and provided evidence at trial that the landlords did not move into the first unit until July 2015, rendering their June 2015 eviction notice to the tenant invalid. The evidence that the owners did not move into the first unit included evidence that their windows were covered with newspapers, no one ever saw them come and go, and no sounds were never heard from their apartment. Evidence was also offered that the owner's brother did not know what rent would be or if there was parking available. The jury found that defendants violated the Rent Ordinance because their purported reason for evicting plaintiffs was a pretext for their true motivation of increasing the rental value of the unit and awarded the tenant $360,000 plus attorney's fees.
The Decision: The court affirmed that the Rental Ordinance was not unconstitutionally vague, and that the recovery of the unit was entered in bad faith under the Rental Ordinance. Furthermore, the court held that the litigation privilege did not apply to a 60-day notice of termination because the purpose of the notice was to evict the tenants, not for purposes of litigation.

Why this Case is Important: This case provides insight as to what is not "good faith" it also endorses detailed inquires to may be made in determining the issue.

Tenant files action against landlord for false representations and failure to disclose material facts regarding problems with conditional use authorization.
ENA North Beach, Inc. v. 524 Union Street (2019) Cal.App.5th, 2019 WL 6767208.

Issue: Can a punitive damage award be reduced by a trial court vis a judgement notwithstanding the verdict?

Holding: The court determined some evidence supported the tenant's punitive damages award against landlord and the trial court could not reduce award through motion for judgment notwithstanding the verdict.

Facts: Plaintiff leased premises for the purpose of a restaurant and bar. Unknown to plaintiff, under the San Francisco Planning Code, a new full-service restaurant could be operated in this space only if there had not been a gap in operations of such a restaurant for more than three years, as the conditional use authorization would otherwise lapse. Unable to obtain approval to open the restaurant, ENA North Beach sued 524 Union and its owner Beverly, alleging that Beverly falsely told plaintiff there had been full-service restaurants in the space "continuously," failed to disclose the more than three-year gap, and falsely represented that the prior tenant had an alcohol license. Substantial evidence supported plaintiff's allegations. Plaintiff gave notice of termination of the lease and prevailed in her action for intentional misrepresentation, concealment, and breach

of the implied covenant of good faith and fair dealing. The jury awarded plaintiff punitive damages against 524 Union in the amount of $916,925 and against the landlord personally in the amount of $91,692.50. The landlord filed motions for judgment notwithstanding the verdict (JNOV) and for a new trial. The trial court denied the new trial motion, granted the motion for JNOV in order to reduce the award of punitive damages against 524 Union to $131,500. Plaintiff appealed stating that the trial court erred in reducing the award by means of the JNOV process, as the exclusive procedure for such a reduction is the remittitur process set forth in Code of Civil Procedure Code section 662.5. At the hearing following the court's issuance of its tentative decision reducing the amount of the punitive damages award against 524 Union, plaintiff objected to the court's reduction, but *not* by raising any issue as to the court acting in the context of a [JNOV] but simply argued the merits, stating that the jury's award was within constitutional limits. Clearly, as the court was hearing argument on both the motion for JNOV and the new trial motion, it could easily have rectified the problem if it had been brought to the court's attention. At the appellate oral argument, plaintiff's counsel effectively stipulated that if this court finds the amount of the jury's award unsupported plaintiff accepts the amount to which the trial court reduced the award. Counsel made clear his client's paramount desire to avoid further litigation in this matter. In these circumstances, the result of a remand is a foregone conclusion. The trial court has already determined the amount of punitive damages it found fair and reasonable, and plaintiff represented she would accept this amount rather than pursuing a new trial. In the interest of efficiency and judicial economy and to avoid unnecessary further proceedings, the court affirmed the judgment.

The Decision: The Court of Appeal held that the trial court erred in granting a motion for JNOV to reduce the award of punitive damages but because plaintiff failed to bring up the issue at trial and because counsel stipulated at oral argument that plaintiff wanted to avoid further litigation the reduction of punitive was upheld to prevent a new trial on the issue.

Why this Case is Important: Landlords must disclose any material facts regarding problems with conditional use authorization and state all legal objections to a JNOV timely.

Tenant asserts landlord's bad faith in rejecting rental payment to issue a 3-day notice and evict tenant.
Bawa v. Terhune (2019) 33 Cal.App.5th Supp. 1.

Issue: Whether a tenant can assert the landlord's bad faith in rejecting the rental payment as a defense to an unlawful detainer action.

Holding: Yes, the court determined that there was bad faith in rejecting the payment and that there was a tender of payment but there was no acceptance by landlord.

Facts: Tenant paid rent one penny short of what was due. Landlord refused the payment sent a pay or quit notice and filed an unlawful detainer action thereafter. The Court of Appeal affirmed that the landlord's refusal to accept rent without any legitimate intent other than to evict tenant was in bad faith.

The Decision: A "trivial" or "de minimis" breach of the rental obligation—even when it is payment of rent—does not support a tenant's eviction.

Why this Case is Important: Bad faith refusal of rent can be used as an affirmative defense by a tenant in an unlawful detainer action.

Principles of equitable estoppel cannot be used against a government agency to compel an act in excess the authority of the agency.
1041 20th Street, LLC v. Santa Monica Rent Control Bd. (2019) 38 Cal.App.5th 27.

Issue: Whether the rent control board was authorized to exempt units from rent control and whether they were equitably estopped from denying that units were permanently exempt from rent control.

Holding: No, the court concluded that the rent control board was not authorized to exempt units from rent control and thus could not have been equitably estopped from denying that units were permanently exempt

from rent control.

Facts: Property owners had applied for, and received, "removal permits" allowing them to take certain rental units off of the rental market, back in the 1990s. (As opposed to invoking the state-law Ellis Act, these local regulations allowed a landlord to apply for various permits under local law for reasons such as being unable to collect the current Maximum Allowable Rent or if a rental unit is uninhabitable and cannot be made habitable in an economically feasible manner.) Over the years, the Rent Board unequivocally stated that the properties had been granted permanent exemptions. However, in 2016, the Rent Board notified the owners that the units were subject to the rent ordinance because they were not demolished or converted and continue to be used as residential rental units. The tenants petitioned for a reduction in rent and an award of the overpayment. The owners petitioned for writ of mandate, on the theory that the Rent Board was equitably estopped from now treating the properties as subject to the rent ordinance.

The Decision: The Court determined that the rent control board was not authorized to exempt units from rent control and was, therefore, not equitably estopped because administrative finality cannot apply to a ruling that exceeds an administrative agency's jurisdiction.

Why this Case is Important: A landlord cannot rely on a rent board's exemption because a rent board does not have power to exempt.

Court denies constitutional challenges to the City of Oaklands ordinance requiring landlord to make relocation payments.
Ballinger v. City of Oakland (2019) 398 F.Supp.3d 560.

Issue: Whether city ordinance requiring landlords to make relocation payments to evicted tenants for qualifying no-fault evictions violates landlord rights under Takings Clause, Due Process Clause, Fourth Amendment, and Contracts Clause.

Holding: No, city ordinance did not constitute physical taking or "seizure" for Fourth Amendment purposes, nor did it violate landlords substantive due process rights or violate the Contracts Clause.

Facts: Landlords brought forth the matter against the City of Oakland's Uniform residential Tenant Relocation Ordinance, under which landlords are required to make relocation payments to evicted tenants for qualifying no-fault evictions. Landlords alleged the city ordinance violated their rights under the Takings Clause, Due Process Clause, the Fourth Amendment, and the Contracts Clause. The City moved to dismiss. The Court found that landlords failed to provide a cognizable legal theory on their constitutional allegations towards the city ordinance and granted the motion to dismiss.

The Decision: The court granted the City's motion to dismiss on the basis that the landlord's have failed to plead a cognizable legal theory on any of their constitutional challenges to city ordinances.

Why this Case is Important: Landlords are required to make relocation payments to evicted tenants on qualifying no-fault eviction matters.

Right of First Refusal after the expiration of the lease term does not carry forward unless explicitly expressed.
Smyth v. Berman (2019) 31 Cal.App.5th 183.

Issue: Does a right of first refusal carry over when a tenant becomes a holdover tenant?

Holding: No, a right of first refusal is not an essential term carrying forward into a holdover tenancy unless parties indicate so.

Facts: Tenants claimed they had a right of first refusal on the grounds that this right, as reflected in their lease, carried over when they became a holdover tenant. The lease specified that "the continuing [holdover] tenant

will be from month to month."

The Decision: The court denied the tenant's purchase lease option holding that purchase options are nonessential lease terms.

Why this Case is Important: The general rule is that when a lease becomes a holdover tenancy, the tenancy is presumed to continue under the same terms contained in the now-expired lease except as those terms may have been modified by the landlord and tenant. However, outside of any modified terms, not all the lease terms remain. The court emphasized, only the essential terms such as amount and time of payment of rent apply.

Anti-SLAPP Statute's first prong: a claim "based on" protected activity.
ValueRock TN Properties, LLC v. PK II Larwin Square SC LP (2019) 36 Cal. App. 5th 1037.

Issue: Does refusal of a lease assignment during a pending litigation protected activity that falls under the litigation privilege?

Holding: Court of Appeal affirmed denial by Orange County Superior Court judge of a landlord defendant's anti-SLAPP motion.

Facts: The landlord repeatedly refused to consent to the proposed assignment of a lease. The tenants and the party that agreed to take the assignment sued, alleging the landlord's refusal violated the lease. During that litigation, plaintiffs made an amended assignment request, and when that request was denied, filed a second amended complaint asserting this refusal again violated the lease. The landlord filed an anti SLAPP motion to strike the second amended complaint, contending the complaint was based on protected activity because the landlord's response to the amended assignment request constituted settlement communications and statements made in litigation.

The Decision: The trial court denied the anti-SLAPP motion because a landlord's refusal to consent to an assignment of a lease is a "business decision," not a settlement communication or protected litigation-related activity. "To be sure, [the landlord] withheld consent to the amended assignment request during the litigation, which presumably prompted the filing of the second amended complaint. But that is not to say the second amended complaint was based on [the landlord's] litigation conduct."

Why this Case is Important: The court of appeal once again emphasized the distinction between petitioning activity that is merely related to a claim and a claim based on petitioning activity.

Commercial lease provision limiting liability in is no longer enforceable after the lease is subsequently assigned to foreclosing lender.
Gietzen v. Covenant RE Management, Inc. (2019) 40 Cal. App. 5th 331.

Issue: Is a landlord liable for breach of contract under a lease post foreclosure of the property?

Holding: A landlord is liable for the breach of lease since the landlord's protection from liability under the lease was also assigned to their lender when it foreclosed on the landlord.

Facts: A commercial tenant leases space in a multi-unit property to operate a restaurant. The landlord failed to disclose that it was in the process of negotiating a new lease for a space in the shopping center for a gym. The gym's customers monopolized the shared parking lot, negatively impacting the tenant's restaurant business. The tenant sued for fraud and breach of lease and prevailed. After entry of judgment the landlord lost its interest through foreclosure. The tenant filed a motion to add the landlord's general partner as a judgment debtor under Corporations Code § 159.04(a) which provides that all general partners are liable jointly and severally for all obligations of the limited partnership. The motion was denied under the theory that paragraph 39 of lease the landlord's liability was limited to its "interest in the shopping center" and the tenant waived recourse against partners or affiliates.

The Decision: The court held that the foreclosure caused the assignment of the lease from the landlord to the landlord's lender, terminated the landlord's rights under the lease, and terminated the rights of the third-party beneficiary general partner. As such, the general partner could no longer rely on the limitation of liability in article 39 of the lease.

Why this Case is Important: Protections of the lease may end with the foreclosure and third-party beneficiaries are not entitled to greater rights than the contracting party.

Local ordinance imposes various obligations on companies that host online platforms for short-term vacation rentals are not preempted by Communications Decency Act and do not infringe on First Amendment free speech rights.
HomeAway.com, Inc. v City of Santa Monica (9th Cir 2019) 918 F3d 676 In 2015.

Issue: Can a local ordinance impose obligations on companies that host online platforms?

Holding: Yes, local governments must be given leeway to address significant issues.

Facts: City of Santa Monica passed Ordinance 2535. The Ordinance was aimed at restricting short-term vacation rentals and preserving the character of City's neighborhoods. An online business advertising short-term rentals argued that the ordinance was preempted by the Communications Decency Act (CDA) (47 USC §230) and infringed on their First Amendment rights. The district court dismissed the complaints for failure to state a claim and dismissed as moot the appeals from the denial of preliminary injunctive relief. The Ninth Circuit affirmed, rejecting the claim that the Ordinance was preempted by the CDA, which gives Internet companies certain immunities to "promote the continued development of the Internet and other interactive computer services." 47 USC §230(b)(1). HomeAway argued that the Ordinance required them to monitor and remove third party content and violated the CDA by making them liable for "publishing" third party content. In contrast, however, the Ordinance required monitoring "incoming requests to complete a booking transaction— content that, while resulting from the third-party listings, is distinct, internal, and nonpublic." The court found that state and local governments must be given leeway to address significant issues faced by their communities. Here, the issue was preservation of its housing stock and preserving the quality and nature of residential neighborhoods. The Ninth Circuit also rejected the contention that the Ordinance impermissibly infringed on HomeAway's First Amendment rights. As a threshold issue, the First Amendment applies to expressive activity. The Ordinance here regulated nonexpressive conduct—specifically, booking transactions—not free speech. Even assuming that the Ordinance would lead HomeAway to voluntarily remove some advertisements for lawful rentals, there would not be a severe limitation on the public's access to lawful advertisements, particularly considering the existence of alternative channels such as Craigslist. The Ninth Circuit reasoned that such an incidental burden was far from a substantial restriction on the freedom of speech.

Why this Case is Important: It permits local governments to impose affirmative obligations on online hosting companies such as monitoring third-party content.

Equity and subrogation rights against arguably negligent lessee.
Western Heritage Ins. Co. v Frances Todd, Inc. (2019) 33 CA5th 976.

Issue: Whether a commercial condominium association's insurance carrier could subrogate against the tenants (aka lessees) of one of its member unit owners.

Holding: The Court of Appeal held that the association's carrier could not subrogate against the lessees because they were implied co-insureds on the policy.

Facts: The lessor owned a commercial unit within a multi-unit commercial building managed by an association. The CC&Rs required the Association to procure fire insurance for the commercial units by adding the unit owners as additional insureds. The CC&Rs prevented owners from obtaining their own fire insurance. A fire erupted and the insurance company covering the Association filed for subrogation against the lessee. the Court of Appeal acknowledged California precedent held a lessee is not responsible for negligently caused fire

damages where the lessor and lessee intended the lessor's fire policy to be for their mutual benefit. The Court of Appeal cited prior decisions holding that if the lease states that fire insurance will be used to repair fire damages, then all parties to the lease are considered co-insureds to the policy, thereby barring subrogation. The Court of Appeal further cited cases holding that if a lease holds the lessor responsible for repairing damages caused by fire, then it is implied that the lessor will procure insurance on the premises for the benefit of the tenant as well.

The Decision: In reaching its decision, the Court of Appeal explained an insurer steps into the shoes of its insured, not the party with whom it is in privity. Although the first-party property portion of the association's insurance policy did not, as required by the association's declarations, have the owner listed as an additional named insured, the court held that it would be inequitable to treat the association as the sole insured for purposes of determining the right to bring a subrogation action.

Why Is This Case Important: This case reminds subrogation professionals that courts may invoke equitable principles when determining subrogation-related issues. Courts often consider the insured with whom the insurer is in privity to be the party in whose shoes the insurer steps. Courts may invoke equitable principles to determine that the insurer steps into the shoes of all named insureds under the policy, even insureds with whom the insurer is not in privity.

Mobile home park owners not liable for allegedly high rent under several liability theories. Rent could not be limited to lower rate than rental agreement expressly allowed unless regulated by rent-control ordinance.
Bevis v Terrace View Partners, LP (2019) 33 CA5th 230.

Issue: Can a mobile home park owner interfere with park resident's property rights by charging high rents?

Holding: No, park owners are not required to limit rent unless required to do so under the lease agreement or by law.

Facts: 69 current and former residents of Terrace View Mobile Home Estates in San Diego, sued the park's owners and management, claiming that they failed to maintain the park "in good working order," thereby creating a nuisance and that they unreasonably increased space rent, making it difficult or impossible for park residents to sell their mobile homes. The jury awarded $58,000,000 in economic, non-economic, and punitive damages. the record overwhelmingly supports the conclusion that the main basis for the jury's compensatory and punitive damages awards to plaintiffs was the high space rent plaintiffs paid to defendants." Since the park was not in a rent-controlled jurisdiction, it was permitted as a matter of law to set its own rental rates. The Appellate Court found as a matter of law, that rent paid, even if above market rate, cannot constitute intentional interference with property rights because the rental agreements allowed defendants to charge that amount.

The Decision: Defendants cannot be held liable for breach of the implied covenant of good faith and fair dealing by implementing rent increases that the party's rental agreements expressly authorize or were subject to an implied limitation and an objectively determined base.

Why Is This Case Important: This case reminds subrogation professionals equitable principles may be invoked when determining subrogation-related issues. Courts often consider the insured with whom the insurer is in privity to be the party in whose shoes the insurer steps. An insured does not need to be in privity of contract to be considered.

Prohibiting Airbnb rentals does not violate the Dormant Commerce Clause.
Olivares v Pineda (2019) 40 CA5th 343.

Issue: Can regulation of Airbnbs trigger the dormant commerce clause.

Holding: It will not even be considered unless a high burden on interstate commerce is shown.

Facts: Owner alleged that City's short-term vacation rental ordinance violated the dormant commerce clause.

The ordinance prohibits property rentals of 30 days or less unless a primary resident remains in the dwelling.

The Decision: The complaint failed to allege a per se violation of the dormant commerce clause. The ordinance did not directly regulate interstate commerce—it only affected conduct in City, regardless of whether the visitors were from outside the state. At most, it might have an interstate effect because short-term vacation rentals might be less available and affordable. Additionally, the court found that the ordinance does not discriminate against interstate commerce because it applies in the same manner to visitors and local residents alike.

Why Is This Case Important: A plaintiff must show a high burden on interstate commerce to trigger the dormant clause.

COMMON INTEREST DEVELOPMENTS

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LEGISLATION:

AB 670. Accessory Dwelling Units. (Chaptered) -- This bill voids any CCR restrictions or HOA rules effectively prohibit or unreasonably increase the cost of construction of accessory dwelling units or junior accessory dwelling units. An "accessory dwelling unit" is a second unit on a lot, either detached or contained within the walls of the house on the lot, up to 1,200 square feet, and including cooking, sleeping, and bathroom facilities. Accessory dwelling units may also have relaxed setback and parking requirements. A "junior accessory dwelling unit" may be up to 500 square feet and must have an outside entrance and cooking facilities, but may share bathroom facilities with the main house on the lot.

ADU companion bills signed by the Governor include:

AB 68 makes major changes to facilitate the development of more ADUs and address barriers to building. The bill reduces barriers to ADU approval and construction, which will increase production of these low-cost, energy-efficient units and add to California's affordable housing supply.

AB 587 provides a narrow exemption for affordable housing organizations to sell deed-restricted land to eligible low-income homeowners.

AB 671 requires local governments' housing plans to encourage affordable ADU rentals and requires the state to develop a list of state grants and financial incentives for affordable ADUs.

AB 881 removes impediments to ADU construction by restricting local jurisdictions' permitting criteria, clarifying that ADUs must receive streamlined approval if constructed in existing garages, and eliminating local agencies' ability to require owner-occupancy for five years.

SB 13 creates a tiered fee structure which charges ADUs more fairly based on their size and location. The bill also addresses other barriers by lowering the application approval timeframe, creating an avenue to get unpermitted ADUs up to code, and enhancing an enforcement mechanism allowing the state to ensure that localities are following ADU statute.

SB 323. Elections & Director Qualifications. (Chaptered) -- A variation of this bill was vetoed last year by Governor Brown. This bill requires extensive changes to election rules dealing with mandatory and permissive candidate qualifications, a longer election cycle, nomination procedures, who must serve as inspectors of election, verification of voter and candidate information, the inclusion of email addresses in the membership list, and the inspection and retention of election materials.

- Must adopt new election rules;
- Create candidate registration list and voter list and allow member verification at least 30 days before ballots are distributed;
- Send nomination procedures at least 30 days before nomination deadline;
- Candidates must be members. OPTIONAL: (i) current assessments, (ii) no co-owners, (iii) member >1 year, (iv) criminal conviction prevents fidelity bond;
- Cannot suspend voting rights;
- Must allow someone with a general power of attorney to vote for a member;
- May not amend election rules less than 90 days before an election;
- Must use independent inspectors of election; and
- Email addresses now part of membership list.

The bill makes members' email addresses part of the membership list available to all members. It requires elections to be held at minimum every four years. It provides that when a court finds that election procedures were not adopted or adhered to, it shall void the election results unless the association established that its noncompliance did not affect the election results. It allows a member to be awarded attorneys' fees for consulting an attorney for small claims court.

AB 2912: Financial Reviews -- Adds or amends Civil Code sections 5380, 5500, 5501, 5502 and 5806. These new laws add the following requirements:

Associations must maintain fidelity bond/insurance coverage in a minimum amount equal to or exceeding current reserves, plus three months of assessments. The association's fidelity bond/insurance must include computer fraud and funds transfer fraud. If the association uses a managing agent or management company, the association's fidelity bond coverage shall additionally include dishonest acts by that person or entity and its employees.

Any transfers greater than $10,000 or 5% of an association's total combined reserve and operating account deposits, whichever is lower, are prohibited without prior written approval from the board.

The board must review various financial documents and statements on at least a monthly basis rather than quarterly. These documents and statements include the check register, monthly general ledger, and delinquent assessment receivable reports. This review requirement may be met when every member of the board, or a subcommittee of the board including the treasurer and at least one other board member, reviews these documents and statements independent of a board meeting if the review is ratified at the board meeting subsequent to the review and that ratification is reflected in the minutes of that meeting.

As a result of this new law, the board may need to take the following actions:

- Include fidelity coverage in the budget and be sure any existing coverage meets the minimum requirements.
- Address fund transfer limitations in any management agreement and in other instructions and authorizations to management.
- Set up a board subcommittee to review financials monthly.

SB 326. Balcony Inspections; CC&R Restrictions on Construction Defect Actions. (Chaptered) This bill does the following:

- Starting in 2025, condominium associations must have visual inspections of load-bearing components (six feet above ground, supported entirely or substantially by wood) and associated waterproofing systems every nine years. An inspector must submit a report to the board providing the current physical condition and remaining useful life of the load-bearing components and associated waterproofing systems.
- Inspection obligations apply only to buildings with three or more multifamily dwelling units.
- The declarant or developer of a condominium project must submit a complete set of architectural and structural plans and specifications to an association for any buildings containing exterior elevated elements, as specified.
- Voids developer imposed CC&R provisions requiring a vote of the membership to initiate an action against the developer for construction defects as well as any provision that restricts the board's authority to retain legal counsel or incur expenses to pursue a claim.

SB 234. Family Daycare Homes. (Chaptered) - This bill extends the protection that is already applicable to small family daycare homes (8 children) to large family daycare homes (14 children). A large family daycare home is to be treated as a residential use of property. CC&Rs can't contain restrictions related to the use or occupancy of the property as a family daycare home. This applies to daycares in condominium units, and townhouses as well as single family detached homes. It also prohibits refusal to sell or rent to a daycare

provider. The definition of a "family daycare home" is a facility that regularly provides care, protection, and supervision for 14 or fewer children, in the provider's own home, for periods of less than 24 hours per day, while the parents or guardians are away, and is either a large family daycare home or a small family daycare home.

SB 652. Entry doors: Display of Religious Items. (Chaptered) -- This bill would, with certain exceptions, prohibit restrictions on the display of religious items on an entry door or entry door frame of a dwelling. Specifically, SB 652 prohibits a "property owner" (defined to mean an HOA, an HOA board, or landlord) from adopting or enforcing any rule that prohibits the display of one or more **"religious items" on an entry door or doorframe**. The bill defines "religious item" to mean any item displayed "because of sincerely held religious beliefs." The bill also identifies reasonable exceptions, such as allowing an HOA or landlord to prohibit the display of anything that threatens public health or safety, violates existing law, contains obscenities, hinders the opening or closing of any entry door, or is larger than 36" by 12" inches. Also, an HOA may require a separate interest owner to remove a religious item as necessary to perform maintenance on a door or doorframe.

CASE LAW:

2019 CID - NOTABLE CASE LAW

Case Name	Date and Citation	Published?	Summary
Ranch at The Falls, LLC v. O'Neal	38 Cal.App.5th 155 7/31/19	Yes	The trial court ruled in favor of plaintiff, finding it was entitled to an express easement (or in the alternative a prescriptive easement) and an equitable easement over all private streets in a gated community and express and equitable easements over a homeowner lot in an adjacent community. The appellate court found the trial court erred on several points. One was that the individual homeowners within the gated community who owned the private streets were indispensable parties to the lawsuit. Another was that plaintiff did not establish the requirements for prescriptive easement over the private streets. The trial court also failed to make the necessary findings to support equitable easement.
Orchard Estate Homes, Inc. v. The Orchard Homeowner Alliance	32 Cal.App.5th 471 1/29/19	On review with Calif Supreme Court	The statutory language of Civil Code section 4275 requires a finding of five elements in order to authorize a reduction in the required voting percentage, and a finding of voter apathy is not among the list of elements that must be established.
Sands v. Walnut Gardens Condominium Association, Inc.	35 Cal.App.5th 174 5/13/19	Yes	Plaintiffs sued the association for a pipe on the roof that broke causing water damage to their bedroom. The trial court granted a nonsuit in favor of the association. The appellate court reversed. The CC&Rs required the association to keep the project in a "first class condition." Witnesses testified the association failed to perform preventative maintenance and roof pipes had not been inspected or maintained in years.

Obduskey v. McCarthy & Holthus LLP	139 S. Ct. 1029 3/20/19	Yes - US Supreme Court	A law firm that sends a letter in connection with a nonjudicial foreclosure proceeding is not acting as a "debt collector" under the Fair Debt Collection Practices Act (FDCPA). "... but for §1692f(6), those who engage in only nonjudicial foreclosure proceedings are not debt collectors within the meaning of the [Fair Debt Collection Practices] Act." On judicial foreclosures the Court stated: "And whether those who judicially enforce mortgages fall within the scope of the primary definition is a question we can leave for another day. See 879 F. 3d, at 1221–1222 (noting that the availability of a deficiency judgment is a potentially relevant distinction between judicial and nonjudicial foreclosures)."
Curto v. Country Place	921 F.3d 405	Yes	Association's policy of assigning many more swimming pool hours to men on the weeknights was discriminatory because it made certain assumptions about genders, and those assumptions resulted in little access to the pool for women with day jobs. The policy was found to be "facially discriminatory."
UNPUBLISHED CASES:			
Merritt v. Gandhi	12/20/19 2019 WL 7037478	No	The Association changed its parking rules to allow owners with extra vehicles to purchase a parking permit to park in common area spaces. To obtain a permit, the owners had to allow an inspection of their garage to determine if the garage was being used properly. Owner refused to comply and asserted fair housing and disability claims. He lost and the court awarded over $200,000 in attorneys' fees based on CC&R provision. On appeal, the issue was whether attorneys' fees were proper. The court found that the contractual fee clause was broad and enforceable under Civil Codes 1717 – and it did not need to apply the Davis Stirling Act right to fees in enforcement actions at Civil Code Section 5975.
Benlloch v. Johnson	6/4/2019 2019 WL 2353439	No	HOA vice president is removing unauthorized postings on HOA bulletin Board, owner Johnson objects, grabs Benlloch's arm and leaves bloody marks. Johnson calls police who arrest Benlloch. Charges are dropped, but the HOA hires an attorney and a 3-year restraining order is obtained for

			Benlloch and against Johnson. Benlloch seeks and obtains an award for 12K in fees. Johnson appeals, and claims Benlloch has no right to seek fees because the HOA paid the fees. CCP Section 527.6, subdivision(s) provides that the "prevailing party [in a proceeding pursuant to an application for a civil harassment restraining order] may be awarded court costs and attorney's fees, if any." Despite case law holding that even if a third-party funds the fees for a restraining order an award of fees is proper, Johnson argues that the HOA bylaws prohibit the payment. The court of appeals disagreed and upheld the award. This is an important case in that HOA's often pay to protect their directors. This confirms the ability to obtain fees in that effort.
Club Acacia Community Association v. Professional Community Management Company of California	7/11/19 2019 WL 3024491	No	No award of attorney's fees to HOA since dispute was decided in Superior Court and not by arbitration. Contract allowed for prevailing atty fees in arbitration.
Curamus Management v. Sweich	10/9/19 2019 WL 5059013	No	Anti-SLAPP motion denial was upheld against neighboring owner who published statements online against management company and was sued for defamation. The statements were free speech but did not involve a matter of public interest as it only involved a tree dispute. The court rejected the argument that the Defendant was just trying to protect the public against bad management companies, but did state that it might have been different if the online speech was on a consumer oriented website, such as Yelp.
Durant Towers Owners Association v. Winchester	3/29/19 2019 WL 1416974	No	Upstairs owner refuses HOA request for access to repair water leak into downstairs unit. HOA sues without seeking ADR first, and obtains TRO/injunction. Once injunction obtained, HOA dismisses case and seeks fees, arguing that it had obtained its litigation objective and was the prevailing party. HOA is award fees. The appellate court affirms, agreeing that ADR not required and HOA obtained litigation objective, justifying fee award.
Fox Bay Civic Association, Inc. v. Creswell	5/30/19 2019 WL 2305890	No	The Fox Bay Civic Association's CC&Rs prohibited fences. A disabled homeowner constructed a fence around her backyard without the association's

			approval. She wanted to keep her emotional support and service dogs in her yard. Association determined that Creswell had alternatives that did not violate the CC&Rs, such as installing a dog run or invisible fence (which the Association offered to install). Court agreed and said that the disabled owner was entitled to a reasonable accommodation not absolute accommodation. This case has the best quote: "The CC&Rs are "deed restrictions" not "deed suggestions."
Hunkel v. Gerhardt	3/12/2019 2019 WL 1123721	No	Non-Davis Stirling HOA sued an owner for installing a fence. Defendant Owner defending on grounds that the Board was not duly elected, had no bylaws or other processes, and the adhoc decision violated fundamental due process. Trial Court agreed, judgment for Defendants. "When a corporation operates without bylaws and adjudicates decisions ad hoc as things develop, it violates fundamental due process because the members of that small corporation have no reason to expect how things will be adjudicated. Ultimately decisions made in that ad hoc basis violate fundamental due process." Fees of over 100K awarded to Defendants.
Kim v. Kim	1/14/19 2019 WL 181334	No	Association owes no duty to protect candidate's interest in serving as president, so even if candidate was encouraged to run and promised support by acting president and other directors, not actionable if the promise was false.
Miriwa Center Investments v. Miriwa Center Condominium Owners' Association	12/16/19 2019 WL 6870562	No	This case upheld the Association's passage of a rule establishing business hours for the commercial condominium owner to attempt to address issues concerning homeless people sleeping. urinating and defecating in the common areas.. The appellate court analyzed statutes in the commercial and industrial CID act pertaining to operating rules (Sections 6630 and 6632). It also cited to Lamden as to the board's decision-making in adopting the rule.
Richardson v. Huntington Pacific Beach House Condominium Association	8/26/19 2019 WL 40144736	No	HOA violated CC 4600 for failure to obtain membership approval for owner's conversion of a window to a door.

CONSTRUCTION & CONSTRUCTION DEFECT

Prepared by Scott Williams (Williams & Gumbiner LLP)

LEGISLATION:

2018 LEGISLATION

Validity of building permit after change in building code (AB 2913) – A provision of the California Building Standards Law specifies that a local ordinance adding or modifying building standards for residential occupancies, published in the California Building Standards Code, applies only to an application for a building permit submitted after the effective date of the ordinance. This new law instead provides that a permit issued before the effective date of the ordinance will remain valid for purposes of the California Building Standards Law if the work on the site authorized by that permit is commenced within 12 months after its issuance. The law also authorizes a permittee to request and the building official to grant one or more extensions of time for periods of not more than 180 days per extension. (Added H&S Code §§18938.5 & 18938.6.)

Inspections of elevated decks and balconies / apartment buildings (SB 721) – In response to the collapse of a Berkeley apartment balcony during a college party in 2015, which resulted in numerous deaths and injuries, this detailed bill requires the owner of a multifamily residential building containing three or more units to obtain an inspection of the "exterior elevated elements" by a licensed construction professional every six years. The new law addresses reporting and repair requirements, and imposes civil penalties for violations by owners. (Adds H&S Code §17973; amended CC §1954.)

2019 LEGISLATION

Inspections of elevated decks and balconies / HOAs (SB 326) – Last year the Legislature enacted SB 721 to require the periodic inspections of decks and balconies attached to multifamily residential buildings containing three or more units. This year, the Legislature enacted SB 326 to require such inspections for common interest developments. At least once every nine years a structural engineer or architect must conduct a "reasonably competent and diligent visual inspection of a randomly generated and statistically significant sample" of the decks and balconies in buildings containing three or more multi-family units to determine if they comply with safety standards. The inspector must notify the HOA and local code enforcement of any inspection that reveals a threat to the safety of the occupants. (Adds CC §5551.)

Elimination of HOA voting requirements before filing suit (SB 326) – In response to the decision in *Branches Neighborhood Corp. v. CalAtlantic Group, Inc*. (2018) 26 CA5th 743, new Civil Code §5986 provides that attempts by developers to insert provisions in an HOA's governing documents that require a vote of the membership to initiate a construction defect claim are prohibited. All such provisions in existing CC&Rs are null and void, and the statute applies retroactively except as to those cases that have been resolved by a final decision on the merits. (Amends CC §6150 and adds CC §5986.)

Extension of ADR process for public works contractors (AB 456) – Originally enacted in 2016, Public Contracting Code §9204 established ADR procedures for construction contractors' claims on public works projects. With the law set to expire on December 31, 2019, AB 456 extends the sunset date to January 1, 2027. The ADR procedures apply to any contractor "who has entered into a direct contract with a public entity for a public works project." (Amends Pub Cont C §9204.)

Prevailing wage law extended to pre-construction activities (AB 1768) – Under Labor Code §1773, contractors employed for public works projects must pay "prevailing wages." For purposes of the prevailing wage law, this bill expands the definition of "public works" to include work conducted during site assessment or feasibility studies. Under AB 1768, pre-construction work, including design, site assessment, feasibility studies, and land surveying, is deemed part of a public works project, regardless of whether any further construction work is conducted. (Amends Labor C §1720.)

CASE LAW:

CONSTRUCTION CONTRACTS:

Subcontractor's duty to defend developer under indemnity clause in contract
Centex Homes v. R-Help Construction (2019) 32 CA5th 1230

The developer/general contractor (Centex) hired R-Help to trench and install the utility boxes and conduits for a residential development. A pedestrian, who sustained injuries when he fell into one of the utility boxes, sued Centex and R-Help. Centex tendered the defense of the suit to R-Help pursuant to an indemnity clause in the subcontract, but R-Help refused to defend. The trial court submitted the question of duty to defend to the jury, which found that the plaintiff's injuries were not caused by R-Help's work, resulting in a defense verdict.

Held: The determination of the duty to defend is a question of law, not one for the jury. As a matter of law, Centex was entitled to a defense at the outset – regardless of whether it was subsequently determined that R-Help was not at fault. As with liability insurance policies, the duty to defend is broader than the duty to indemnify, and it arises whenever there is a potential of coverage under the policy.

General contractor entitled to withhold retention funds and attorney fees
Regency Midland Constr., Inc. v. Legendary Structures Inc. (2019) 41 CA5th 994

The general contractor (Regency) hired Legendary to perform the concrete work on a new 71-unit apartment building. Legendary quit halfway through the project. Regency hired another contractor to complete the work and withheld 10% of the contract amount due Legendary. The two sued each other and the dispute turned on the "retention" clause in the contract. The court of appeal wrote an entertaining opinion, commenting on the grammatical inadequacies of a sloppily written contract, and how they did or did not impact the result.

Held: Based on the specific language of the retention clause at issue, Regency was entitled to retain the retention funds, and was also the prevailing party for purposes of recovering attorney fees.

CONSTRUCTION DEFECTS:

10-year statute of limitations under SB800
Hensel Phelps Construction Co. v. Superior Court (2020) 44 CA5th 595

Background: CCP §337.15 provides a 10-year "statute of repose" for latent construction deficiencies. In 2002, the Legislature enacted the Right to Repair Act (SB 800, Civil Code §§895 *et seq*.), which provides a statutory scheme for the resolution of residential construction defect claims, including both mandatory prelitigation procedure and substantive law that replaces common law causes of action with a statutory right of action. CC §941, which provides a 10-year statute of repose, replaced §337.15 for purposes of construction defect claims involving residential construction. Both statutes commence upon the "substantial completion" of the project. *Hensel Phelps* is the first published decision to apply §941.

In this case, an HOA sued the developer and general contractor (Hensel Phelps) for construction defects. HP asserted that the HOA's suit was barred by §941, noting that its contract with the developer stipulated to the date of "substantial completion," which date, it argued, was controlling for purposes of §941.

Held: Nice try but no cigar. HP offered no authority for the novel proposition that certain parties may, by contract, conclusively establish the date when a limitations period begins to run on another party's cause of action. The statute does not simply adopt the date determined by private parties to a contract for their own purposes as the date of substantial completion.

HOA voting requirements before filing suit rejected
Aldea Dos Vientos v. CalAtlantic Group (2020) 2020 WL 581464

Background: In a Draconian ruling, the court in *Branches Neighborhood Corp. v. CalAtlantic Group, Inc*. (2018) 26 CA5th 743, upheld a requirement inserted by the developer in the HOA's CC&Rs requiring a formal vote of the membership before initiating a construction defect claim against the developer. Because such a vote was not held, the court affirmed the dismissal of the HOA's arbitration claim against the developer. The *Branches* holding led to the passage of SB 326 (noted above), which retroactively nullifies such voting requirements inserted by developers in CC&Rs.

In this case, as in *Branches*, the HOA failed to obtain a membership vote before initiating a construction defect claim. When the developer discovered that the HOA failed to obtain the required vote, the HOA, as in *Branches*, obtained a vote of the members who retroactively approved the claim – with over 99% of the members approving. As in *Branches*, the arbitrator ruled that retroactive approval was insufficient, and dismissed the claim. The trial court confirmed the award and entered judgment for the developer.

Held: The court could have simply applied SB 326 and ended the discussion there. But instead, it heavily criticized *Branches*, pointing out that the voting provision was unconscionable and violated public policy. Regarding SB 326, the developer pointed to language in the statute that said it "applies retroactively to claims initiated before the effective date of this section, except if those claims have been resolved through an executed settlement, a final arbitration decision, or a final judicial decision on the merits." Based on this language the developer argued that the decision of the arbitrator was final. The court responded: "There is no reason why the Legislature would intend to require a final judicial decision to be on the merits but not a final arbitration decision to be on the merits," and, noting that the arbitrator's decision was not on the merits, interpreted the statute to require a decision on the merits.

CONTRACTORS:

Contractor's "willful" failure to obtain building permit
ACCO Engineered Sys., Inc. v. Contractors' State License Bd. (2018) 30 CA5th 80

A contractor who violated B&P Code §7110 by failing to obtain a building permit before replacing a boiler appealed the $500 penalty imposed by the Contractors' State License Board on the ground that the violation was not "willful" under the statute. *Held*: The statute's use of the term "willful" only requires a showing of *general* intent rather than *specific* intent. The court's interpretation did not convert §7110 into a strict liability statute, because the court imagined situations in which a contractor would not be held liable for failure to obtain a permit.

LIABILITY INSURANCE:

Insurer's burden to prove damage preceded inception of policy
Insurance Co. of the State of Penn. v. American Safety (2019) 32 CA 5th 898

This coverage dispute between the insurers for a developer and grading subcontractor (Camarillo) arose from a construction defect suit by homeowners against the builders. Camarillo's insurer denied coverage based on an anti-*Montrose* exclusion in the policy providing that, in a case involving continuous and progressive property damage, if the damage occurred before the inception date of the policy, all damage is deemed to have occurred prior to the inception date. The insurer argued that, although the homeowners presented evidence that their damages first *manifested* during the Camarillo policy period, the developer's insurer failed to prove that the damage *occurred* during the policy period.

Held: It was not the insured's obligation to prove that damage first *occurred* during the policy period. Once it was shown that physical injury to property first *manifested* during the policy period, the burden shifted to the insurer to prove that is *occurred* prior to the policy period.

Application of "care, custody or control" exclusion in CGL policy
McMillin Homes Constr. v. National Fire & Marine Ins. Co. (2019) 35 CA5th 1042

A general contractor was covered as an additional insured on a commercial general liability (CGL) policy issued to its roofing subcontractor. The roofer's insurer refused to defend the general contractor after it was sued by homeowners for construction defects concerning roofing, prompting the general's suit against the insurer. The trial court held the insurer owed no duty to defend based on the exclusion in the policy for damage to "property in the care, custody or control of the additional insured"; *i.e.*, the trial court held that the general contractor was in "control" of the property.

Held: The court of appeal reversed. The exclusion has been interpreted to require exclusive or complete control by the insured. Here, there was shared control between the general contractor and the roofer. The court considered the maxim that there is a duty to defend whenever there is potential of coverage, and in light of an ambiguity argument, also addressed the general's objectively reasonable expectations of coverage.

MECHANICS LIENS:

Mechanics lien was premature because work was not complete
Precision Framing Sys., Inc. v. Luzuriaga (2019) 39 CA5th 457

General contractor hired to construct veterinary hospital subcontracted with Precision for the framing and trusses. Precision subcontracted with Inland to fabricate the trusses. Precision did not receive full payment and recorded a mechanics lien. A problem with the trusses was thereafter discovered, and Precision's president returned to the site with Inland to resolve the problem. Precision filed suit to foreclose on its mechanics lien.

Held: When a mechanics lien is recorded prematurely, it is void and cannot be enforced. As long as notices of completion were pending, the project could not be considered complete. The court held that "work" under CC §8414(a) refers to the entire structure or scheme of improvement as a whole. The truss repairs were part of Precision's work and, therefore, Precision had not yet ceased work when it recorded the mechanics lien. The court noted that, even if Precision did not know there was a problem with the trusses when it recorded its lien, nothing prevented Precision from recording its lien again after the trusses were repaired.

PUBLIC CONSTRUCTION CONTRACTS:

Application of Subletting and Subcontracting Fair Practices Act
Synergy Project Mgmt., Inc. v. City & County of San Francisco (2019) 33 CA5th 21

The Subletting and Subcontracting Fair Practices Act requires a prime contractor to obtain the awarding authority's consent begore replacing a subcontractor listed in the original bid (Pub Cont Code §4107(a)). The complex factual scenario of this case is worth reading and attempting to digest only if you have a case involving the replacement of a subcontractor on a public works project (or have trouble sleeping).

No conflict of interest arising from award of two public contracts
California Taxpayers Action Network v, Taber Constr. Inc. (2019) 42 CA5th 824

District put out two separate bid requests for a proposed construction project, one for preconstruction planning and the second for performance of the actual construction. Taber was the successfully bidder for both phases of the project. CTAN sued Taber alleging that Taber's participation in the planning phase constituted a conflict of interest under Govt. Code §1090, barring it from being awarded the phase two contract.

Held: There was no conflict of interest. Although Taber's involvement in the preconstruction phase of the project may have influenced the design of the project, it could not have influenced its own selection as

contractor because that selection had already been made.

JOBSITE INJURY:

Application of peculiar risk doctrine to jobsite injury
Johnson v Raytheon Co. (2019) 33 CA5th 617

Raytheon hired a prime contractor for its water-cooling tower renovation project (Systems XT), and an independent contractor to provide control room staff (ABM). An employee of a subcontractor hired by ABM was injured when he fell from a ladder left on the site by one of System XT's subcontractors. The employee sued everyone.

Held: Raytheon could not be held liable under *Privette's* application of the peculiar risk doctrine, or the *Hooker* exception to the doctrine because it did not guarantee that the ladder was a safe replacement for the platform ladder which should have been used. A hirer may be held liable for its omissions in some circumstances, but this was not one of them.

FINANCE - MORTGAGE LOANS & FORECLOSURES

Prepared by Spencer P. Scheer (Scheer Law Group, LLP)

LEGISLATION:

California Home Owner Bill of Rights: California Home Owner Bill of Rights:

- Original HOBR in 2013-2017.
- Sunset and new provisions effective 1.1.18. (See e.g. Civ. Code §§ 2923.5, 2923.55).
- Reinstatement of Original HOBR (with some modifications), effective 1.1.19. **Note:** Changes of Note re the reinstated HOBR, Below

California Successor/Survivor Bill of Rights (Codified in CA Civ. Code §2920.7) was added to the original HOBR, and was set to sunset on January 1, 2020, unless extended. Provisions not extended so sunset on January 1, 2020.

- **Note:** there are federal procedures governing successor rights and servicer obligations under TILA/RESPA (See generally 12 CFR §1024.36). These federal provisions are not the same as those contained in CA Civ. Code §2920.7.

Amendments to Cal Military and Veterans Code: Mil. & Vet. Code, §§ 400 to 409.13 (Effective January 1, 2019), CA amended Section 408 of the California Military and Veterans Code, to limit foreclosures as follows without a court order and until 12 months after service ends:

> Mil. & Vet. Code, § 408:
> (c) No sale, foreclosure, or seizure of property for nonpayment of any sum due under any obligation as provided in subdivision (a), or for any other breach of the terms thereof, whether under a power of sale, under a judgment entered upon warrant of attorney to confess judgment contained therein, or otherwise, shall be valid if made during the period of military service or within one year thereafter, except pursuant to an agreement between the parties made after the nonpayment or breach, unless upon an order previously granted by the court and a return thereto made and approved by the court.

Note: The time spent in the military is not counted in the 12 month sale prohibition (Mil. & Vet. Code, § 404, subd. (a)). Also, under state law the protection against foreclosure applies to all active duty military, even if the loan was originated prior to the time of active military service.

Amendment to CA Rosenthal Act (CA-FDCPA), Civ. Code §1788.14 (Effective January 1, 2019). Provisions of the CA FDCPA were amended, effective January 1, 2019, The new law requires that debt collectors disclose statute of limitations ("**SOL**") problems in written communications and limits collection actions that can be taken in such cases. **It is unclear** whether the statute applies to real property foreclosures where the lender is not suing but is foreclosing.

CCP 337(d), effective January 1, 2019, now sets forth that a debt collector may not **initiate** a lawsuit if the statute of limitations has already expired, subject only to the exception in Code Civ. Proc., § 360, which extends the statute of limitations where there is a written acknowledgment of the continuing contract or debt but not more than 4 years after the original obligation matured. Payments may indicate the continuing obligation.

Senate Bill 18 (§ 3, eff. Jan. 1, 2020. Repeals sunset date of December 31, 2019 for CCP Section 1161b). Keeps in effect law requiring a minimum of a 90-day notice to quit following the completion of a foreclosure before an unlawful detainer proceeding can be initiated against a residential tenant or other occupant of the foreclosed property, if it includes a residential unit. The 90-day period applies even if the lease is only for a period of less than 90 days or month-to-month. If an arm's length lease and is for a fixed term and entered into prior to the foreclosure sale, the tenant may remain in possession for the *full term*, and may not be terminated on 90 days' notice, unless a specific exception to the full-term statutory right of possession applies

H.R. 3311; S. 1091) (Small Business Reorganization Act Added to Bankruptcy Code).

- Subchapter V now added as additional option in a Chapter 11 bankruptcy. It is for both individuals and entities **Impact:** Individual Debtor's Operating a Business Now Have More Options i.e. Chapter 13, Chapter 11, Chapter 11, Subchapter V.
- Available to "Small Business Debtors engaged in commercial and business actives having aggregate non-contingent liquidated secured and unsecured debt, excluding debt to insiders or affiliates of not more than $2,725, 626 (as of April 4, 2019). No less than 50% of debt must arise from commercial or business purposes.
    - **Real estate exclusion modified;** Single Asset RE debtor ineligible. Debtors whose primary activity is to own or operate more than one property will now be eligible.
- Debtor must opt-in to Subchapter V.
- Subchapter V Debtor is a "debtor in possession", with rights of a standing trustee.
- **Notable Provisions:** 60 day Mandatory Conference; Debtor has 90 days to file a plan there can be no creditor or competing plans; Disclosure Statement not required unless ordered by Court; Absolute Priority Rule (prohibition on owner retaining interest in debtor without payment non-consenting impaired classes) not applicable; Confirmation can occur without the vote of any impaired class.

CASE LAW:

U.S. Supreme Court Rejects Subjective Belief and Strict Liability Standards in Determining Bankruptcy Discharge Violations
Taggart v. Lorenzen (2019) 139 S.Ct. 1795 [204 L.Ed.2d 129].

The Court rejected the Ninth Circuit's "good faith belief" standard in determining if there was a violation of the bankruptcy code discharge injunction. Recognizing that creditors often have the "upper hand" when dealing with debtors, Judge Breyer said that the rule proposed by the circuit court "may too often lead creditors who stand on shaky legal ground to collect discharged debts, forcing debtors back into litigation (with its accompanying costs) to protect the discharge that it was the very purpose of the bankruptcy proceeding to provide."
On the other hand, Breyer also rejected a strict-liability standard that would authorize a contempt finding "regardless of the creditors' subjective beliefs about the scope of the discharge order, and regardless of whether there was a reasonable basis for concluding that the creditor's conduct did not violate the order."
This is good news for lenders

Default Interest Standards as Contractual Right or Unlawful Penalty now on Appeal:
East West Bank v. Altadena Lincoln Crossing, LLC (C.D. Cal. 2019) 598 B.R. 633, 639 (now on appeal 9th Cir. Apr. 03, 2019).

Court looked back to prior CA Supreme Court decisions in finding that parties can contractually be bound to default interest provisions, apart from a determination of whether the increased rate is a penalty under CCP § 1671.

Servicer must Identify Investor Reasons for Disallowance of Loan Modification, per Cal. Civ. Code §2923.6(f):
Potocki v Wells Fargo Bank, N.A. (2019) 38 Cal. App. 5th, 566.

Lender's explanation for its denial of borrowers' Home Affordable Modification Program (HAMP) application was insufficiently detailed to comply with the Homeowner Bill of Rights, which required a servicer, following the denial of a loan modification, to send written notice identifying the reasons for the denial; the explanation, that lender lacked the contractual authority to modify the loan because of limitations in its servicing agreement, was ambiguous and appeared to imply the investor did not want to approve it, without providing specific reasons for the investor disallowance.

When Lender Agrees to Loan Modification Deferring Delinquent Payments, it Cannot Require that such payments be paid upon Subsequent Loan Default
Taniguchi v. Restoration Homes LLC (2019) 43 Cal.App.5th 478, 484 [256 Cal.Rptr.3d 679, 683], *review filed (Jan. 16, 2020)*

> The Court of Appeal analyzed California Civil Code section 2924c, which allows a borrower to reinstate a loan by paying all amounts due, and Section 2953, which limits the ability of a borrower to waive his or her right of reinstatement and makes any such agreement void.
>
> The court held that modification is appropriately viewed as the making or renewal of a loan secured by a deed of trust. It is thus subject to the anti-waiver provisions of section 2953. The court reasoned that after the renewal (*i.e.*, the modification), "the debtor is not in breach or default so long as the amended or renewed terms of the indebtedness are performed. But requiring the borrower to also pay the arrears that gave rise to the modification in the first place may deprive the borrower of reinstatement rights.

Second Appellate District Holds No Duty Under Tort Law When Reviewing Loan Modification Application:
Sheen v. Wells Fargo Bank (2019) 38 CA 5th 346.

CA courts are divided on whether lender owes a duty to borrower under tort law during the loan modification process. The Second Circuit finds that no such duty exists during contract negotiations (loan modification discussions) and further fond that there were no allegations of personal injury or property damage supporting the claims.

New Case with Potential for Devastating Impact to Foreclosing Lenders After Relief from Bankruptcy Stay Obtained:
Williams v. 21st Mortgage Corporation (2020) 44 Cal.App.5th 495.

> Court holds that Civ. Code §2924c prohibits requesting reinstatement demand for amounts to be paid via plan in bankruptcy when payments are still being made via plan. Lender's must tailor relief from stay orders and cease plan distributions accordingly.

Law Firm Engaged only in Respect to Non-Judicial Foreclosure Process, not a Debt Collector Under FDCPA.
Obduskey v. McCarthy & Holthus LLP (2019) 139 S.Ct. 1029 [203 L.Ed.2d 390].

> The Supreme Court held that a business such as the law firm that is engaged in no more than the kind of security-interest enforcement at issue here, that is, nonjudicial foreclosure proceedings, is not a "debt collector" subject to the main coverage of the FDCPA, except for the limited purpose of 15 USC §1692f (6) (threatening to take non-judicial action under specified conditions).

Sky Not so Black for Lender. Lender Foreclosing Itself Out can Sue for Deficiency;
Black Sky Capital, LLC v. Cobb (2019) 7 Cal.5th 156 [246 Cal.Rptr.3d 583, 439 P.3d 1149].

> California Supreme Court issued a ruling that upsets 25 years of precedent prohibiting a lender with multiple deeds of trust on real property from obtaining a deficiency judgment against the borrower when the lender forecloses its senior lien. The court held that prior established authority (Simon v. Superior Court (1992) 4 Cal.App.4th 63, 66) and its progeny wrongfully interpreted and read non-existent language into the anti-deficiency statute (CCP § 580 (d)) by applying it to multiple deeds of trust. Instead, the Court found that the anti-deficiency statute applies only to a creditor seeking a deficiency on the loan that was foreclosed, not to separate junior loans, even if held by the same creditor.

Expanded Borrower Rights to Attorney's Fees under HOBR TRO Application 2019 WL 4051751
Hardie v. Nationstar Mortgage LLC (2019) 32 Cal.App.5th 714, 720 [243 Cal.Rptr.3d 911, 913]; See Also: *Bustos v. Wells Fargo Bank, N.A.* (2019) 39 Cal.App.5th 369, 380 [252 Cal.Rptr.3d 172, 179], *reh'g denied (Sept. 27, 2019), review denied (Nov. 20, 2019).*

Two CA Appellate Districts now hold that a borrower applying at a TRO hearing are eligible to claim reimbursement for attorney's under HOBR (Civ. Code §2924,12, allowing discretionary award of fees if borrower the prevailing party. Primary concerns to the lender are: The short notice required for a borrower to obtain a TRO and the oftentimes inability of a lender or servicer to appear to oppose on short notice; and the willingness of courts to grant a TRO based on insubstantial evidence, pending a further hearing on the application for a preliminary injunction. This highlights the need for lenders and servicers to respond to every TRO application citing HOBR and requesting fees or to face later claims for repayment of the borrower's fees and costs.

Predatory Lending: Loans to Consumers and the Business/Investment Purpose Exception:
Clenney-Martinez v. Miramontes (Cal. Ct. App., June 20, 2019, No. B288398) 2019 WL 2537691, at *6 (unpuliblished).

Court holds that CA Predatory Lending Statute (Fin. Code §4973) not applicable when security taken for loan is not secured by the real property used or intended to be used as consumer's principal dwelling. In this case, the borrower was living elsewhere went the loan was made and intended to continue to live there.

The bigger picture in the "hard-money" lending world is that borrowers are obtaining huge verdicts and settlements aghast brokers, lenders and investors. They do so by challenging, "disguised" or disputed business purpose loans under state and federal statutes such as this one and under general tort theories. Many lender/investors think that it is sufficient to just have the borrower sign loan documents asserting a business or investment purpose. This is very dangerous. Imputation of agency liability to a lender/investor for the actions of an originating broker adds to the risk. Industry wide revisions to broker/lender/loan origination documentation (to at least evidence a review of the business purpose and claimed use of funds) is one emerging trend.

EASEMENTS & BOUNDARY DISPUTES

Len Rifkind (Rifkind Law Group)

CASE LAW:

Using your neighbor's land for a significant period of time and improving it does not necessarily establish an irrevocable license.
Shoen v. Zacarias (2019) 33 Cal.App.5th 1112.

Facts. The parties are neighbors whose rear yards are steep upward hillsides. Approximately halfway up the hillside is a flat area and the common boundary line zigzags through this patch. Prior owners had improved the flat area with three concrete meditation pads and ornamental gravel. Railroad tie stairs lead to the area from one property and just short of the pad from the other property. Zacarias mistakenly believed she owned the entire patch and made various improvements: Grading, removed overgrown brush, installed more ornamental gravel, planted a hedge and installed a 1-foot perimeter fence, put up a cloth cabana with furniture, installed electrical conduit and irrigation. Thereafter, Shoen's seller discloses Zacarius encroachments, and Shoen closes escrow. Shoen permits the use to continue to be a good neighbor. Subsequently, Shoen decided she wanted to use her portion of the flat area and asked Zacarias to vacate possession, who ignored the requests. In the first case, the trial court granted Zacarias an equitable easement reversed on appeal that moving portable furniture was not greatly disproportionate to Shoen losing use of her property. On remand, Zacarias contended she had an irrevocable license based on Shoen's acquiescence. Zacarias also sought an injunction against Shoen's video camera on a claim of private nuisance. The trial court found Zacarias had spent at most $25,000 to improve and maintain the disputed area, and most of that prior to Shoen's acquiescence. The trial court also ordered the video cameras to be removed. The trial court granted the claim for an irrevocable license to be permanent.

Held. The license was reversed on appeal because such licenses may only be granted if the expenditures in the reliance on the license are substantial, considerable and great. (*Richardson v. Franc* (2015) 233 Cal.App.4th 744, 756. Here, the expenditures did not meet the standard and an irrevocable license should not have been granted by the trial court.

Electric utility owns permanent easements (converted from floating easements) over agreed-on access routes, given (1) conveyance specifically gave utility "free access," (2) decades in which prior landowners had allowed utility to use property, and (3) current landowner's agreement to allow utility's free use.
Southern Cal. Edison v. Severns (2019) 39 Cal.App.5th 815.

Facts. Defendant Landowner had a 15.82-acre property parcel burdened by three public utility easements consisting of a 10-foot-wide strip along the eastern boundary of the property containing electrical power lines and power poles. In 2008, Landowner took steps to prevent Plaintiff Utility's access to the strip of land. In response to complaints about a lack of access, Landowner suggested that Utility use other adjacent properties or helicopters to access the strip of land. Thus, the parties disagreed on whether Utility had the right to access the 10-foot-wide land strip by crossing other parts of the property.

Trial Court. Utility sued for interference with its easements and for declaratory relief. Landowner cross-complained, seeking damages for nuisance, trespass, and ejectment. The trial court found that Utility enjoyed floating easements over the property to access its electrical facilities. Although the floating easements burdened the property at the time of creation, they did not become fixed easements until Utility and Landowner agreed on the access routes. Once agreement had been reached, the trial court found that Utility became the owner of an easement of reasonable width over each agreed-on access route. Thus, Utility was entitled to free access to those routes.
On appeal, Landowner argued that the easements were defined by the metes-and-bounds descriptions in the recorded conveyances. The court of appeal disagreed and affirmed, holding that Utility owned three floating easements, which became fixed easements, over the agreed-on access routes. Notably, the recorded deeds specifically conveyed easements with "free access," so Utility was entitled to some right of access over Landowner's property to reach its electrical facilities located in the specific easements. Given the decades in

which the prior landowners had allowed Utility to freely drive over their property, and the 2006-2008 agreement of Landowner to allow Utility's free use, the floating access easements became fixed easements. Once the easements became fixed based on the long and uncontested history of use of the property, no change could be made without the parties' consent. It was irrelevant that Utility could have accessed the strip of land using an adjacent property, because the recorded conveyances gave Utility contractual access rights.

The court also held that Utility did not forfeit its statute of limitations defense to Landowner's cross-claims. Notably, Landowner made no objection to Utility's pleading of the statute of limitations defense, either through a demurrer or in opposition to Utility's summary adjudication motion. Thus, Landowner waived any such objection to the pleading.

Furthermore, because the trial court's findings established that the alleged nuisance was permanent, Landowner's challenge to the summary adjudication ruling was moot. Under CCP §338(b), one must file a cross-claim alleging property damage within 3 years of the damage. Landowner did not file his cross-complaint based on a permanent, rather than continuing, nuisance within 3 years, since the original damage occurred in 2008 and he did not file his cross-complaint until 2013.

Take Away. To avoid floating easements usually sought by utilities, but sometimes occur with sloppy drafting or a desire to avoid surveyor expenses, specify the access by metes and bounds. Here, the power poles were located in a specific location, but the access to the poles were not.

Civil Code section 1009, subdivision (b) generally prohibits implied-in-fact dedications of private noncoastal property.
Mikkelsen v. Hansen (2019) 31 Cal.App.5th 170.

Facts. Defendants/Landowners erected a wall across a pedestrian path in a subdivision. A group of current and former subdivision residents (Plaintiffs/Residents) asked the trial court to enjoin Landowners from impeding public use of the path. Residents argued a common law dedication of the subdivision segment was both implied in fact and implied in law.

Held. The trial court issued a permanent injunction and then granted Residents their attorney fees. On appeal, the court of appeal reversed.

Rationale. During the appeal, the California Supreme Court decided *Scher v Burke* (2017) 3 Cal.5th 136, 147, which held that Civil Code section 1009, subdivision (b) (enacted in 1972) prohibits reliance on post-1972 public use to support a claim of implied dedication. Under *Scher*, before an express or implied common law dedication may be upheld, the landowner must make a dedication offer and the public must accept that offer, either expressly or impliedly. Under Section 1009, subdivision (b), a landowner must give an "express written irrevocable offer of dedication of [the] property to [public] use" and "the county, city, or other public body" must accept that offer.
Although the parties agreed that *Scher* abrogated the superior court's injunction of an implied-in-law dedication, Residents argued that the judgment must be upheld because an implied-in-fact dedication remained possible. The Court of Appeal ruled that Section 1009, subdivision (b) instructs that no public use shall "ripen" after 1972. Residents argued the that term "ripen" applies only in a prescriptive context, which was not the situation here. The court opined that had the legislature intended to limit the scope of Section 1009, subdivision (b) to exclude implied-in-fact dedications, it was capable of using more specific language to make its intent clear. Further, Residents' construction would make the statutory language requiring "an express written irrevocable offer of dedication" to be accepted by a public body superfluous, which is contrary to rules of statutory interpretation. Therefore, the Court of Appeal reversed both the judgment and the postjudgment order awarding fees, holding that section 1009 subdivision (b) generally prohibits implied-in-fact dedications of private noncoastal property.

Prescriptive easement, granted to allow neighboring property owner access to scenic sand dunes, was not prohibited public easement.
Ditzian v. Unger (2019) 31 Cal.App.5th 738.

Facts. Property Owners own neighboring parcels in Mendocino County. The scenic sand dunes of MacKerricher State Park are behind the parcels. Property Owners historically accessed the dunes using a path that runs along Property Owners' property line, then crossed Neighbors' property, and then crossed the parcel of another neighbor. In 2015, Neighbors erected a fence that blocked Property Owners' access to the dunes on the property line path. Property Owners sued.

Held. The trial court granted Property Owners a prescriptive easement allowing them and their invitees (including Airbnb guests) to use the path. The court of appeal affirmed.

Rationale. A prescriptive easement requires use of the property in an open, notorious, continuous, and adverse manner for an uninterrupted period of five years. Neighbors claimed no prescriptive easement could be formed because it constituted a prohibited public easement under Civil Code section 1009, which states in pertinent part it is "in the best interests of the state to encourage owners of private real property to continue to make their lands available for public recreational use," and because owners who allow "members of the public to use, enjoy or pass over their property for recreational purposes" risk loss of the property rights, "no use of such property by the public … shall ever ripen to confer upon the public or any governmental body or unit a vested right to continue to make such use permanently, in the absence of an express written irrevocable offer of dedication."

In contrast, the easement here was private, appurtenant to Neighbors' property, and did not extend to the public generally. No authority prohibits an appurtenant easement from benefiting vacation renters. Allowing renters to use the easement did not result in "a substantial increase or change of burden on the servient tenement" because the number of people using the easement did not change from when renters or owners occupied the property.

Neighbors contended that Property Owners had unclean hands, which doctrine did not apply here, despite Property Owners' delay in seeking a vacation rental permit. That delay was not inequitable conduct directly related to the case before the court and did not impact the relationship between the parties. Here, Property Owners continuously used the path without any interference from Neighbors, and that use constituted "presumptive evidence of [the easement's] existence and in the absence of evidence of mere permissive use it will be sufficient to sustain a judgment."

Horse ranch owner not entitled to access easements by prescription or equity over one adjacent gated community (Indian Springs) and over homeowner's lot in another adjacent gated community (Indian Oaks).
Ranch at the Falls LLC v. O'Neal (2019) 38 Cal.App.5th 155.

Facts. In 2002, Ranch Owner bought Ranch, a property in the Indian Springs gated community, and moved into the community in 2008. From 2005 to 2012, Ranch Owner also owned property in the Indian Oaks gated community. The Indian Oaks homeowners association requested Ranch Owner cease using its private streets for Ranch purposes and asserted a violation of its covenants, conditions, and restrictions (CC&Rs). The Indian Springs homeowners association made a similar request, but limited Ranch Owner's use to one roadway. Ranch Owner claimed easements over both residential gated communities in which she had no ownership interest on the following legal theories:

- Ranch required access from the West to where she or her lessee stabled horses owned by them and by members of the public.
- Ranch required access for Ranch operations, such as deliveries of supplies in large semi-trucks, removal of manure, visits by veterinarians, and access by members of the public to ride or visit their horses.

Held. The trial court granted Ranch Owner's quiet title action, but the court of appeal reversed.

Rationale. The court of appeal concluded that "the trial court erred on several points" and stated that none of the asserted easements was enforceable, except for one express easement evidenced in a recorded grant over a specific route. Consequently, there was no basis for an award of damages or attorney fees to Ranch Owner.

- An express easement (granted as part of the development of the Indian Springs gated community) by its terms (including an appended map) clearly applied only to one specific route, not all the private streets of the Indian Springs gated community.

- When the trial court's judgment decreed an express easement "or, alternatively, a prescriptive easement" over Indian Springs and Indian Oaks gated community private streets, the court's statement of decision did not mention or discuss a prescriptive easement. Notably, Ranch Owner failed to prove the statutory elements required for a prescriptive easement (open, notorious, continuous, and adverse use for 5 uninterrupted years). Ranch Owner's use could not be hostile until 2012 because she actually owned properties in the gated communities over which she claimed easements.

- The trial court did not make the findings necessary to support an equitable easement, and the trial record did not contain evidence "to support the factors that are necessary to impose an equitable easement" over the private streets of Indian Springs and Indian Oaks gated communities. Courts must balance the relative hardships of each party; the trial court here disfavored the other homeowners' substantial interest in the exclusive use of their private streets, particularly given the large semi-trucks servicing Ranch. Significantly, the trial court did not properly consider a critical, required factor to find an equitable easement: whether Ranch Owner's conduct "was innocent, rather than willful or negligent." Ranch Owner was not innocent because she knew about access difficulties when she bought Ranch.

- Another 2010 recorded easement with a roadway over one homeowner's lot was found to have benefited Ranch Owner in particular when she owned an adjacent property, but Ranch was not specifically benefited in the easement. Ranch Owner had at one time owned both the servient and the dominant tenements, but she ultimately sold both properties. Her stated intention to grant an easement to Ranch was not borne out in the actual recorded easement, which granted an unambiguous easement "running with the land" to the dominant tenement. In any event, that easement could not be used without also using the private streets of the Indian Springs gated community.

Finally, the court of appeal ruled that 18 homeowners in the Indian Springs gated community, who were not joined as defendants in the action but were bound by the judgment as third party movants, should have had their motion to vacate the judgment granted. The trial court denied that motion in error.

In action involving disputed easement, servient tenement owner filed timely anti-SLAPP motion on newly pleaded claims within 60 days of amended complaint.
Starview Prop., LLC v. Lee (2019) 41 Cal.App.5th 203.

Facts. Predecessors to two adjoining landowners granted and accepted a driveway easement. One year later, both parties amended the easement agreement to jointly agree: "Should any further documents be necessary … for the purpose of perfecting title …, the parties hereto mutually agree to execute such additional documents." Then decades later, the two adjoining landowners began a bitter dispute over the easement. Dominant Tenement Owner wanted to remodel a home on the property and sought city approval. City conditioned its approval on the joint execution of a Covenant and Agreement for Community Driveway. Servient Tenement Owners refused to sign the required document unless the Dominant Tenement Owner paid them $5000. Dominant Tenement Owner resolved city's parking concerns by installing a vehicle lift system and the remodel was approved. Then, Dominant Tenement Owner sued Servient Tenement Owners for their contractual failure to sign City's covenant. Later, Dominant Tenement Owner amended its complaint to add causes of action for negligent and intentional interference with easement, breach of the implied covenant of good faith, and private nuisance. Some discovery had begun. Servient Tenement Owners filed an anti-SLAPP motion under Code of Civil Procedure section 425.16.

Held. The trial court found the motion untimely and the court of appeal reversed.

Rationale. One may file an anti-SLAPP motion within 60 days of an amended complaint as long as the new

causes of action were not susceptible to a prior anti-SLAPP motion. Dominant Tenement Owner unpersuasively argued that the anti-SLAPP motion could have been brought at the time the original complaint was filed because the newly pleaded claims were based on previously asserted facts. But this argument misstates the law. An anti-SLAPP motion allows a party to strike a cause of action *arising from* one's protected activity, and this does not deal with "merely factual allegations." Here, there was no ability to challenge the new causes of action until the amended complaint was filed. "As a matter of law and common sense, an anti-SLAPP motion cannot be brought to strike a claim until the plaintiff asserts it." This rule keeps the plaintiff from waiting to file certain claims, thus thwarting the purpose of the anti-SLAPP statute. Having found that Servient Tenement Owners' anti-SLAPP motion was timely, the court of appeal declined to consider the merits of the motion and remanded the case to the trial court.

Agreed Boundary Doctrine Proven Through Hearsay Testimony Because Witness Unavailable.
McDermott Ranch, LLC v. Connolly Ranch, Inc. (2019) 43 Cal. App. 5th 549

Facts: Landowner brought quiet title action against neighbor arising out of boundary dispute, seeking declaratory relief and alleging breach of implied contract and trespass. Neighbor counterclaimed to quiet title and for declaratory relief. The trial court awarded Connolly a disputed 58 acres under the agreed boundary doctrine, in part based on testimony from Mark Connolly (Mark) regarding statements made by his father Robert Connolly (Robert) about the background and intent of the parties in entering into a 1958 transaction. Robert had negotiated the deal on behalf of his mother Ann Connolly, who was a predecessor in interest to Connolly.

Held. The trial court granted summary judgment to neighbor as to breach of implied contract and trespass claims and, after bench trial, awarded disputed property to neighbor.
The Court of Appeal affirmed, holding as a matter of apparent first impression, fact that a party has an interest in disputed boundary of land does not per se preclude admission of that party's statement concerning boundary, pursuant to statute allowing admission of statements concerning boundary if declarant is unavailable and had sufficient knowledge of subject, and
The trial court acted within its discretion in admitting neighbor's testimony as to his father's statements concerning location of disputed boundary.

Issue. Whether a statement concerning boundaries is not rendered untrustworthy under Evidence Code section 1323 because the declarant had an ownership interest in the property at issue.

Answer: No witness available (i.e., still alive) who participated in resolution of boundary dispute in 1958. Accordingly, the trial court admitted testimony from one of the parties (Mark Connolly), who was the son of one of the two people who had negotiated the 1958 resolution.

Rationale. McDermott objected to Mark's testimony regarding Robert's statements as hearsay. McDermott argued Mark was not trustworthy. Connolly argued the testimony was admissible pursuant to sections 1323 and 1250. The trial court found the testimony admissible as an exception to the hearsay rule pursuant to section 1323. The trial court noted that Robert had personal knowledge of the 1958 transaction because he negotiated the exchange. Robert was deceased and therefore unavailable.

LAND USE

Prepared by Riley Hurd (Ragghianti Freitas LLP)

LEGISLATION:

AB 1736 – Enhanced Affordable Housing Density Bonus

Beginning January 1, 2020, AB 1763 will allow projects that provide 100% affordable housing (no more than 20% moderate-income, and the rest for lower-income) to seek an 80% increase in density from the previously allowed 35% increase. The 80% density bonus represents the first time the Legislature has specifically tailored a density bonus to completely affordable housing projects, and has allowed owners to meet affordable rent requirements with the maximum rents allowed under the low income housing tax credit program. If the project is located within a half mile of a major transit stop, AB 1763 goes even further by eliminating all local government limits on density, and allowing a height increase of up to three stories or 33 feet.

Prior to the passage of AB 1763, projects qualifying for a density bonus were entitled to one to three "incentives" and "concessions" to help make the development of affordable and senior housing more economically feasible. AB 1763 provides a fourth incentive and concession to 100% affordable projects. Local governments are required to grant the applicant's proposed concession or incentive unless it would not reduce project costs, would cause public health or safety or environmental problems, would harm historical property, or would be otherwise contrary to law. Qualifying developers are entitled to incentives and concessions even without a request for density bonus units.

SB 330- Housing Crisis Act of 2019

SB 330 provides a set of limited reforms to the Housing Accountability Act (HAA), Planning and Zoning Law, and Permit Streamlining Act. SB 330 tightens the protections for development projects under the HAA by limiting a jurisdiction's ability to change development standards and zoning applicable to the project once a "preliminary application" is submitted. It also prevents jurisdictions from increasing exactions or fees during a project's application period, and only allows such increases if the resolution or ordinance establishing the fee calls for automatic increases in the fee over time. If the development project does not start construction within 2 ½ years of final approval or the project is modified to include 20% or more residential units or square footage, then a jurisdiction can subject a project to new standards.

The bill also amends the Permit Streamlining Act to specify what constitutes a "preliminary application" and states that a jurisdiction has one chance to identify incomplete items in an initial application, and after that may not request any new information. The bill also reduces the time in which a lead agency is required to approve or disapprove certain housing projects.

Finally, the bill prohibits a jurisdiction (with some exceptions) from enacting development policies, standards or conditions that would change current zoning and general plan designations of land to "lessen the intensity of housing"; from placing a moratorium or similar restrictions on housing development; and from limiting or capping the number of land use approvals or permits.

AB 1485 – Streamlining Housing Development

AB 1485 makes a number of important clarifications to SB 35 of 2017, a law that allows qualifying housing and housing-rich mixed use projects to qualify for a streamlined, ministerial CEQA-exempt approval process if the project meets the local government's objective zoning, subdivision and design review standards, provides a specific minimum number of affordable housing units, agrees to pay prevailing wages to construction workers, and meets other qualifying criteria.

AB 1485 amends/clarifies SB 35 as follows:

- Broadens eligibility for SB 35 to Bay Area projects that provide 20 percent of their units for moderate-income households (less than 120% of area median income), under certain conditions.
- The calculation to determine if a project qualifies for SB 35 where it consists of two-thirds residential excludes underground space such as parking garages and basements.
- The 3-year expiration for SB 35 approval in case of litigation expires 3 years after a final judgment

upholding the approval, and clarifies that the approval also remains valid as long as vertical construction has begun and is in progress.

- The standard for determining whether a project shall be deemed consistent with objective planning standards is highly deferential to the project applicant. A project complies with SB 35 as long as "there is substantial evidence that would allow a reasonable person to conclude" that the development qualifies. Any permits subsequent to the streamlined, ministerial approval are required to be issued if the application substantially complies with the development as it was approved.
- Under existing law, SB 35 projects are entitled to protection under the Housing Accountability Act.

AB 1483 – Housing Impact Fee Data Collection and Reporting
AB 1483 requires local agencies to make information available on housing development fees, applicable zoning ordinances and standards, annual fee reports and archived nexus fee studies. Such agencies are then required to update the information within 30 days of any changes. Additionally, HCD will be required, on or after Jan 1, 2020, to prepare a 10-year housing data strategy that identifies the data useful to enforce existing housing laws and inform state housing policymaking. Among other information requirements, the strategy must include information that provides a better understanding of project appeals, approvals, delays and denials and provides an understanding of the process, certainty, costs and time to approve housing.

AB 101 – Housing Development and Financing 2019-20 Budget Act
Effective as of July 31, 2019, AB 1010 requires local governments to provide "by right," CEQA-exempt approvals to certain qualifying navigation centers that move homeless Californians into permanent housing. The act also creates additional incentives for cities to comply with their mandates to plan for sufficient housing under Housing Element law, creates steep penalties for cities that refuse to comply with Housing Element law, and ties financial incentives to cities that adopt "pro-housing" policies.

AB 1560- California Environmental Quality Act "Major Transit Stop"
AB 1560 broadens the definition of a "major transit stop," which exempts from CEQA residential infill projects located within ½ mile from a major transit stop. The broadened definition of a major transit stop includes bus rapid transit stations. Bus rapid transit is defined as public mass transit service which includes (1) full-time dedicated bus lanes or operation in separate right-of-way dedicated for public transportation with frequency of service interval of 15 minutes or less during morning and afternoon peak commute periods, (2) transit signal priority, (3) all-door boarding, (4) fare collection system that promotes efficiency and (5) defined stations.

AB 1515- Limits Remedy For Community Plan Update Cases
Adds Govt C §§65458-65458.3. Enacts Government Code §65458.1 specifying that, if a court finds a CEQA defect in a community plan update, the approval of a specific project pursuant to that update may not be set aside. Applies if the project was approved, or application deemed complete, prior to the court order finding the plan update to be inadequate.

SB 99 - General Plan Safety Elements To Include Emergency Evacuation Routes
Amends Govt C §65302. The Planning and Zoning Law requires the legislative body of a city or county to adopt a comprehensive, long-term general plan that includes various elements, including a housing element and a safety element for the protection of the community from unreasonable risks associated with the effects of various geologic and seismic hazards, flooding, and wildfires. Existing law requires the safety element to address, among other things, evacuation routes related to identified fire and geologic hazards. Existing law requires the housing element to be revised according to a specific schedule. Existing law requires the planning agency to review and, if necessary, revise the safety element upon each revision of the housing element or local hazard mitigation plan, but not less than once every 8 years, to identify new information relating to flood and fire hazards and climate adaptation and resiliency strategies applicable to the city or county that was not available during the previous revision of the safety element.

This bill would require the city or county, upon the next revision of the housing element on or after January 1, 2020, to review and update the safety element to include information identifying residential developments in hazard areas that do not have at least 2 emergency evacuation routes. By increasing the duties of local officials, this bill would impose a state-mandated local program.

Accessory Dwelling Units
A package of laws, **AB 68, AB 881, SB 13, AB 670**, **AB 671**, **and AB 587** intend to limit local jurisdictions' ability to restrict the development of accessory dwelling units ("ADUs") and incentivize the development of "affordable by design" ADUs.

AB 68 & AB 881- Streamlining ADU Approvals
AB 68 and AB 881 were consolidated and enacted as one bill whose fundamental goal is to streamline and improve the ADU process in order to facilitate the development and construction of ADUs. Both bills amend Government Code § 65852.2.
Effective January 1, 2020, these bills will:

- Require permits for ADUs and Junior ADUs added to existing single-family and multi-family homes to be ministerially approved or denied within 60 days rather than 120.
- If both the ADU and the dwelling are submitted at the same time, there may be a delay in the approval of the ADU, but the ADU permit still must be issued ministerially.
- Allow cities and counties to establish minimum and maximum ADU size requirements, provided that the maximum floor area is not less than 850 square feet or 1,000 square feet if the ADU has more than one bedroom.
- Prohibits imposition of limits on lot coverage, floor area ratio, open space, and minimum lot size if ADUs of 800 sf x 16 sf with a 4 sf setback from rear and side could not be built.
- Prohibit municipalities from requiring that existing nonconforming zoning conditions be corrected as a condition for ADU permit approval.
- Prohibit local agencies from requiring the replacement of offstreet parking spaces if a garage or covered parking is demolished to construct a new ADU. Also, municipalities will be prohibited from enforcing parking standards for ADUs located within ½ mile walking distance of public transit.
- Subject to certain requirements, the consolidated bills will require ministerial approval for projects in residential and mixed-use zoning districts that propose to create the below:

    i. One ADU (attached or detached) and one junior ADU on a lot with either an existing or proposed single family home;
    ii. Multiple ADUs within an existing multi-family building; or
    iii. Up to two detached ADUs on a lot with an existing multi-family building.

SB 13- Owner Occupancy and Fees
In addition to having many similar restrictions to the consolidated AB 68 and AB 881, SB 13 also addresses the issues of required owner occupancy and fees. Currently, as a condition of approval, local agencies can require that an applicant for an ADU permit occupy either the primary residence or the proposed ADU. SB 13 will exempt all ADUs from such owner –occupancy requirements until January 1, 2025. Additionally, to incentivize owners to construct ADUs, SB 13 will implement a tiered fee structure based on the ADU's size and location. Specifically, no impact fees can be imposed on ADUs smaller than 750 square feet, and any impact fees assessed for larger ADUs must be proportional to the square footage of the primary residence. This bill amends Government Code § 65852.2 and adds Health & Safety Code § 17980.12.

AB 670, AB 671 –HOA and General Plans
AB 670 prevents homeowners' associations from banning or unreasonably restricting the construction of ADUs on single-family residential lots. See new Civil Code § 4751.

AB 671 will require local General Plan housing elements to incentivize and promote the creation of accessory dwelling units that can be offered at affordable rent for very low, low-, or moderate-income households in its housing element. The bill requires HCD to develop a list of existing state grants and financial incentives for ADU development and to post that list on its internet website by December 31, 2020. Amends Government Code § 65852.26 and adds Health & Safety Code § 50504.5.

AB 587- ADU Sales or Separate Conveyance
Existing law prohibits local ADU ordinances from allowing ADUs to be sold, or otherwise conveyed, separate from the primary residence. For cities with local ordinances, this requirement therefore prohibits

shared ownership models that occur in California, such as tenancy in common.
This bill creates an exemption to this prohibition by allowing such tenancy in common sales to occur, but only in a very limited and narrow manner where: 1. The house and ADU are built by a non-profit whose mission is to sell those units to low-income families; 2. That both the primary house and the ADU are sold to low-income families; and 3. That any subsequent sale also be to a low-income family. The purpose of this bill is to enable affordable housing organization such as Habitat for Humanity to create ownership units for low-income families. Adds Government Code §65852.26.

CASE LAW:

PLANNING AND ZONING:

A permit amendment, allowing nonconforming quarry to import and process asphalt grindings, constituted impermissible extension of a nonconforming use.
Point San Pedro Rd. Coalition v County of Marin (San Rafael Rock Quarry, Inc.) (2019) 33 CA5th 1074

Quarry produced asphaltic concrete from material mined onsite and imported sand. It became a nonconforming use in 1982, when County rezoned the property for commercial and residential use. In 2010, after County completed an environmental review of Quarry's operations under CEQA, County amended the existing mining permit. The permit expressly prohibited importing "gravel, used asphalt concrete or concrete for recycling, or dredged non-sand material." In 2013, Quarry obtained a 2-year modification to allow the importation of asphalt grindings to be processed onsite for the production of asphaltic concrete.

Interest Group filed a timely petition for a writ of administrative mandate, challenging the amendment as allowing an enlargement, increase, and intensification of the nonconforming use, which was prohibited by the County code. The superior court granted County's and Quarry's motion for judgment on the pleadings and dismissed the petition. Interest Group appealed and the case was dismissed for mootness because of the passage of time. County extended the amendment for 2-4 years. The State Mining and Geology Board rejected Interest Group's objections. In 2016, Interest Group filed another mandate petition. The trial court ordered County to set aside the amendment. County and Quarry appealed. The court of appeal affirmed.

The local zoning law "allows nonconforming uses to continue, 'provided that the use shall not be enlarged, increased, or intensified (e.g., longer hours of operation, more employees, etc.), nor be extended to occupy a greater area than it lawfully occupied prior to becoming a nonconforming use.'" California case law instructs that zoning laws are intended to reduce the number of nonconforming uses in the zone. Quarry failed to show that the importation and processing of asphalt grindings were required for, or reasonably related to, the existing nonconforming use. The processing of asphalt grindings required new, full truckloads of asphalt grindings and the additional use of heavy crushing, blending, mixing, conveyance, and screening equipment. County would have allowed Quarry to conduct a new and additional operation—the importation and processing of asphalt grindings—on land not zoned for industrial use.

Nor did County or Quarry make a showing that a denial of the request to import and process asphalt grindings would restrict a vested right. The activity constituted an impermissible extension or enlargement of the nonconforming use, prohibited by the zoning ordinance, so County lacked authority to approve the amendment.

New zoning ordinance requiring permits for new oil and gas exploration, drilling, and production on split-estate land did not violate company's constitutional rights to due process and equal protection, even though ordinance's two-pathway system for permit processing had a 7-day approval time for applicants who obtain surface owner's consent, but a 120-day approval time for applicants who do not.
Vaquero Energy, Inc. v County of Kern (2019) 42 CA5th 312

County adopted a new zoning ordinance requiring permits for new oil and gas exploration, drilling, and production. The ordinance imposed a wide range of environmental and other standards on permit applicants, adopting two procedural pathways for obtaining permits when the proposed activity would be conducted on

split-estate land (i.e., land in which the surface rights and the mineral rights are held by different owners) zoned for agriculture. Under the ordinance, permit applicants who obtain the surface owner's written consent to the site plan proceed through an expedited 7-day pathway. Permit applicants who do not obtain such consent proceed through a more expensive 120-day pathway.

The ordinance primarily affected mineral rights owners, such as plaintiff Vaquero, who sought written consent from surface rights owners to proceed on the expedited pathway. Vaquero sued County, alleging that the ordinance violated its constitutional rights to equal protection and due process because it inappropriately delegated permitting authority to the private interests of surface owners who could arbitrarily withhold their consent until their demands were met. The trial court rejected Vaquero's claims and Vaquero appealed.

The court of appeal affirmed the judgment of the trial court. Based on its interpretation of a line of relevant United States Supreme Court cases, the court of appeal held that the new ordinance did not violate Vaquero's right to due process because the ordinance did not give the surface rights owner complete and final control over how a mineral rights owner exercises its rights. Rather, the final authority rests with County. County, not surface rights owners or any other private party, assesses mineral rights owners' proposed site plans and resolves all details of the proposed operations to ensure compliance with applicable law. Once County completes its review of a proposed site plan, the plan is eligible for permit approval even if the surface owner disapproves. Additionally, the 120-day delay caused by the surface owner's disapproval does not create an onerous burden on the permit applicant because it is temporary; the applicant may commence with its plans once County issues it a permit.

In regard to the equal protection claim, the court of appeal applied the deferential rational basis test and held that the ordinance did not violate Vaquero's equal protection rights. County passed the ordinance for a legitimate public purpose: to promote cooperation between owners of mineral rights and owners of surface rights and reduce conflicts. Moreover, the means of achieving this purpose was rationally related: The board of supervisors rationally could have decided that the availability of an expedited 7-day pathway would promote cooperation between owners of mineral rights and owners of surface rights. Thus, any disparate treatment between permit applicants who have a surface rights owner's consent and those who do not was not unlawful. Whether in fact the ordinance would promote cooperation and reduce conflict was irrelevant to the court of appeal's analysis.

Government Code §65009(c)(1) provides 90-day statute of limitations in which to challenge violation of municipal code hearing requirement on affordable housing project.
1305 Ingraham, LLC v City of Los Angeles (2019) 32 CA5th 1253

City began planning the development of a mixed-use commercial and affordable housing project. City approved the project and Developer began to move forward. Nine months later, Objector filed a petition for writ of mandate, alleging that the project failed to comply with the California Environmental Quality Act (CEQA). Later, Objector filed an amended petition abandoning its CEQA claim (which arguably was untimely under CEQA's 30-day statute of limitations in Pub Res C §21167(c)) and alleging instead that City failed to hold a hearing on its appeal, which violated a Los Angeles Municipal Code provision (LAMC §16.05.H.4) requiring the Area Planning Commission to hold a hearing before deciding an appeal. The trial court sustained Developer's and City's joint demurrer. The court of appeal affirmed.

The opening clause of Gov't C §65009(c) allows one to challenge a "legislative body's decision" as long as the proceeding and service on the body are commenced within 90 days of the decision. The court rejected Objector's contention that the statute of limitations in Govt C §65009(c)(1) did not apply because there was no "decision" on its appeal and no "legislative body" made a ruling. Notably, LAMC §16.05.H.4 specifically provides that the Planning Director's determination on the development becomes the final "decision" if the Commission fails to act. Construing LAMC §16.05.H.4 to strictly require a hearing without any other alternative arguably "would allow a project to remain in a state of perpetual limbo due to a procedural error." Government Code §65009(c) can be construed to cover any "underlying decision being reviewed" without reference to the "reviewing body." Absurd results would ensue if §65009(c) were limited as the objector proposed. Finally, the court held the 3-year general statute of limitations in CCP §338(a) could not be

harmonized with the shorter, more specific limitations period in Gov't C §65009(c)(1). Thus, the 90-day statute of limitations under §65009(c)(1) controlled in this case and barred Objector's challenge as untimely.

Challenger to local scenic view ordinance served her petition on city planning commission more than 90 days after city council denied her appeal, which barred her appeal under Govt. Code §65009(c)(1)(E) as construed under Govt. Code §65901(a).
Weiss v City of Del Mar (2019) 39 CA5th 609.

Trustee, acting as trustee for her own trust, applied under a local scenic view ordinance to compel a neighboring property owner to trim and maintain its landscaping. After City's Planning Commission denied her application, Trustee petitioned for an administrative writ of mandate in the superior court. The court dismissed the action because Trustee served the summons on City more than 90 days after it denied her application. On appeal, Trustee challenged the applicability of Govt C §65009. Finding no reversible error, the court of appeal affirmed.

Govt Code §65009(c)(1)(E) establishes a statute of limitations of 90 days for a person to challenge a local legislative body's zoning and planning decisions. Although the scenic view ordinance here does not represent typical zoning law, the court construed §65901(a), which authorizes a board to "exercise any other powers," as applicable to a local body's decisions on a broad range of issues. The scenic view ordinance here regulates the use of real property to improve "the overall quality of life enjoyed by residents, property owners, and visitors." When City's Planning Commission denied Trustee's application, it "was functionally acting in a zoning board capacity," making a "quintessentially [] public entity decision involving the regulation and management of property."

The court of appeal found §65009 was not limited to challenges involving a project or development, nor did it imply any need for immediate challenge. Here, service had to have been effected on City's Planning Commission within 90 days of its denial of Trustee's request.

Local district must comply with city's zoning ordinance on proposed solar energy project because project was not absolutely exempt from city's zoning ordinances under Govt C §53091(e) and district abused its discretion in finding project qualifiedly exempt under Govt C §53096(a).
City of Hesperia v Lake Arrowhead Community Servs. Dist. (2019) 37 CA5th 734

The Court of Appeal upheld the trial court's conclusion that the Lake Arrowhead Community Services District's ("District") Solar Project is not exempt from – and must comply with – the City of Hesperia's ("City") zoning ordinances. The District, which is only authorized to provide water and wastewater treatment services within its boundaries, planned to develop a solar energy project on property zoned as "Rural Residential" that it owns within the City. The City's Municipal Code dictates that solar farms are only permitted in nonresidential and nonagricultural areas with the approval of a conditional use permit by the City's planning commission.

Pursuant to CEQA, the District prepared and circulated an Initial Study and Mitigated Negative Declaration for comments on the Solar Project in May 2015. The City commented that the Project required a general plan amendment and zone change to be filed with the City and that the Project would violate the City's Municipal Code, which prohibits solar farms within 660 feet of agriculturally designated property. Government Code section 53091 requires that local agencies comply with the building and zoning ordinances of the county or city in which they are located.

On December 15, 2015, the District's Board adopted a resolution that purported to render the City's zoning ordinances inapplicable to the Solar Project. In passing this resolution, the District relied on Government Code section 53091, subdivision (e), an absolute zoning exemption for electrical energy generation facilities, and Government Code section 53096, a qualified zoning exemption for projects with no feasible alternative location.

The City subsequently filed a lawsuit contending that the Solar Project is beyond the scope of the District's

authority and is subject to the City's zoning ordinances. The court agreed with the City and held that the Project was not exempt under either of these sections.

Gov't Code § 53091(e) states that the "[z]oning ordinances of a county or city shall not apply to the location or construction of facilities . . . for the production or generation of electrical energy." The court explained that while the section 53091, subdivision (e), exemption does apply to the Project, the same section also includes an exception to the exemption that applies to the Project and negates the exemption. The exception to the exemption provides that "[z]oning ordinances of a county or city shall apply to the location or construction of facilities for storage or transmission of electrical energy by a local agency, if the zoning ordinances make provision for those facilities." Here, the court agreed with the City that the Solar Project involves the transmission of electrical energy and is therefore not exempt from the City's zoning ordinances under section 53091, subdivision (e).

In reaching this conclusion, the court was influenced by the fact that the District had earlier entered into an agreement with Southern California Edison Company, which stated that the District "will export electrical energy to the grid" and be responsible for "delivery of electricity." The dictionary definitions for "export" and "delivery" are consistent with the "transmit" terminology in the exception. The court rejected the District's argument that using the plain meaning of the word "transmission" would prohibit any electrical energy facility from qualifying for a zoning exemption because section 53096, subdivision (a) (discussed below), provides a qualified exemption for energy facilities under certain conditions.

Govt. Code § 53096(a) provides a qualified exemption from zoning ordinances for facilities related to the transmission of electrical energy upon a four-fifths vote by the agency's board that there is no feasible alternative to the proposed use. Here, the District's Board determined that it was not feasible to install the Solar Project at any alternative locations, as doing so "would result in a significant cost increase, measurable power loss, and project delay."

The court concluded that while the Board followed the proper procedural requirements of the qualified exemption, the administrative record did not contain substantial evidence to support the District's findings. The City successfully demonstrated to the court that the administrative record did not include evidence of "economic, environmental, social, or technological factors associated with an alternative location." The court was persuaded by the fact that the Board failed to consider any alternative location for the Solar Project in reaching its discretionary determination under § 53096(a).

In determining the definition of "feasible" for purposes of this exemption, the court relied on case law related to CEQA's definition for feasible alternatives and mitigation measures. The court cited *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, which dictates that the consideration of feasible alternatives is governed by the "rule of reason" – where alternatives must be analyzed if doing so is "necessary to permit a reasoned choice." Here, the court concluded that the "any 'rule of reason' requires consideration of alternatives." The District therefore needed to provide evidence that it considered an alternative location and "economic, environmental, social, and technological factors" related to the alternative, but it merely provided evidence that the site was a "good location" for the Project. Thus, the court held that the section 53096(a) exemption also does not apply to the Solar Project.

County's conditional approval of proposed tentative residential subdivision map on Williamson Act land did not comply with Govt C §66474.4 as use incidental to commercial agriculture (cattle grazing and breeding) and constituted abuse of discretion.
Cleveland Nat'l Forest Found. v County of San Diego (2019) 37 CA5th 1021

Court of Appeal held that a residential use on land subject to a Williamson Act contract cannot be subordinate (or minor) to the land's primary agricultural use, but it must be used with, or functionally necessary to, the primary use so as to be concomitant with, or facilitate, that primary use.

Developers sought tentative map approval from Respondent County of San Diego ("County") for a 24-lot subdivision on 1,416.5 acres of land within a County-designated agricultural preserve, a majority of which

was subject to a Williamson Act contract requiring that the land be restricted to agricultural and compatible uses.

The County Board of Supervisors adopted a resolution conditionally approving the tentative map, finding in part that the subdivision "will not result in residential development not incidental to the commercial agricultural use of the land" pursuant to § 66474.4 of the Subdivision Map Act. The Cleveland National Forest Foundation ("Cleveland") filed a petition for writ of mandate alleging, among other things, the residential uses were not "incidental" to the agricultural use of the land. The trial court denied the petition, and Cleveland appealed.

Cleveland argued that the project was not incidental to the agricultural uses as required by the Map Act. Since "incidental" is not defined in Government Code § 66474.4 and is susceptible to more than one reasonable interpretation, the court of appeal looked to the statute's legislative history to determine its meaning. In doing so, the court found that the legislative policy underlying this section was to prohibit subdivision of Williamson Act land for "residential purposes." Thus, the court held that "incidental" must be associated with or dependent on the primary commercial agricultural use so as to be concomitant with and functionally necessary to the agricultural use. In doing so, the court reasoned that this interpretation was in line with the legal definition of the word and best effectuated the Williamson Act.

While the County interpreted "incidental" to mean that residential development had to be "subordinate" or "minor" in relation to the agricultural use, the court of appeal disagreed, reasoning that the County's interpretation would permit residential development and infrastructure unrelated to any agricultural operation as long as the agricultural uses predominated a project.

Turning to the project, the court of appeal determined that the infrastructure improvements were not necessary for the managed grazing and breeding of cattle. The court reasoned that the ranchers who manage the agricultural operations lived elsewhere, so the residential infrastructure was unrelated as well. Finally, the court found that the limited number of cattle proposed to be onsite did not amount to a commercial operation. The court found that the residential development and associated infrastructure were not incidental to the agricultural uses. Therefore, the court of appeal held that the County abused its discretion in approving the project.

Proposition 218 administrative hearing not prerequisite to lawsuit challenging water district's methodology for calculating wastewater usage fees.
Plantier v Ramona Mun. Water Dist. (2019) 7 C5th 372

The California Supreme Court held that when an agency considers increasing a property-related fee, the fee payor challenging the method of fee allocation need not exhaust administrative remedies by participating in a Proposition 218 hearing that addresses only a proposed rate increase.

Cal. Const. art. XIII D, 6, which was added in 1996 by Proposition 218, requires that before a local governmental agency may impose or increase property-related fees and charges it must notify affected property owners and hold a public hearing. The representative plaintiffs in this class action sought to invalidate a wastewater service charge imposed by a water district, claiming that the district's method for calculating the charge violated one of the substantive requirements of Proposition 218. The trial court concluded that the suit was barred because the plaintiffs failed to exhaust administrative remedies by raising their challenge at public hearings on proposed increases to the rate charged for services. The court of appeal reversed. The Supreme Court affirmed, holding that a Proposition 218 rate hearing was not an administrative remedy that the plaintiffs were required to exhaust under these particular circumstances.

The Romona Municipal Water District had previously requested that the case be bifurcated to address the exhaustion issue first. Now a second case challenging the District's method of charging sewer fees violates Proposition 218 because the charges can exceed the proportional cost of services will proceed.

Commission on State Mandates properly denied water and irrigation districts' reimbursement claims because districts continued to have legal authority to levy fees, even if subject to majority protest of district customers.
Paradise Irrig. Dist. v Commission on State Mandates (Department of Water Resources) (2019) 33 CA5th 174

Various local water and irrigation districts (Districts) argued state water quality regulations were reimbursable mandates. The Commission on State Mandates (Commission) determined that Districts had sufficient legal authority to levy fees to pay for any water service improvements mandated by the Water Conservation Act. The trial court agreed and denied a petition for writ of mandate brought by Districts.

The court of appeal considered whether the passage of Proposition 218 affected the authority of Districts to recover costs from their ratepayers, thus requiring the state to reimburse Districts' unfunded state mandates for water service. Proposition 218, codified in part under Gov't C §53755(a)(1), (b), gave a majority of property owners the opportunity to protest a fee imposed by Districts and prevent its imposition. Districts argued that their ability to raise fees was threatened by the majority protest procedure under Gov't C §53755(a)(1), (b). The court nevertheless affirmed the trial court's judgment, finding that the districts possessed statutory authority under Wat C §§22280 and 35470 to collect fees necessary to comply with the Act.

Under Gov't C §17556(d), as long as the local district "has the authority to levy service charges, fees, or assessments sufficient to pay for the mandated program or increased level of service," it is not entitled to subvention. Although Proposition 218 did codify a majority protest procedure, it did not divest Districts of their authority to levy fees—Districts faced only the possibility of a protest. The court held that the inquiry into fee authority constitutes an issue of law rather than a question of fact. Fee authority is a matter governed by statute rather than by factual considerations of practicality. The Commission properly denied the reimbursement claims at issue in this case because Districts continued to have legal authority to levy fees, even if subject to majority protest of District customers.

Real parties in interest's anti-SLAPP motion in mandamus proceeding was not frivolous. Attorney fee award to opposing party was abuse of discretion.
Rudisill v California Coastal Comm'n (2019) 35 CA5th 1062.

Developer filed applications for coastal development permit. Petitioners filed petition for writ of mandate against the California Coastal Commission and City of Los Angeles and named Developer as real party in interest. Developer filed an anti-SLAPP motion arguing that the petition asserted claims against Developer arising from protected petitioning activity of applying for permits. Petitioners filed a motion for sanctions and the trial granted sanctions and denied the anti-SLAPP motion concluding that the petition contained no claim against Developer and petitioning conduct, but challenged government decisions. Trial court granted attorney's fees against Developer.

The court of appeal reversed the order awarding attorney fees. Developers' anti-SLAPP motion was not frivolous. Under current case law, a reasonable attorney could have concluded that the petition asserted a claim or claims against Developers as real parties. In a mandamus proceeding, a real party in interest is a person whose interest will be directly affected by the proceeding. The petition identified real parties as the owners of property involved in the development and sought an order directed to all permits pertaining to the development. The claim for attorney fees in the petition was not limited on its face to an award against the Commission and City. Under existing case law, it was a "close question" whether Developers could reasonably believe that the petition asserted a claim against them arising from their petitioning activity.

Whether such a claim actually arose from protected conduct was another question. The trial court was correct in concluding that the relief sought against the Commission and City did not arise from Developer's petitioning conduct. However, the request for attorney fees directly against Developer would necessarily involve a direct challenge to their petitioning conduct. The request for attorney fees against Developer was based on their participation in the litigation and on their furtherance of an interest that was at least partly responsible for the policy or practice that gave rise to the litigation. As a result, Developer could have

concluded that the petition asserted a claim against them arising from conduct protected under CCP §425.16(e).

California's open meeting law (Ralph M. Brown Act) does not permit limiting comment at special city council meetings based on comments at prior, distinct committee meetings.
Preven v City of Los Angeles (2019) 32 CA5th 925

Appellant addressed a meeting of the Los Angeles City Council's Planning and Land Use Management Committee, which is comprised of five members of the 15-member City Council, regarding a proposed real estate development near his residence. After the Committee voted unanimously to make a report and recommendation of approval to the full City Council, Appellant sought to address the full Council at a special meeting held the following day, at which it was to consider approval of the Committee's recommendation. However, citing Appellant's prior opportunity to speak at the Committee meeting on the matter, the City refused to allow Appellant to address the full Council during the special meeting.

The appellate court determined that the City could not bar Appellant from speaking at the special meeting based on his prior opportunity to speak at a separate and distinct committee meeting. The Brown Act expressly requires public entities to provide the public an opportunity to speak "before or during" the consideration of an item at both special and regular meetings. One exception is made in Government Code § 54954.3(a), which says the public entity need not provide an opportunity for public comment "on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, unless the item has been substantially changed since the committee heard the item, as determined by the legislative body." The court concluded that pursuant to the plain language the "committee exception" only applies to items scheduled at a regular meeting of the legislative body and not to items heard at a special meeting.

San Francisco's ordinance conditioning access to public rights-of-way for wireless installation permits, based on aesthetic considerations was not preempted by Public Utilities Code § 7901.
T-Mobile W. LLC v City & County of San Francisco (2019) 6 C5th 1107

Amidst the ongoing power struggle between communications service providers striving for unfettered access to rights-of-way to place their facilities, and municipalities working to protect their authority over such rights-of-way, local governments retained a measure of control over the deployment of wireless equipment in their rights-of-way when the California Supreme Court held that municipalities may consider aesthetics when granting wireless installation permits.

Wireless service providers (T-Mobile) challenged a San Francisco ordinance conditioning access to public rights-of-way on aesthetic considerations. In particular, the City's ordinance No. 12-11 regulated the construction, installation, and maintenance of wireless equipment in order to prevent the placement of equipment in a manner that would "diminish the City's beauty," and required heightened aesthetic review in certain areas. T-Mobile argued that the Ordinance was preempted by a provision of the California Public Utilities (PUC) Code that allowed telephone corporations to install equipment in public rights of way in a manner not "incommod[ing] the public use of the road."

The court rejected the wireless companies' conflict preemption claim for similar reasons, as the statute didn't address aesthetics or prohibit local governments from requiring a permit. Nor did the statute occupy the field, as it didn't impose comprehensive regulations on telephone equipment or create a general regulatory scheme. Finally, the court concluded that obstacle preemption was inapplicable because the plaintiffs merely alleged that ordinance might hinder the statute's intent to encourage the development of a statewide telephone network. The statute, moreover, did not have the goal of promoting telephone equipment above all other interests, as evidenced by its inclusion of the incommode clause.

The court also briefly noted that its interpretation was consistent with the PUC's administration of the statute, which allowed local governments to impose restrictions on the location and design of telephone equipment.

As the court explained, "generally the [Public Utility Commission] will not object to municipalities dictating alternate locations based on local impacts, but it will step in if statewide goals such as 'high quality, reliable and widespread cellular services to state residents' are threatened. Contrary to plaintiffs' view of the respective spheres of state and local authority, the [Public Utility Commission's] approach does not restrict municipalities to judging only whether a requested permit would impede traffic."

The statute also required siting regulations for telephone equipment to "be applied to all entities in an equivalent manner," and the plaintiffs contended that the city's aesthetic standards violated this provision to the extent that they singled out wireless providers from other telephone corporations. However, the statute's legislative history indicated that this provision was only intended to apply to temporary access to public roads for construction purposes, and because the ordinance treated all telephone corporations equally in this respect the court found that there was no violation.

COASTAL ACT:

Coastal Act/CEQA –based challenge to project rejected as time-barred for failure to join indispensable parties within limitations period.
San Diego Navy Broadway Complex Coalition v California Coastal Comm'n (2019) 40 CA5th 563.

This was a 68 page-page opinion in which the Fourth District Court of Appeal affirmed the trial court's judgment rejecting a plaintiff group's numerous challenges to the California Coastal Commission's certification of a port master plan amendment. The trial court had rejected the statute of limitations defense of indispensable parties City and One Park Boulevard, LLC, and ruled against plaintiff's challenges on the merits. The Court of Appeal, however, disagreed with the statute of limitation ruling and based its affirmance on the plaintiff's inexcusable failure to name developers, who were indispensable parties, because group should have known both One Park and City were developers, given that multiple documents identified them as such, including EIR and 2012 port resolutions. Court of Appeal did also reject all of plaintiff's legal challenges on their substantive merits holding that the California Coastal Commission (1) did not improperly negotiate changes to the port plan amendment, (2) correctly found the Convention Center expansion was not appealable to it (meaning it need not conform to Chapter 3 of the Coastal Act), and (3) made sufficient and supported Coastal Act and CEQA findings.

Petitioners must comply with administrative exhaustion requirement in order to sustain a takings challenge.
Greene v California Coastal Comm'n (2019) 40 CA5th 1227.

Residents challenged California Coastal Commission CDP condition requiring property owners to set back duplex remodel construction 5 feet from seaward property line. The Commission found that the proposed remodel would effectively privatize public beach in violation of Coastal Act's public access policy. Residents contended the setback requirements constituted an unconstitutional taking of their property.

In affirming the trial court's ruling in favor of the Commission, the Court made clear the strict application and consequences of administrative exhaustion requirements and found that Residents' general objections at the CDP hearing, which "articulated the principles" of the *Nollan* and *Dolan* cases, failed to identify the specific takings challenge. Thus, the Court concluded that Residents effectively waived their right to pursue this argument in court. Under the California Coastal Act, a takings challenge is barred if an applicant fails to specifically assert its exact claim during the prior administrative process before the Commission.

Coastal Commission properly determined that accurate or complete information would not have caused Commission to act differently in ruling on coastal development permit application.
Hubbard v California Coastal Comm'n (2019) 38 CA5th 119.

Appellants petitioned the Commission to revoke a coastal development permit (CDP), alleging that Malibu Valley Farm's (MVF) CDP application to rebuild its equestrian facility following a fire contained intentional misrepresentations regarding approvals it received from the Los Angeles County Environmental Review

Board (ERB), the California Water Resources Control Board (Water Board), and the California Department of Fish and Game (Fish and Game). After the Commission denied the petition, appellants petitioned the superior court for a writ of administrative mandate to set aside the Commission's decision.

The Court of Appeal affirmed the superior court's denial of the petition and held that substantial evidence supported the Commission's determination that accurate or complete information would not have caused the Commission to act differently in ruling on MVF's CDP application. In this case, the Commission correctly interpreted and applied section 13105, subdivision (a), which states that a permit may be revoked for "[i]ntentional inclusion of inaccurate, erroneous or incomplete information in connection with a coastal development permit application, where the commission finds that accurate and complete information would have caused the commission to require additional or different conditions on a permit or deny an application." Substantial evidence supported the Commission's determination that although MVF's application contained intentional misrepresentations regarding the approvals by the ERB, Fish and Game, and the Water Board, the Commission would not have imposed additional conditions or denied the CDP if accurate information had been provided.

INITIATIVE/REFERENDUM:

After city council adopted initiative that created internal inconsistency in general plan, court ordered city to bring its general plan into compliance with statutory requirements.
Denham, LLC v City of Richmond (2019) 41 CA5th 340.

City adopted an initiative prohibiting residential development on a stretch of hillside land. Property owners who were affected by the initiative challenged it. Environmental Group intervened to promote and defend the initiative. The trial court found that the initiative caused an inconsistency in City's general plan and ordered City to vacate the adoption of the initiative. Environmental Group appealed.

The court of appeal agreed that the general plan was internally inconsistent but, rather than vacating the initiative, the court felt the appropriate remedy was to order City to bring its general plan into compliance with statutory requirements for the general plan.

A general plan amendment is presumed to be valid. The challengers had the burden of proof to show that the general plan was internally inconsistent after adoption of the initiative. The original land use element of the general plan allowed single-family and multifamily housing on the hillside. In contrast, the initiative amended the open-space element of the general plan to prohibit residences on the same hillside. This created an inconsistency in the general plan from the open-space element as compared to the text and the maps in the land use element.

In response to the finding of inconsistency, Environmental Group argued that transferable development privileges, from the open-space area to other areas of City, remedied the inconsistency. The court of appeal, however, found "the availability of transferable development credits may mitigate the property owner's financial losses, [but] it does not cure the inconsistency between the Hillside Residential designation and the initiative's ban on residential development." Environmental Group's other arguments involving the exception for a court-determined constitutional taking and language about "developable" property were unpersuasive because the initiative flatly prohibited development of the hillside.

The court held a different remedy should be ordered as defined under Govt C §65754, i.e., requiring City to bring its general plan into compliance with Govt C §§65300-65303.4 in 120 days. A "general plan is the constitution for all future land use, and subsidiary enactments, including zoning ordinances, must be consistent with the general plan"—including those amendments made by initiatives.

Petition to dissolve fire district is administrative in nature and not subject to referendum process.
Southcott v Julian-Cuyamaca Fire Protection Dist. (2019) 32 CA5th 1020.

Fire protection district's resolution to apply to local agency formation commission to dissolve district was not subject to referendum opposing resolution, because resolution was administrative in nature under Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 ("ACT"). The Court reasoned that if a district's resolution of application were subject to referendum, opponents could thwart the Act's method for considering and challenging dissolution proposals. Use of the referendum process in such a manner would "interfere[] with and frustrate[] state [dissolution] procedures and cannot [be] sustained." The Court also reasoned that under the Act a resolution of application is administrative in nature—a prerequisite to obtaining a decision from LAFCO, which holds the power to approve or disapprove the proposed dissolution. Accordingly, the District's resolution is not subject to the referendum process.

FEES & TAXES:

City's parks and recreation development fee held invalid and unenforceable because city had already acquired ample land at no cost. There was no reasonable nexus between fee and development.
Boatworks, LLC v City of Alameda (2019) 35 CA5th 290.

The Mitigation Fee Act, Government Code section 66000 et seq., authorizes local agencies to impose fees on development projects in order to cover the cost of public facilities needed to serve the developments. However, the local agencies' power to impose mitigation fees is not unlimited: the fees must be reasonably related to the increased burden on public facilities caused by the new development. (Gov. Code § 66000(b); 66001.)

In 2014, City adopted a development impact fee ordinance that would impose on a developer a fee to benefit park facilities as a condition for approving future development. Developer owned City property that it (or the previous owner of the property) had been seeking to develop since at least 2005, with the most recent submitted project being a 182-unit residential housing project. After City did not approve any desired project, Developer brought a facial challenge to City's ordinance, arguing the proposed fees for park facilities lacked a reasonable relationship to the burden of future development and thus violated the Mitigation Fee Act. The trial court entered judgment partly in favor of City and partly in favor of Developer. For Developer, the trial court held that the fees were excessive and constituted invalid exactions.

The trial court concluded that the fees in this case constituted invalid exactions by imposing on new residents the purported cost of acquiring land for parks. Here, City did not need to buy new parkland. Further, the trial court found that City erred by including in its park inventory two parks that were not yet open and by categorizing certain areas as parks rather than (less expensive) open space.

The court of appeal reversed in part, holding that City could properly include Shoreline Park, Osborne Model Airplane Field, and two boat ramps in the inventory of parks. For the development fees to support parks and recreation, the court stated that a fee based in significant part on costs City would not incur, because it had already acquired ample land at no cost, did not have the required "reasonable relationship to the cost of the public facility attributable to the development." 35 CA5th at 301, quoting Home Builders Ass'n v City of Lemoore (2010) 185 CA4th 554, 562. See also Govt C §66001(a)(3)-(4).

Developer unpersuasively argued that the fees could not be applied to address any existing problems with park facilities. The court said it did "not read the statute so broadly as to prohibit the city from imposing fees to maintain its current level of service." 35 CA5th at 304. See also Govt C §66001(g).

The trial court improperly ordered City to perform a legislative act by ordering it to vacate and excise parts of the ordinance. The court of appeal instructed that the proper remedy would be to "declare the ordinance void or invalid to the extent it sets the parks and recreation fees."

Finally, Developer was entitled to attorney fees under CCP §1021.5 because it showed a requisite benefit to

other developers and potential homebuyers and incurred a financial burden because the development approval was admittedly uncertain. The court of appeal remanded the case so that the trial court could issue a judgment declaring the ordinance's parks and recreation fee invalid and unenforceable.

The appellate court's decision demonstrates that courts tend to give local agencies significant deference when determining whether there is a reasonable relationship between an impact fee and a proposed development. But there are limits to the courts' deference, such as when City purported to calculate fees required for the purchase of land when that land already has been acquired for free.

School district was not required to separately analyze impact of unique subtype of residential construction not contemplated in statutes on assessing impact fees.
Tanimura & Antle Fresh Foods, Inc. v Salinas Union High Sch. Dist. (2019) 34 CA5th 775.

The Salinas Union High School District (Salinas) had imposed a developer fee on a 100-unit agricultural employee housing complex commissioned by Tanimura & Antle Fresh Foods, Inc. (Tanimura) within Salinas. The complex, per the terms of its development permit issued by the Monterey County Board of Supervisors, was designed to house only agricultural workers, without dependents.

In relation to its agricultural worker housing project, Tanimura sued for a refund of its fees, alleging that the developer fees imposed by Salinas were not reasonably related to a need for school facilities, as required by statute. Tanimura cited the project's prohibition on dependents, arguing that, as no children would reside in the complex, its construction would not generate an increased burden on the district's facilities. The Government Code requires a public agency, before imposing prospective developer fees, to establish the purpose of the fee, the agency's use for the funds, a reasonable relationship between the fee's use and the type of development project on which it will be imposed, and a reasonable relationship between the need for public facilities and the type of development project on which the fee is imposed. The trial court held in favor of Tanimura, opining that Salinas was required to account for the fact that no children would be permitted to live at the complex, and in failing to do so had not met the nexus requirement of the Government Code.

The Court of Appeal for the 6th District reversed and held that, when establishing a nexus between developer fees and a development project, a public agency need not consider the specific project in question; its calculus is limited to the general type of project at issue (e.g., residential, commercial, or industrial). As applied here, Salinas was not required to consider the complex's prohibition on dependents in its fee analysis and its treatment of the complex as a generic, residential development was lawful.

The court asserted that its interpretation was the only "commonsense" reading of the statute that avoided practical absurdities. To adopt Tanimura's position, the court held, "would have the practical effect of requiring a school district to expand its needs analysis to address the projected impact on school facilities of undefined, variant subtypes of residential construction not contemplated in the statute." The court found such an effect to be contrary with the purpose of the statutes. Further, the law contains exceptions from developer fees for certain types of developments, including government-financed agricultural migrant worker housing. However, the Legislature has created no such exception for privately-financed farmworker housing. This indicates that the Legislature did not intend for projects such as the complex to be exempted from developer fees.

Court refunded developer fee due to inadequate fee study.
SummerHill Winchester LLC v Campbell Union Sch. Dist. (2018) 30 CA5th 545.

The Court of Appeal for the Sixth District (the same as decided *Tanimura*) invalidated the Level 1 developer fees adopted by Campbell Union School District (Campbell). In doing so, the court applied the rule laid out in a prior case, *Shapell Industries, Inc. v. Governing Board of the Milpitas Unified School District* (1991) 1 Cal.App.4th 218, that a Level 1 fee study must include an analysis of the following three factors: (1) the projection of the total amount of housing to be constructed within the school district; (2) estimation of the number of new students that are expected to result from the new development; and (3) estimation of what it will cost to provide the necessary school facilities for that approximate number of new students.

The Court held that the District's study did not satisfy these three elements because the data relied on was vague and not precise enough to determine what type of school facilities would be needed to accommodate the increased enrollment.

Fee Studies must contain realistic, quantifiable data to support the imposition of Level 1 developer fees. Because the process necessarily involves projections and predictions regarding development and building costs, data need not be exact but must present a reasoned analysis of each of the required elements in order to connect the burden imposed by new development and the District's fee. Even for overcrowded districts, a fee justification study needs to show the anticipated number of new residential units, the projected enrollment increase from those new units, and the cost of facilities, new or existing, actually needed to house students generated by new development.

TAKINGS:

State-litigation requirement under *Williamson County* overruled. Landowner with small family graveyard on her property, who challenged local ordinance requiring all cemeteries to be open to public during daylight hours, asserted actionable Fifth Amendment takings claim and could bring her claim in federal court under 42 USC §1983 without first exhausting state law remedies.
Knick v Township of Scott (June 21, 2019, No. 17-647) 2019 US Lexis 4197.

Township passed an ordinance requiring that "[a]ll cemeteries … be kept open and accessible to the general public during daylight hours." Township notified a property owner (Knick), whose 90-acre rural property had a small family graveyard, that she was violating the ordinance. Knick sought declaratory relief arguing that the ordinance caused a taking of her property, but she did not bring an inverse condemnation action.

Township withdrew the violation notice and stayed enforcement of the ordinance. After the state court declined to rule on Knick's suit, Knick filed a federal action under 42 USC §1983, arguing that the ordinance violated the takings clause. The Third Circuit affirmed the dismissal of her claim, citing *Williamson County Reg'l Planning Comm'n v Hamilton Bank* (1985) 473 US 172, which held that property owners must seek just compensation under state law in state court before bringing a federal claim under 42 USC §1983.

In a 5-4 decision, the U.S. Supreme Court reversed and expressly overruled the state-litigation requirement of *Williamson County*. A government violates the takings clause when it takes property without compensation. A property owner may bring a Fifth Amendment claim under 42 USC §1983 at that time. The Supreme Court noted that 2 years after the *Williamson County* decision, it returned to its traditional understanding of the Fifth Amendment in deciding *First English Evangelical Lutheran Church v County of Los Angeles* (1987) 482 US 304. A property owner acquires a right to compensation immediately on an uncompensated taking because the taking itself violates the Fifth Amendment.

The Court found that the state-litigation requirement in *Williamson County* "imposes an unjustifiable burden on takings plaintiffs" and "conflicts with the rest of our takings jurisprudence." Looking to the text of the Takings Clause, the Court found that the most natural reading of that provision is that the right of compensation arises at the time of the taking. Under *Williamson County*, the government did not need to compensate in advance or simultaneously with the taking, but only provide a "reasonable, certain, and adequate" mechanism for recovering such compensation after the fact. By forcing plaintiffs to seek compensation after the taking in state court before allowing them to proceed in federal court, *Williamson County* imposes an "unjustifiable burden" on these plaintiffs. Additionally, the Court expressed concern over the likelihood that a plaintiff would bring a state-court claim, lose, and therefore be precluded from bringing a claim in federal court at all.

Landowner's inverse condemnation action dismissed because dedication on subdivision map showing land was in process of being deeded to Caltrans was sufficient evidence to support promissory estoppel and specific performance.
Prout v Department of Transp. (2018) 31 CA5th 200, modified (Jan. 16, 2019) 2019 Cal App Lexis 51.

As a condition of subdivision map approval and an encroachment permit in 1989, Prout agreed to dedicate a 20 foot-wide strip of land along the side of his subdivision-to-be where it abutted a public highway. Prout recorded a subdivision map showing the dedication, but he never formally deeded the property to the state. In 2010, CalTrans expanded the highway adjoining the subdivision, occupying the dedicated but undeeded strip. Prout sued for inverse condemnation.

Held: Prout sued too late to challenge the dedication condition as an improperly forced taking. The time to challenge that decision by a mandate petition began in 1989 when the condition was imposed. Also, the trial court properly found that Prout had impliedly dedicated the strip to CalTrans by recording the subdivision map showing it and by promising to dedicate the strip. CalTrans impliedly accepted the dedication when it used the strip in 2010. Its 20-year delay in acceptance was not unreasonable in light of its excuse (it lost track of the lack of a formal deed of dedication) and did not exceed the statutory 25-year limit under Civ. Code 771.010.

City did not abuse its discretion in denying landowners' request for deviation from ordinance's grading requirements. Owners' regulatory takings, due process, and equal protection claims failed.
York v City of Los Angeles (2019) 33 CA5th 1178.

The Court of Appeal held that property owners whose request to grade almost 80,000 cubic yards on their property was denied by a city, but who submitted no other alternative grading proposal in connection with their plans to build a house and other structures on their property, did not have inverse condemnation or civil rights claims that were “ripe” for adjudication. Here the property owners sought to grade 79,700 cubic yards on a 40 acre parcel. The requested grading, which was intended to allow the construction of a 8,000 sf house, a 1,300 sf guest house, driveway, swimming pool, and wine caves, was more than 24 times the amount that is permitted as of right. The Zoning Administrator (ZA) granted most of the building permits for the structures but denied the grading request. The ZA permitted the maximum of 3,300 cubic yards of grading permitted as of right by the Municipal Code. The ZA did not approve any grading in an amount between 3,300 cubic yards and 79,700 cubic yards because no alternatives were presented. The owners made some changes to their plan, though not reducing the grading request, and appealed the ZA’s decision to the Planning Commission. The Planning Commission denied the administrative appeal.

The owners then filed a complaint and petition for writ of mandate. The first cause of action alleged that the City’s action was arbitrary and capricious, and it sought a writ of mandate directing the City to set aside its action and approve the application. The second cause of action, for inverse condemnation, alleged that the City had taken the landowners’ property by depriving them of substantially all economically viable or beneficial uses of the property.

The superior court denied the writ petition, concluding that the City’s findings and decision were supported by substantial evidence, and granted judgment on the pleadings on the inverse condemnation and civil rights causes of action, finding that the matter is not ripe because the plaintiffs did not propose plans of reduced scope that would nonetheless allow the proposed project.

The Court rejected the landowners’ claim that the City’s outright denial of their request for a deviation was an abuse of discretion because it precludes them from building a home of any size on their property, noting that their arguments were based on the assertions of their attorneys, which are argument, not evidence. The Court explained that the City had no duty to present evidence concerning the amount of grading necessary to build a home on the landowners’ property, and the City had no duty to consider any project other than the one the landowners presented to them. Instead, as the applicants for the land use adjustment, the Court held that the owners bore the burden of demonstrating their entitlement to the adjustment. And the Court rejected the landowners’ claim that the City’s denial of their grading permit is unsupported by the evidence because the

landowners ignored most of the ZA's extensive findings.

Finally, the Court affirmed the trial court's determination that the City had not rendered a final decision nor precluded all development of the property. Instead, the City granted the landowners permission to build a single-family home, accessory buildings, and retaining walls. And while the City denied the landowners' request to permit a maximum of 79,000 cubic yards of cut and fill grading, it neither definitively limited them to 3,300 cubic yards of grading nor precluded the landowners from submitting another, more modest, proposal. The Court thus held that the City's determination cannot be characterized as a "final decision" regarding the application of the zoning ordinance to the landowners' property and cannot form the basis for a regulatory takings claim.

FIRST AMENDMENT RESTRICTIONS

Shopping center restriction on abortion protestors' "grisly or gruesome displays" is unconstitutional.
Center for Bio-Ethical Reform, Inc. v The Irvine Co. (2019) 37 CA5th 97.

In 1979, the California Supreme Court declared a right, under the California Constitution, to engage in political speech and activity at shopping malls. While the U.S. Constitution protects free speech only from government interference, the state court said a large shopping center was the modern equivalent of a town square or meeting place where people came to exchange ideas, as well as spend money.

An antiabortion group wanted to picket shopping centers to protest alleged contributions to Planned Parenthood by companies affiliated with the stores at the centers. The owner of the centers stated that it would allow peaceful protests, but would not permit "grisly or gruesome displays." The organization challenged the regulation. A state appeals court held that the Center could impose some restrictions, such as keeping the protesters away from store entrances and prohibiting them from using body cameras that could take videos of passers-by. The ban on "grisly or gruesome" content, however, violated free speech. The court specifically noted that the Center's allowance of images considered "beautiful or pleasant" demonstrated the ban was a content-based restriction and is the type of value judgment the Constitution protects by safeguarding freedom of expression.

The exterior, unticketed areas of Six Flags Discovery Kingdom amusement park are a public forum for expressive activity under Cal Const art I, §2.
Park Mgmt. Corp. v In Defense of Animals (2019) 36 CA5th 649.

Six Flags, a Vallejo amusement park, features rides and animal attractions on 138 acres, including a ticketed interior portion with the entertainment activities and an exterior portion with an admissions area connected by walkways and streets to a paid parking lot. The property falls within the city's "public and quasi-public facilities zoning district." For many years, the amusement park was municipally owned but privately operated. In 2006, a federal district court recognized the constitutional right of an individual to protest at the park's front entrance, which is public fora under California's free speech clause. The following year, Park Management exercised its option and acquired the park from the city for $53.9 million; the city committed to retaining the park's zoning designation.

In 2014, Management banned all expressive activity at the park, including protests. Weeks later, people protested against the park's treatment of animals at the front entrance area and handed out leaflets in the parking lot. Management filed suit, alleging private trespass. A long-time animal rights protestor argued that he had a First Amendment right to protest there because the park had been dedicated to public use, the park was a public forum under state constitutional law, and given the amount of times he had protested at the park in the past, he had acquired a common law prescriptive easement right to protest there.

The trial court granted Management summary judgment. It ruled that the First Amendment does not apply to private property and that the property was not a public forum under California's constitution. It also rejected the prescriptive easement claims. The Appeals Court reversed, except as to the prescriptive easement claim.

Although the Park was zoned as a public and quasi-public property, the Appeals Court grappled with whether to classify the Park as a private or public forum. The Court applied a balancing test which balanced society's interest in free expression against the Park's interests as a private property owner. The Court found that Management's interest in keeping restricting free expression in the unticketed area, exterior area, was minimal. The Court concluded that the unticketed, exterior portion of the Park was a public forum. The Court reversed the decision of the trial court and held that on the undisputed facts here, the Park may not ban expressive activity in the non-ticketed, exterior areas of Six Flags.

Santa Monica's Ordinance 2535, which imposes various obligations on companies that host online platforms for short-term vacation rentals, was not preempted by Communications Decency Act and did not infringe on HomeAway.com's and Airbnb Inc.'s First Amendment free speech rights.
HomeAway.com, Inc. v City of Santa Monica (9th Cir 2019) 918 F3d 676.

In 2015, City passed Ordinance 2535 (Santa Monica Mun C §§6.20.010-6.20.100) allowing residents to rent their homes, only if they were present when their guests were there. The Ordinance was aimed at restricting short-term vacation rentals and preserving the character of City's neighborhoods. Airbnb and HomeAway.com (Platforms) challenged the Ordinance, arguing it was preempted by the Communications Decency Act (CDA) (47 USC §230) and infringed on their First Amendment right to freedom of association. The district court dismissed the complaints for failure to state a claim and dismissed as moot Platforms' appeals from the denial of preliminary injunctive relief. The Ninth Circuit affirmed.

The Ninth Circuit rejected Platforms' claim that the Ordinance was preempted by the CDA, which gives internet companies certain immunities to "promote the continued development of the Internet and other interactive computer services." 47 USC §230(b)(1). Platforms argued that the Ordinance required them to monitor and remove third party content and violated the CDA by making them liable for "publishing" third party content. In contrast, however, the Ordinance required monitoring "incoming requests to complete a booking transaction— content that, while resulting from the third-party listings, is distinct, internal, and nonpublic." 918 F3d at 683. Although Platforms had to monitor City's registry, that action could not be construed as publication of third party content. Nor could Platforms reasonably argue they would have to remove third party content because the Ordinance did not strictly require such removal.

Further, removing noncompliant listings was to Platforms' advantage because it reduced crowding of their websites with prohibited rentals. State and local governments must be given leeway to address significant issues faced by their communities—here, the "preservation of its housing stock and preserving the quality and nature of residential neighborhoods." 918 F3d at 685. Neither express preemption nor obstacle preemption applied to the Ordinance.

The Ninth Circuit also rejected Platforms' contention that the Ordinance impermissibly infringed on their First Amendment rights. As a threshold issue, the First Amendment applies to expressive activity. The Ordinance here regulated nonexpressive conduct—specifically, booking transactions—not free speech. Even assuming that the Ordinance would lead Platforms to voluntarily remove some advertisements for lawful rentals, there would not be a severe limitation on the public's access to lawful advertisements, particularly considering the existence of alternative channels such as Craigslist. The Ninth Circuit reasoned that such an incidental burden was far from a substantial restriction on the freedom of speech.

The First Amendment claim against Santa Monica is similar to claims filed by short-term rental platforms against other cities' restrictions on short-term rentals. The Ninth Circuit's thorough opinion is likely to be used by other municipalities in their defense of similar ordinances.

CEQA:

Traffic delay may not be treated as a significant environmental impact.
Citizens for Positive Growth & Preservation v. City of Sacramento No. C086345 (3rd Dist. Dec 19, 2019).

Automobile delay (as measured solely by roadway capacity or traffic congestion) cannot constitute a significant environmental impact, even for projects that were approved before the new CEQA guidelines on transportation impacts were certified in December 2018. SB 743 directed that the Office of Planning and Research develop guidelines for assessing transportation impacts based on vehicle miles traveled. SB 743 also provided that upon certification of implementing guidelines "automobile delay, as described solely by level of service [LOS] or similar measures of vehicular capacity or traffic congestion shall not be considered a significant impact on the environment." The SB 743 guidelines (CEQA Guidelines §15064.3) were approved on December 28, 2018. In this case, which involved a challenge to the traffic analysis in a general plan EIR certified in 2015, the court held that the plaintiff's challenge to the adequacy of the EIR's LOS-based traffic analysis was moot. The court explained that the provision in SB 743 stating that automobile delay is not a significant environmental impact began to apply when the SB 743 guidelines were certified and thus was the law in effect at the time the court decided the case. As a result, the plaintiff's challenge to the adequacy of the EIR's LOS-based analysis of the general plan's traffic impacts was moot. The court also recognized that because the new VMT guidelines apply prospectively beginning July 1, 2020 unless an agency elects to be governed by them sooner, the EIR was not required to analyze transportation impacts under the new VMT criteria.

First decision upholding a "sustainable communities environmental assessment" under SB 375.
Sacramentans for Fair Planning v City of Sacramento (2019) 37 CA5th 698.

A court of appeal has upheld Sacramento's determination that a high-rise condominium building in the city's midtown area was a transit priority project that qualified for streamlined CEQA review under SB 375. A transit priority project is a project that contains at least 50 percent residential use, provides a minimum density of at least 20 units per acre, and is located within one-half mile of a major transit stop or transit corridor. Under SB 375, if such a project is consistent with applicable land use and other policies specified for the project area in an Air Resources Board-approved sustainable communities strategy, and satisfies other specific statutory criteria, the project can qualify for streamlined CEQA review.

The city found that the project qualified for streamlined review under SB 375, in the form of a "sustainable communities environmental assessment" instead of a negative declaration or environmental impact report. The plaintiffs argued that by relying on the sustainable communities strategy in the regional transportation plan to justify streamlined environmental review under SB 375, the city violated CEQA because the strategy was inadequate and too vague for that purpose. The court rejected that claim, reasoning that under SB 375, a qualifying plan need not regulate land use. Instead, a plan is sufficient if it sets forth a broad strategy and establishes a regional pattern of development that will, if implemented by local agencies, reduce greenhouse gas emissions. "The strategy identified the general location of uses, residential densities, and building intensities in the region, and it forecast where and how future development of those uses could best achieve greenhouse gas emission reductions." That, the court found, was sufficient.

Zoning ordinance changes are not automatically a CEQA project.
Union of Med. Marijuana Patients, Inc. v City of San Diego (2019) 7 C5th 1171.

Supreme Court rejected argument that all zoning ordinance changes are "projects" subject to CEQA simply because they are listed in Public Resources Code § 21080. The action must still meet the statutory standard of an activity with direct impact or reasonably foreseeable indirect impact. (Public Resources Code § 21065) Here, city ordinance authorizing establishment of medical marijuana dispensaries and regulating their location and operation could lead to new business, new traffic impacts and reasonably foreseeable indirect impact and constituted CEQA project under §21080.

CEQA does not apply to agency inaction.
The Lake Norconian Club Foundation v. Department of Corrections and Rehabilitation (2019) 39 Cal.App.5th 1044.

An agency's failure to maintain a historic building—"demolition by neglect"—is not a "project" subject to CEQA. The State Department of Corrections had used a former hotel that is listed on the National Register of Historic Places for administrative offices until 2002. The Department then left the building vacant due to its unsafe seismic condition, and the building suffered severe damage during El Nino rains due to the Department's failure to repair the building's roof. The plaintiffs claimed the Department's ongoing failure to maintain the historic hotel building and protect it from further damage was equivalent to a decision to demolish it. The court held that the Department's failure to act was not a "project" subject to CEQA, even if environmental consequences might result, because CEQA applies to actions "undertaken" by a public agency, not to agency inaction.

Project description based on conceptual scenarios was inadequate.
stopthemillenniumhollywood.com v City of Los Angeles (2019) 39 CA5th 1.

An appellate court ruled that a project description designed to allow flexibility as to future uses and project features within an outer "impact envelope" violated CEQA's requirement for an accurate, stable and finite project description. A developer submitted an application for a master land use permit that included detailed site plans, including the location, heights, elevations and uses of each of several proposed buildings. Three years later, the developer submitted another application that was similar in some ways to the original application but did not include the same level of detail. It did not specify the type, amount, or location of the mix of uses proposed within the site and instead presented "a concept plan and several land use scenarios," and was designed to create an "impact envelope" within which a range of development scenarios would be permitted. It also included a "land use equivalency program" that would allow the developer to change uses by transferring development floor area among parcels within the project. The court held that the project description was not "accurate, stable and finite" and therefore failed to comply with CEQA, and rejected the argument that the EIR's analysis of a "worse-case scenario" was sufficient.

The court found that by analyzing the impacts of an "impact envelope" for a concept plan with a range of development scenarios instead of the impacts for a defined project, the EIR failed to fulfill CEQA's informational purpose. As the court put it: ""The draft EIR does not describe a building development project at all. Rather, it presents different conceptual scenarios that Millennium or future developers may follow for the development of this site. These concepts and development scenarios - none of which may ultimately be constructed - do not meet the requirement of a stable or finite proposed project." Further, because no additional CEQA review was required, the court held that the EIR inappropriately deferred the environmental assessment of the project. Without the requirement for further environmental review, the EIR failed to ensure that the final configuration of the project would not result in new or more significant environmental impacts.

Project description of mixed-use development in downtown San Francisco was clear in draft EIR and was not confusing or inadequate because it described two different options.
South of Mkt. Community Action Network v City & County of San Francisco (2019) 33 CA5th 321.

A situation akin to *Stopthemillenium* arose here, but led to the opposite result. A court of appeal ruled that an EIR's project description may identify alternative development schemes for a single project, and the agency may approve a modified version of the project that incorporates elements of the alternatives reviewed in the EIR. The EIR prepared by the City of San Francisco described two options for a four-acre mixed-use development project, each with a varying mix of office and residential uses. The court found that, even though two alternative uses were described, the EIR evaluated a single project — a mixed-use development involving retention of two historic buildings, demolition of other buildings on the site, and construction of four new buildings. The project description did not fluctuate during the EIR process, and did not, contrary to plaintiffs' arguments, present a "misleadingly small fragment of the ultimately approved project." Instead, "it carefully articulated two possible variations and fully disclosed the maximum possible scope of the project" and thereby "enhanced, rather than obscured, the information available to the public." The court also upheld

the city's selection of a plan that did not match either scheme but instead modified one of them by retaining a building that would have been demolished, noting that a basic purpose of an EIR's evaluation of alternatives is to allow consideration of options that may be less harmful to the environment. The court also rejected the plaintiffs' other CEQA claims relating to the EIR's analysis of cumulative impacts and impacts related to traffic, wind, shadow and shade, and open space.

Exemption for single family homes upheld, sensitive environment exception did not defeat use of categorical exemption.
Berkeley Hills Watershed Coalition v City of Berkeley (2019) 31 CA5th 880.

City approved construction of three single family homes under the CEQA Guideline § 15303 exemption for construction of limited numbers of small structures- which specifies that it applies to "up to three single-family residences." Petitioner argued that the location of the three residences in an earthquake fault zone triggered the "location exception" of Guideline 15300.2. This exception applies "where the project may impact on an environmental resource of hazardous or critical concern where designated, precisely mapped, and officially adopted." The Court applied the same bifurcated standard of review as has been developed for the unusual circumstances exception- whether the project is located in a particularly sensitive environment is a substantial evidence question; but the question of impact based on such a location is a fair argument question. The decision was based entirely on Guideline wording, but Court noted this holding is consistent with *California Building Industry Ass'n v. Bay Area Air Quality Management Dist.* (2015) 62 Cal. 4th 369 and its holding that CEQA is concerned with project impacts on environment, not the impacts of the existing environment on the project.

CEQA review is not triggered by design review requirement.
McCorkle Eastside Neighborhood Group v City of St. Helena (2018) 31 CA5th 80.

The Court of Appeal held that the City of St. Helena did not violate CEQA by approving a demolition permit and design review for a multi-family residential project without undertaking CEQA review. Under applicable city ordinances, multi-family dwelling units are permitted by right within the city's high-density residential districts, subject only to design review. The Court explained that CEQA only applies to a project when the agency has the ability to consider and mitigate the project's environmental impacts in connection with a discretionary approval. Because the city's discretion under its design review ordinances was confined to building design issues, and did not give the city authority to address environmental impacts, CEQA review was not required.

Mitigate negative declaration on conversion of apartments to hotel upheld against claim of impact based on loss of rent-stabilized units; baseline did not include any such units.
Hollywoodians Encouraging Rental Opportunities v City of Los Angeles (2019) 37 CA5th 768.

Mitigated negative declaration prepared for converting vacant 18-unit apartment building into boutique hotel. The units had already been withdrawn from rental market, so the baseline of existing conditions was an uninhabited building, and there is no impact on supply of rent-stabilized housing. There is also no impact on population and housing for the same reason.

Coastal development permit cannot be challenged in court before Coastal Commission decides an appeal.
Fudge v City of Laguna Beach (2019) 32 CA5th 193.

When Coastal Commission accepted homeowner's appeal from local agency decision approving neighbor's demolishing of home, concurrent CEQA challenge to coastal development permit brought in district court was rendered moot. Dismissal of district court case proper because no relief can be granted in trial court action.

CEQA challenge to tree removal agreement was timely filed.
Save Lafayette Trees v City of Lafayette (2019) 32 CA5th 148.

City of Lafayette signed an agreement allowing PG&E to cut down 272 trees in a natural gas pipeline right of way. Appellants sued under CEQA and the Planning and Zoning law to stop the removal. The Court found that while Appellants' Planning and Zoning law claim was barred by its failure to comply with the 90-day statute of limitations to file and *serve* the complaint, the CEQA claim could still proceed because the 90-day limitations period was incompatible with CEQA's 180-day statute of limitations and the longer period must be given effect. The Court distinguished this holding from the conflicting decision in *Friend of Riverside's Hills v. City of Riverside* (2008) 168 Cal.App.4th 743, on the ground that in that case the CEQA claim was filed within 30-days, but the petitioner there missed the 90-day planning law service requirements. In that case the statutory requirements could be harmonized.