THE MARIN COUNTY BAR ASSOCIATION

REAL PROPERTY SECTION

2018
SIGNIFICANT DEVELOPMENTS IN CALIFORNIA REAL PROPERTY LAW

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LANDLORD/TENANT

Prepared by Len Rifkind (Rifkind Law Group)

LEGISLATION:

AB 2847. **Commercial Property Abandonment**. Authorized service of a Notice of Belief of Abandonment where rent has been due and unpaid for at least the number days required for the landlord to declare a rent default under the terms of the lease, but in no case less than three days. Service of the statutory notice form may occur by overnight carrier. Civ. Code §§1946, 1951.3. Effective January 1, 2019.

AB 2173. **Commercial Abandoned Personal Property**. Increases the calculation of the resale value of abandoned personal property from $750 (or $1.00 per SF) to either $2,500 or an amount equal to one month's rent, whichever is greater. AB 2173. Civ. Code §§1993.04, 1993.07. Effective January 1, 2019.

AB 2343. **Eviction Notices Excludes Weekends and Holidays**. In addition to excluding weekends and holidays from counting a three-day notice, the five-day summons period also excludes weekends and holidays as well. This legislation represents a major statutory change and win for tenant's rights. Code of Civ. Proc. §§1161m 1167. Effective September 1, 2019.

SB 721. **Deck Inspections**. All buildings with three or more multi-family units with "exterior elevated elements" such as: decks, balconies, porches, stairways, walkways, entry structures, which are elevated more than six feet above grade shall be inspected by a licensed professional by 2025 and not less than every six years thereafter. Landlord's should not wait until 2025. Lack of deck maintenance is a major source of liability. Civ. Code §1954, Health & Saf. Code §17973. Effective January 1, 2019.

AB 2413. **Domestic Violence**. Protects tenants from eviction or non-renewal of a tenancy by protecting right of tenant to summon law enforcement as victim of abuse, or victim of a crime, creating a rebuttable presumption in unlawful detainer cases. These cases are both heart rendering for the victim and difficult because often the victim remains co-habitating with the perpetrator. Civ. Code §1946.8, Code of Civ. Proc. §1161.3, Gov. Code §53165. Effective January 1, 2019.

AB 2219. **Rental Payments by Third Parties**. By state law, landlords do not have to accept Section 8 housing vouchers. However, many local agencies (e.g. Marin County, Fairfax, Novato, San Anselmo, San Rafael) may require landlords to accept vouchers. If third parties are paying rent, a landlord can require written acknowledgment no landlord-tenant relationship is created with the third party. Civ. Code §1947.3. Effective January 1, 2019.

AB 1919. **Rental Price Gouging**. As a result of wild fires in 2017 and 2018, the Governor has declared a State of Emergency (SOE) in multiple counties across the state over the past two years, now effective through May 4, 2019. Rent for any housing cannot be increased annually by more than 10% as determined by the actual rent paid by the tenant at the time of the proclamation. California AG has interpreted the law to apply state wide. If a unit becomes vacant during the SOE, the prior rental amount paid remains in effect as a limitation, unless furnished and additional 5% may be added. If unit was rented within one year prior to the SOE, then the last rent paid is the set rental price. If the rental was not rented for one

year prior to the SOE, rent limitation is 160% of fair market rent established by HUD. It is not a defense to increase rent in excess of 10% annually because of the length of rent term, increases goods or services, except furnishings, or paid by an insurance company on behalf of tenant.

Penalties. Up to $10,000 in fines and one year in jail and constitutes an unlawful business practice and unfair competition under Business and Professions Code section 17200, subjecting a landlord to punitive damages and attorney's fees under the private attorney general statute. Exception: A greater rental price increase is not unlawful if that person can prove that the increase is directly attributable to additional costs for repairs or additions beyond normal maintenance that were amortized over the rental term that caused the rent to be increased greater than 10 percent. Evictions may only occur for grounds stated by Code of Civil Procedure section 1161: rent, breach of covenant, lease termination, improper subletting, waste, nuisance, illegal use. A landlord cannot rent a unit for a rental price greater than the evicted tenant could be charged. (A Novato real estate agent was criminally prosecuted for raising the rent on her home from $5,000 to $9,000 (80%) after the 2017 Sonoma County fires. Penal Code §396, Gov. Code §8588.8. Effective January 1, 2019.

Marin County Just Cause Eviction Ordinance. Applies to three or more dwelling units. Exceptions: Does not apply to: Section 8 tenancies if the tenant's portion of the rent does not exceed 30% of household income; ADU's; JDU's; and resident managers. There are seven prerequisites before a Landlord can evict: (i) Business license; (ii) Service of Notice of Tenant Rights; (iii) Notice of Termination with copy to the County CDA; (iv) No acceptance of rent beyond term of tenancy; (v) Termination qualifies as For Cause; (vi) Registered the Dwelling Unit by June 1, 2019; and (vii) Compliance with "all other applicable regulations" regarding the premises. May only evict for the following: (1) rent; (2) breach of rental contract; (3) illegal activities; (4) threat of a violent crime; (5) nuisance behavior; (6) domestic violence, sexual assault, stalking. Landlord can evict under no fault for any of the following: (1) removal of the unit permanently from the market, (2) owner move in; (3) substantial rehabilitation for health and safety. Failure to comply is an affirmative defense and subjects a landlord to civil liability and attorneys' fees. Marin County Code, Chap. 5.100. Effective January 17, 2019

Other Local Jurisdictions: Cities of San Rafael, Novato Healdsburg have indicated they will also adopt just cause eviction ordinances.

Marin County Mediation Mandatory Requirement. In the County of Marin, tenants are entitled to mandatory mediation if rent is increased by five percent or services decreased by five percent. Tenants can sue to enforce mediation rights. Marin County Code Chap. 5.95. Effective February 12, 2018.

San Francisco Gross Receipts Tax. Proposition C imposes a new gross receipts tax of 1 percent on revenues a business receives from leasing warehouse space in San Francisco and 3.5 percent on revenues a business receives from leasing certain qualifying commercial spaces in San Francisco. Proposition C. Effective January 1, 2019.

CASE LAW:

Ban on short-term rentals of 30 days or less was a "development" under the Coastal Act that could not be instituted by a homeowner's association; regulation of that sort was only proper for the local governments and the Coastal Commission. *Greenfield v. Mandalay Shores Community Association*. (2018) 21 Cal.App.5th 896.

> **Facts**: Association is located within the jurisdiction of the Coastal Act, whose basic goal is to maximize public access to the beach. Here, an association in Oxnard banned short terms rentals, which associations have the authority to do provided it does not otherwise conflict with applicable law and here it did. A STR restriction changes the intensity of use and access to single family residences in the coastal zone.

Take Away. STR are controversial in every jurisdiction. Must check local ordinance. San Rafael recently decide no STR regulations. Banned in Tiburon, Larkspur. Regulated in Marin, County, Mill Valley, Sausalito.

Late fee was not impracticable or extremely difficult to determine to justify liquidated damages clause, and was invalid under Civ. Code, § 1671, subd. (d). *Del Monte Properties & Investments, Inc. v. Dolan* (2018) 26 Cal.App.5th Supp. 20.

Facts: Landlord gave three day notice to pay rent or quit that included a $50 late charge.

Take Away. This case may be significant and give legal authority to challenge liquidated damage provisions regularly found in rental and sales agreements.

Retaliatory eviction remedies of Civ. Code, § 1942.5 are excepted from the litigation privilege of Civ. Code, § 47, and landlord's retributive tactics *prior* to the eviction proceedings violated Oakland's Just Cause for Eviction Ordinance. *Winslett v. 1811 27th Avenue, LLC* (2018) 26 Cal.App.5th 239.

Facts: Tenant sued former landlord for retaliatory and violation of Oakland's just cause eviction ordinance after he failed to make repairs and filed an unlawful detainer. The landlord responded with a SLAPP (Strategic Limitation Against Public Participation) suit. Tenant alleged the building was in a state of gross uninhabitability: There were alcohol bottles, condoms, drugs and trash in hallways, and inside her apartment it lacked weatherproofing, water leaked from upstairs, unsanitary kitchen, mold, and cockroaches. Mold covered the walls, window sills and refrigerator. Presence of loiters and lack of security added to intolerable conditions. Tenant settled the unlawful detainer action with three months free rent and moving expenses paid. Tenant then sued landlord for 15 causes of action and landlord responded with a SLAPP motion.

Take Away: If you are going to be a slum lord there are both moral and legal risks. This landlord got what he deserved.

Tenant's exercise of option to purchase contained in long-term lease extinguished the tenancy such that no further rents were due, and rents paid after notice of exercise could be offset against the purchase price. *Petrolink, Inc. v. Lantel Enterprises* (2018) 21 Cal.App.5th 375.

Facts: Lessee exercised an option to purchase vacant parcel, but the parties could not agree on the purchase price and sue each other for specific performance. During the pendency of the action, lessee continued to pay rent.

Held: Once lessee exercised the option, the lease terminated, and subsequent rent payments were a credit against the purchase price.

Reverse triangular merger did not result in a transfer of real property that would trigger increased common area maintenance charges under contract because target corporation (tenant) retained its assets after the merger. *North Valley Mall, LLC v. Longs Drugs Stores California, LLC* (2018) 27 Cal.App.5th 598.

Facts: Involved a corporate reorganization called a reverse triangular merger, which arises when an acquiring corporation forms a new subsidiary, which is merged into the surviving corporation. In this case, a survivor corporation merger with Longs Drugs Stores, Inc., the surviving corporation, by sale of its stock but with retention of its legal title to the property at issue. The usefulness of such a merger is to leave the target corporation intact as a subsidiary of the acquiring corporation where the target corporation has contracts or assets that are not easily assignable. Here, keeping the lease in Longs names limited CAMS to 1/4 of 1 percent of gross sales, but if the property sold/assigned, then no limit on the CAMS.

Take Away. Structuring acquisitions to take advantage of favorable lease terms reflects the best good lawyering.

Claim that California Disabled Persons Act requirements for "designated and accessible path of travel" required a separate dedicated path for wheelchair users rather than a route through a parking lot and behind parked cars failed, because property complied with applicable California building standards, which did not require "separate" path. *Baskin v. Hughes Realty, Inc*. (2018) 25 Cal.App.5th 184.

Facts: Baskin suffers from osteogenesis imperfecta, a bone disease that renders her unable to walk or stand independently and requires her to use a wheel chair to be mobile. Baskin brought a claim against defendant operating a Ralph's Grocery Store under the Disable Persons Act (Civ. Code secs. 54 *et seq*.) and the Unruh Civil Rights Act (Civ. Doe 51 *et seq*.) for the time period before defendant established an accessible path of travel for disable persons.

Take Away: Property owners remain at risk for disability access claims and for claims arising before improvements are made. Most prudent course is to consult a CASp expert and implement as many disability access improvements that can be reasonably accommodated.

Commercial landlord was not liable for claims relating to damage to tenant's medical equipment from alleged sewage back-up where tenant was not lawfully on premises at the time of the incident due to failure to pay rent and landlord's initiation of unlawful detainer action. *Mutani v. Knight* (2018) 23 Cal.App.5th 837.

Facts: Tenant operated a medical clinic. Tenant stopped paying rent in July and landlord finally served a three-day notice in December, follow by an UD action. Tenant was finally evicted the following May. Sometime in early January, the premises suffered raw sewage flood.

Held: The monthly tenancy was terminated by tenant's failure to pay rent coupled with the landlord's filing of an unlawful detainer. Therefore, as of the filing of the UD, tenant was a tenant at sufferance and had no lawful right to possession of the premises, and landlord has no liability for tenant's property left on the premises, not caused by landlord's intentional act or negligence.

Take Away: Case of first impression, tenant's failure to pay rent terminated a month to month tenancy.

Owner of parking lot that was leased to taco truck had no duty to taco truck patron injured by another patron's car where the specific type of injury was not foreseeable and the burden to prevent such injuries would be great. *Sakai v. Massco Investments, LLC* (2018) 20 Cal.App.5th 1178.

Facts: Landlord/Defendant owned a gas station and lease a portion of the premises to a Taco Truck operator, who operated 4:00 p.m., to 3:00 a.m., seven days a week. At 2:00 a.m., Sunday (Saturday night) plaintiff entered the lot to get food and the lot was crowded. Plaintiff seeing no room backed up and his car struck another vehicle, causing property damage but no bodily injury. The second party exited his vehicle (borrowed from a friend) and was "pretty pissed off." The second party got back in his car and without warning backed up at a high rate of speed striking plaintiff and dragged him into the street causing serious bodily injury.

Take Away. Landlords can avoid liability in situations involving cars and pedestrians absent clear landlord negligence.

When a party has engaged in arbitration in good faith but is unable to afford to continue in such a forum, that party may seek relief from the superior court to order the other party to pay the arbitration costs or proceed in superior court. *Weiler v. Marcus & Millichap Real Estate Investment Services, Inc.* (2018) 22 Cal.App.5th 970.

Facts: Plaintiffs, now in their 80's lost more than $2M in a commercial investment. They exchanged two Las Vegas properties for a Red Robin restaurant in Texas supposedly worth $4.1M.

Defendant commercial broker represented plaintiffs in both sides of the transaction, sale of Las Vegas properties and acquisition of the Texas property. Shortly after purchase, the Texas tenant defaulted on the lease and failed to pay property taxes. Plaintiffs lost $600K income and sold the property for a $2.1M loss.

Procedure: Plaintiffs filed suit, and commercial broker filed a motion for binding arbitration with AAA. The arbitration moved forward slowly over two years. Because of the amount alleged by plaintiffs, the commercial broker demanded that the matter be heard by a three-person arbitration panel. Over objection of plaintiff the matter proceeded with three panel members at the hourly cost of $1450. After three years, plaintiffs stated they could not afford the cost of proceeding. Plaintiffs sought a *Roldan* motion: Either the broker assumes all costs, or the matter is transferred to the superior court. *Roldan v. Callahan & Blaine* (2013) 219 Cal.App.4th 87.

Take Away. This decision is not surprising where the facts are seniors who lose their life savings to at the hands of a national brokerage firm who demands a three person arbitration panel at the cost of $1500 per hour.

COMMON INTEREST DEVELOPMENTS

Prepared by Wanden P. Treanor, Esq. (Law Offices of Wanden Treanor)

LEGISLATION:

AB 2912: New Requirements Regarding HOA Finances; Fraud Prevention.
Amends CC §§5380 and 5500; adds CC §§5501, 5502, and 5806.
This new law is designed to prevent fraud and embezzlement in common interest developments. It prohibits transfers of greater than $10,000 or 5 percent of the total combined reserve and operating account deposits, whichever is lower, without prior written board approval.

The new statutes require monthly (as opposed to quarterly in prior law) reviews of operating accounts, reserve accounts, as well as many more newly mandated monthly reviews. Those reviews must be documented in the association's records. The Board members must look at actual operating revenues and expenses compared to budget, monthly bank statements, income and expense statements, as well as check registers, the monthly general ledger, and delinquent assessment receivable reports.

Every individual board member is to review all the financial documents described above, at a Board Meeting; however, a subcommittee of the board (Treasurer and another board member) may review and report to the Board for ratification at the next meeting. It also requires associations to obtain fidelity insurance, as well as computer and transfer fraud insurance.

SB 261: Extends use of email to provide notice to revoke authorization and notice for Operating Rules.

Amends Sections 4040 and 4360 of the Civil Code.

Allows wider email use – members may ask for communications by email using email and may revoke that authorization via email. Changes to 28 days instead of the prior 30-day notice to homeowners for proposed Operating Rule changes.

SB 1016: Electric Charging Stations in Common Area and Exclusive Use Common Area. Amends Civil Code Section 4745 and adds Section 4745.1.

Clarified that homeowners must pay the costs associated with the installation and electrical usage of electric vehicle charging stations. It adds "time of usage" meters for electric vehicle charging stations that Associations can't prohibit, allows imposition of reasonable requirements on the homeowner and clarifies that the homeowner must pay the added costs associated with the installation and electrical usage of electric vehicle charging stations.

SB 721: **Last year's "balcony bill,"** was amended in June 2018, to exclude its application to common interest developments. That bill, requiring multilevel residential properties to conduct inspections of balconies and other elevated elements every six years exempts HOAs, for now.

AB 1766: **Swimming Pools** – Adds Section 116046 to the Health and Safety Code.
This bill requires an Automated External Defibrillator (AED) on the premises of any pool that provides lifeguard services and charges a fee. Associations with lifeguards that allow non-members access to their pools, for a fee, would fall under this bill.

VETOED Bills:

SB 1128. It was initially written to allow for election by acclamation, but it was hijacked and turned into extremely complicated election rules and standards for nominations. Passed 38-2 Senate and 76-4 in Assembly

SB 1265. This bill would prohibit candidate qualifications other than being a member of the association, financial felon or delinquent in regular assessments. It also added requirements regarding accessibility to voting areas, use of powers of attorney, a number of voting procedures and it required a court to overturn an election if there was a technical violation. Passed Senate 27-11 and 46-27 in Assembly

In vetoing the bills, Governor Brown said:

> California has over 50,000 common interest developments varying in purpose and size. Each one has governing documents that are tailored specifically for that individual community. This bill takes a once-size-fits-all approach, but not all homeowner associations are alike.
>
> If changes to an election process are needed, they should be resolved by the members of that specific community.

CASE LAW:

Attorney's Fees

Artus v. Gramercy Towers Condominium Ass'n (2018) 19 CA 5th 923

Issue: Did the court err in denying statutory fees and costs under Civil Code §5145 when Artus prevailed in obtaining a preliminary injunction?

Facts: Artus owned three or 260 condominium units and had been elected three times to the Board through cumulative voting. Artus sought declaratory judgment and injunctive relief preventing implementation of the bylaw amendment eliminating cumulative voting. A substantial majority of owners voted to eliminate cumulative voting. Artus claimed that there were errors in the election process, e.g. Board posted signs and sent letters in support of the amendment and owner claimed lack of equal access and failure to distribute mandatory statutory disclosures. Owner obtained preliminary injunctive relief to stall the board election by direct vote.

Before the trial, and without objection from Artus, the Board conducted a second election with a similar result to eliminate cumulative voting, then 30 days later conducted the board election and Artus was not elected. After a three-day bench trial, the trial court entered judgment in favor of HOA, finding the HOA made good faith efforts to comply and that the HOA was the prevailing party and denied Artus's statutory fees and costs. Artus appealed.

Holdings: (1) owner's claim that HOA's conduct violated the Act did not present actual controversy, and therefore owner was not entitled to declaratory judgment that HOA violated the Davis Stirling Act; and, (2) final judgment in condominium owner's favor was required for award of fees and costs under the Davis-Stirling Act.

Enforcement of CC&Rs and legal deference paid to Board decisions

Eith v. Ketelhut (2018) 31 Cal.App. 5th 1 (certified for partial publication, political donation to judge, an issue with the property discharge of Plaintiff's attorney and dealing with a Quiet Title cause of action, were not certified for publication.)

Issue: Does the installation of a vineyard in a residential CID violate a 'no business or commercial activity' restriction in the CC&Rs?

Facts: Owners planted 600 grape vines on their Lot with HOA approval and trucked grapes off the property to make the wine. The wine making business was conducted from the home, and the home was the address for the business license and for the alcohol license. Neighbors complained, Board investigated and focused on the issue if the vineyard 'disturbed the residential character' of the planned community. The Board interviewed homeowners and conducted a public hearing at which the Ketelhuts answered questions. Ultimately, the Board decided that the vineyard was akin to landscaping and did not disturb the residential character of the development and therefore did not constitute a prohibited business activity. Because the Ketelhuts' vineyard did not detract from the residential character of the neighborhood, it was permissible under the CC&Rs.

Neighbors sue winemakers and Board, alleging failure to enforce the CC&Rs. The trial court deferred to the HOA's decision because it was made based "upon reasonable investigation, in good faith and with regard for the

best interests of the community association and its members." The Second District upheld this deference, citing *Lamden v. La Jolla Shores Clubdominium Homeowners Assn.* (1999) 21 Cal.4th 249.

The Court of Appeal concluded that even without deference the small vineyard would not qualify as a prohibited business activity as a matter of law. This analysis was based on the facts of the case, most notably that the wine is made, bottled, and shipped elsewhere, and there is no retail traffic to the property. Indeed, the court explained that "absurd consequences would flow from construing the CC&Rs as prohibiting any business or commercial activity whatsoever irrespective of its effect on the residential character of the community" The court noted, for instance, that an appellate attorney reading briefs at home would be engaged in commercial activity under that definition.

The decision provides an excellent account of the limitations and appropriateness of when judicial deference should be applied and an analysis of several cases addressing the issue. The court clearly states that it will not defer to the Board's 'interpretation' of the CC&Rs as that is a "legal question to be decided by the courts, not the Board." However, it noted that the Board members live in the community, investigated the impacts on the membership and were in a much better position than the courts to evaluate the vineyard's effect on the community; therefore, the court should defer to the Board's "authority and presumed expertise."

Added element that homeowners moved to disqualify the judge on the grounds that neighbors had made campaign contribution to judge's campaign, demanding recusal. Homeowners subsequently filed motion to disqualify judge on grounds that he had received campaign contributions from neighbors' counsel and had not disclosed them to homeowners. Following recusal, another judge denied homeowners' motion for new trial. Homeowners appealed.

Holdings: (1) The judgment was not void because trial judge did not disclose contributions made by neighbors' counsel to his campaign for re-election to the trial court; (2) judicial deference rule applied to decision of association that homeowners' growing of grapes on property did not constitute business or commercial activity prohibited under association's covenants, conditions, and restrictions; and, (3) alternatively, as matter of law, growing of grapes on property did not constitute business or commercial activity.

The Ketelhuts claimed they were entitled to attorney fees of $351,432.55, which was granted after reducing the fees, to which they cross appealed claiming the trial court abused its discretion in reducing the fees by $100,926.05 to $250,506.50, which was sustained on appeal. Parties were to bear their own costs on appeal.

Priority of Association Lien

Bear Creek Master Association v. So. Cal. Investors, Inc. (2018) 28 Cal.App.5th 809

Issue: Did homeowners' association's assessment lien against neighboring golf course property have priority over earlier-recorded third deed of trust?

Facts: In 2013, a lender, Southern California Investors, Inc., recorded a third deed of trust against the golf course property. In 2014, Bear Creek Master Association recorded an assessment lien against the golf course property. The trial court entered judgment on the pleadings in favor of the lender after determining that its third deed of trust had priority over the Association's later-recorded assessment lien. Bear Creek Master Association appealed, claiming its assessment lien has priority.

The Association owns and is responsible for maintaining the common areas within the Bear Creek Development. The golf course property is adjacent to but is not part of the Bear Creek Development. The Association exercised its right to enter the golf course property to remedy course owner's failure to maintain it as it was legally entitled, but not obligated, to do. Its authority to do so was created under the 1984 recorded CC&Rs, which granted the Association a "claim of lien" against the golf course property to secure certain costs. After incurring costs in maintaining the golf course property, the Association recorded an assessment lien to recoup those costs. The Association's lien was recorded after the lender recorded its third deed of trust.

The Association brought an action for declaratory relief, alleging that its assessment lien was superior to third deed of trust recorded against the property. The trial court entered judgment on the pleadings in favor of the lender and the Association appealed.

The Court of Appeal rejected the association's argument that its assessment lien was created by the CC&Rs and related back to the 1984 recordation of the CC&Rs. An assessment lien, like any comparable lien, is not perfected until created and recorded. But creditors were charged with constructive notice of any and all subordination provisions within recorded CC&Rs and are bound by them. The CC&Rs at issue clearly and explicitly stated that an assessment lien had priority over all liens or claims created subsequent to the recordation of the CC&Rs other than tax liens for real property taxes and assessments.

The Court of Appeal reversed on the grounds that the subordination provisions of the CC&Rs gave priority to Association assessments, despite the mortgage lien having been recorded prior to the assessment lien.
1. A mortgage creditor has constructive notice of the CC&Rs when it recorded its deed of trust against property subject to those CC&Rs and was bound by the CC&Rs.
2. Therefore, the subordination provisions in the CC&Rs gave any association assessment lien priority over the mortgage creditor's lien.

Holdings: (1) assessment lien was not created or perfected until association's notice of delinquency of the assessment lien was recorded; (2) assessment lien did not relate back to initial execution and recordation of golf course's covenants, conditions and restrictions (CC&R's); and, (3) assessment lien had priority over third deed of trust pursuant to priority and subordination provisions of golf course's CC&R's.

Premises Liability – Foreseeability of Harm

Staats v. Vintner's Golf Club, LLC (2018) 25 CA5th 826

Issue: Does a golf course operator's duty to maintain the property in reasonably safe condition include a duty to exercise reasonable care to protect patrons from yellowjacket nests on the premises?

Facts: Staats was bitten over 50 times by a swarm of yellowjackets and nearly died. She sued seeking damages for general negligence and premises liability. Before the attack, the Club had no actual knowledge of any swarm, hive, or nest ever being on the grounds, or of any patron ever being stung there. The property was regularly inspected by a pest control company for insects and rodents. There were not traps or other measures taken to control yellowjackets because it was not perceived to be an issue. After the incident, the pest control company found a small hole in the ground with a few yellow jackets around.

The trial court granted summary judgment against Staats on the basis that the Club owed no duty to protect its patrons from yellowjackets that came from an undiscovered nest on the golf course and Staats appealed.

The Court of Appeal reversed, holding that the duty of golf course operators to maintain their property in a reasonably safe condition includes a duty to exercise reasonable care to protect patrons from yellowjacket nests on the premises. The court found it "of marginal importance" that the Club was unaware of any previous swarm or sting; a danger does not have to "previously manifest" to be foreseeable. "Thus, the fortuitous absence of prior injury does not justify relieving [a] defendant from responsibility for the foreseeable consequences of its acts", quoting *Lawrence v La Jolla Beach & Tennis Club* (2014) 231 CA4th 11, 31.

The measures a golf course operator must take to satisfy this duty may vary. Here, the court did not address which actions the Club should have taken to minimize the risk (including the extent of reasonable inspections), whether the Club breached its duty, or whether any such breach caused Staats's injuries. Those unresolved questions of material fact had to be determined by the trier of fact; thus, the court reversed and remanded the case for further proceedings.

Holding: It was reasonably foreseeable that yellow jacket nests would be on the golf course and would injure a player if agitated. Therefore, the Club's duty to keep its premises in a reasonably safe condition included protecting golfer from yellow jacket wasp nests.

Anti- SLAPP (Strategic Lawsuits Against Public Participation).

Golden Eagle Land Investment, L.P. v. Rancho Santa Fe Asociation (2018) 19 Cal.App.5th 399

Issue: Was a developer's claim against an association for allegedly taking certain unauthorized actions in violation of the Open Meeting Act (e.g. voting on matters not specified in the agenda) based on protected activity and therefore subject to an anti-SLAPP motion?

Facts: Property owners brought action against homeowners' association, asserting numerous statutory and tort theories arising out of dispute over land use approvals for development project.

Developers sought approval for a 28-acre senior housing project with a higher population density than typically allowed. As they sought approvals, they reached out to the Rancho Santa Fe Association. The developers understood the president of the association supported the project; a meeting of the association was called and an agenda was distributed disclosing the following item would be discussed: "a presentation on high density housing" and a "review of a 2006 planning committee study and board decision". After the meeting, the Association sent a letter to the County saying the Association had voted unanimously to request that the County adhere to the current general plan and its density requirements (and not the increased density proposed by the development).

Under Civil Code section 4930(a) of the Common Interest Development Open Meeting Act, in most situations, "the board may not discuss or take action on any item at a nonemergency meeting unless the item was placed on the agenda included in the notice . . ." Alleging the Association voted on matters not specified on the agenda and otherwise took unauthorized actions with regard to the proposed development, the developers asserted several claims against the Association, including for violating the Open Meeting Act, as well as for breach of fiduciary duty and breach of the Association's bylaws.

The Association filed an anti-SLAPP motion, and the trial court granted the motion as to all claims except one (an Open Meeting Act claim asserted by one of the developers), and both sides appealed. The Court affirmed the trial court's grant of the motion but reversed its denial of the motion as to the Open Meeting Act claim.

The Court applied the two-step anti-SLAPP analysis: (i) has the defendant met its burden to show the cause of action arose from protected activity; and (ii) if so, has the plaintiff demonstrated a probability of prevailing on the claim. All claims involved protected activity, pursuant to Code of Civil Procedure section 425.16, subdivision (e), which provides that an "act in furtherance of a person's right of petition or free speech . . . in connection with a public issue" includes "any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest."

The Court held that the developers' claims all arose out of the Association's activities related to property entitlements that were matters of "public interest" and as such, were all based on protected activity. It also held that the developers were unlikely to prevail on their claims because the agenda was sufficiently specific and one of the developers did not provide sufficient evidence of standing.

Trial court granted in part and denied in part association's motion to strike under law prohibiting strategic lawsuits against public participation (anti-SLAPP law). Owners appealed and association cross-appealed. Court of Appeal affirmed the trial court's grant of anti-SLAPP motion as to eight claims and reversed the trial court's denial of the one remaining claim; remanded.

Holdings: (1) association's activities in writing letter to county and in holding meeting to receive views on project constituted conduct affecting the public interest, as could fall within protection of anti-SLAPP law; (2) developer failed to establish probability of prevailing on claim for violation of Open Meeting Act, and thus, after

showing of protected conduct, claim was precluded by anti-SLAPP law; and (3) any reliance by developer on representation of association president was not justifiable and thus did not support a fraud claim..

Anti-SLAPP Motion – Requirements for an Association to come under the Davis-Stirling Act

Cheveldave v Tri Palms Unified Owners Association (2018) 27 CA5th 1202

Issue: Did the Association come under the Davis Stirling Act if it does not have common area and its easement for its members to use the recreational facility was not reciprocal?

Background: Two homeowners filed action against homeowners association (Association), prior owner of recreational facility for which homeowners paid usage fees, and against the successful bidder for facility in prior owner's bankruptcy proceeding, seeking declaration that real property development was not common interest development, subject to the Davis Stirling Act. Therefore, the owners claimed that the Association lacked the authority to enter into settlement agreement with successful bidder which increased member fees, claimed that the fee increase was a breach of the CC&Rs, and therefore, the settlement agreement was void.

The Court of Appeal reversed the judgment, concluding that the act of the Association entering into a settlement agreement that increased fees for nearby recreational facility qualified as protected activity for purposes of anti-SLAPP statute, but the owners' claims challenging that agreement had sufficient merit for denial of anti-SLAPP motion.

However, a provision regarding a nonexclusive easement for the recreational facility in the Master Association CC&Rs was not a reciprocal or mutual easement because it did not create a common area under the Davis-Stirling Act. Additionally, the court found that the utility and drainage easements did not create a shared burden. Therefore, the master CC&Rs did not authorize Association to agree to fee increases without member approval, so Cheveldave's claim on that ground also had the requisite minimal merit.

Lastly, the bankruptcy court did not collaterally estop Cheveldave from bringing his claim because the terms of the Agreement were not part of its order. He was an aggrieved party with standing to maintain appeal because of trial court's award of attorney fees to Association.

Holdings: (1) the act of the Association entering into settlement agreement constituted protected activity under anti-SLAPP statute; (2) master CC&R provision regarding non-exclusive easement for use of recreation facility did not create "common area" under Davis-Stirling Act; (3) provisions in CC&Rs for development regarding utilities easements did not create "common area" under the Act; (4) homeowner's claim that master CC&R provision regarding Association powers did not authorize fee increase had minimal merit, so as to support denial of anti-SLAPP motion; (5) argument that any lack of authority by Association to enter into agreement was harmless did not render lawsuit without merit, for purposes of anti-SLAPP statute; (6) any deference due to merits of HOA decision to enter into fee increase did not demonstrate lawsuit's lack of minimal merit, for purposes of anti-SLAPP statute; (7) bankruptcy court order did not collaterally estop homeowner from bringing claims; and (8) homeowner was aggrieved party with standing to maintain appeal despite home foreclosure.

Unpublished Cases

Broad Judicial Discretion

Eicherly v. Palm Beach Park Association (Unpublished) 2018 WL 6599821

The trial and appellate courts upheld an election to impose a $200,000 special assessment, despite numerous procedural violations of the Davis-Stirling Act. The election was found to be reasonably fair.

In 2007 the Palm Beach Park Association purchased land under mobile homes after 100% of owners voted to specially assess all owners equally, $200,000 each, rather than in proportion to benefit. Three years later, after the 2008 economic downturn, the assessment was challenged. Association conducted a new vote, includeing a bylaw amendment to provide for equal assessments and to ratify the 2007 assessment.

The trial court found a number of procedural irregularities in how the election was conducted, including several significant irregularities that were contrary to existing law and the existing bylaws governing elections. The length of time for balloting, the failure to use the mandated double envelope, meaning ballots were not 'secret', including the use of tally sheets such that you could easily discover how each owner voted.

Despite these findings, the trial court exercised its discretion to uphold the election. According to the trial judge, the election was "reasonably fair." The court further reasoned that because the election had not complied with the existing bylaws, there was no reason to address the issue of compliance with the Davis-Stirling Act.

Although the significance of shifting from equal to proportionate assessments is huge, coupled with the irregularities in the election, the trial court still found it was reasonable. Eicherly appealed.

The judgment of the trial court validating the election was affirmed. The Court of Appeal said in the decision, "Using our own discretion, we believe the interests of justice best served by each party bearing its own costs on appeal." As if to reiterate it is all a matter of the courts' discretion.

Mold Remediation Reasonable, not a Nuisance

Bakas v. Mountainback Condominium Owners Assn. (unpublished)

Water heater upstairs floods downstairs unit, Fire Department responds, the Association sends ServPro out the same day. Mold later discovered in cavity between units. Upstairs owner sued the Association for failure to maintain common area in 'first class condition' as a breach of the CCRs, alleged that common area plumbing, not water heater, caused the leak, and further alleged that the Association was negligent in its response, creating a nuisance.

The jury found the seriousness of the harm did not outweigh the public benefit of the Association's diligent response. The evidence supported a jury finding that the damage from the water heater leak was slight. The Association's expert testified that the Bakases' unit "looked great" and had no odor of mold. Because the Association's conduct was not the cause of any mold damage inside the owner's unit, the jury was entitled to determine the alleged nuisance was outweighed by the public benefit of the Association's efforts in responding to the nuisance.

The trial court entered judgment in favor of Mountainback. The Bakases filed a motion for new trial, which was denied and they appealed. The trial court also awarded $425,000 in attorney and paralegal fees to the Association, to which the owners filed a supplemental notice of appeal from the order granting fees and costs. The judgment was affirmed, and the Association recovered its costs on appeal.

Short Term Rental Restrictions

Grande S. at Santa Fe Place Owners Assn. v. Williams (Unpublished)

New Restated CC&Rs were drafted to bring the CC&Rs into compliance with existing law concerning homeowners associations, and to remove the supermajority requirement to amend the CC&Rs and replace it with having a bare majority to make future amendments easier and less costly. The CC&Rs required the approval of its owners representing at least 67 percent of the total members of the Association. Because only 54.8 percent of the owners voted to approve the amendments, the proposed amendments failed under the terms of the CC&Rs. With more than a majority approval, the Association filed a verified petition under section 4275 seeking court approval of the failed amendments.

Williams opposed the petition arguing several issues, including that one of the proposed amendments would critically impact his property rights because it imposed a new minimum lease period of 12 months, where the existing CC&Rs had no minimum lease period. The rental period amendment stated in relevant part:

> No units shall be rented or leased for a period of less than twelve (12) months. All Owners who rent their condominiums shall submit names and contact numbers for their tenants to the management company for the Project on a form provided by the Association that further certifies that the Residential Unit has been leased or rented for a minimum of twelve (12) months to said tenants.

He also objected to the occupancy, notice and limit on guest stay amendments, which provided:

> **Limit on Occupancy**. The upper limit on the total number of occupants who may reside in a Unit at any one time is 2 persons per bedroom plus 1 person per living room.
> **Notification of Guest Stay**. A Resident who permits anyone to occupy the Unit when the Resident is not in residence must submit each occupant's name and contact information to Management for emergency purposes.
> **Limit on Guest Stays**. The Rules and Regulations may limit the number of guest stays for which the Resident is not in residence in a Unit in any calendar year.

The Association argued the provisions were reasonable and necessary to address problems with short term rentals. And, in keeping with current law, grandfathered all current owners for as long as they own their unit.

After hearing oral argument, the trial court granted the petition. The court noted that under Civil Code section 4740 "these new rental restrictions" would not apply to any owner who purchased his or her unit before the amendments went into effect and specified that any proposed order contain the section 4740 limitation.

Association prevails, the amendments were deemed reasonable and were “rationally related to the protection, preservation and proper operation” of the condominium project.

While unpublished, case shows continued support for adoption and enforcement of reasonable short-term rental restrictions by the courts.

CONSTRUCTION & CONSTRUCTION DEFECT

Prepared by Scott Williams (Williams & Gumbiner LLP)

LEGISLATION:

Inspection of balconies and decks (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 Health & S C §17973; amends CC §1954.)

Citation review for violation of Contractors' State License Law (SB 1042) – Provides review procedure for contractors to contest disciplinary citations. The contractor may request an informal citation conference in addition to, or in place of, an administrative hearing. (Adds B&P C §7099.8.)

Contractor liability for wages and benefits (AB 1565) – This is a follow-up bill to clarify a 2017 bill that created new joint and several liability provisions for contractors and subcontractors. As amended, a "direct contractor" (one in privity with the owner) assumes liability for wages/benefits owed to workers hired by subcontractors. However, a direct contractor's obligations do not impose liability for anything other than unpaid wages and fringe or other benefit payments or contributions, including interest. A direct contractor is allowed to withhold all sums owing to subcontractor if subcontractor fails to produce payroll information, and information about the subcontractors they may hire. General contractor must specify in its contract with subcontractor what information subcontractor must produce to avoid withheld payments. (Amends Lab C §218.7.)

CASE LAW:

CONSTRUCTION DEFECTS:

SB 800 provides exclusive remedy for residential construction defect claims.
McMillin Albany LLC v. Sup. Ct. (2018) 4 C5th 241.

Background – SB 800, Civil Code §§896 *et seq*., enacted in 2002, provides a statutory scheme for the resolution of residential construction defect claims, including both mandatory prelitigation procedure and substantive law that by all appearances replaced common law causes of action for strict liability and negligence with statutory standards, the violation of which creates a statutory right of action.

The Supreme Court accepted review because appellate court decisions were split on the question whether SB 800 provides an exclusive remedy in defect suits. The split began with the holding in *Liberty Mutual Ins. Co. v. Brookfield Crystal Cove LLC* (2013) 219 CA4th 98, which held, to the surprise of many, that SB 800 did not provide an exclusive remedy, and that the owner of residential property could pursue common law causes of action in addition to the statutory cause of action created by SB 800.

In *McMillin*, the plaintiffs sought to avoid the prelitigation procedure required under SB 800 by dismissing their statutory cause of action and proceeding only on their common law claims. The Fifth District, however, disagreed and held that, as many believed all along, SB 800 provides the exclusive remedy in residential construction defect litigation.

The Supreme Court held that SB800 provides an exclusive remedy in construction defect suits, supplanting common law causes of action for strict liability and negligence, and that a plaintiff seeking recovery for constructive defects must initiate the prelitigation procedures embodied in the Act. The Court disapproved of *Liberty Mutual* and *Burch v. Sup. Ct.* (2014) 223 CA4th 1411, to the extent they held that the Right to Repair act was adopted to provide a remedy for construction defects causing only economic loss and that the Act did not alter preexisting common law remedies in cases where actual property damage or personal injuries resulted.

The Court wrote that its holding does not apply to claims that are expressly placed outside the reach of the Act, such as claims for breach of contract, fraud, and personal injury. The Court implied that the Act also does not apply to breach of warranty claims.

Failure to comply with pre-suit procedures in CC&Rs.
Branches Neighborhood Corp. v. CalAtlantic Group, Inc. (2018) 26 CA5th 743.

Background – The Supreme Court held in *Pinnacle Museum Tower Assn. v. Pinnacle Market Development* (2012) 55 C4th 223, that the CC&Rs are the equivalent of an arms-length contract between the developer and the HOA, notwithstanding that the CC&Rs are a unilateral creation of the developer, before the HOA even exists, and therefore, the HOA may not amend or delete those provisions favorable to the developer – such as mandatory arbitration or restrictions that make litigation against the developer more difficult – which are fully enforceable by the developer.

In *Branches*, the HOA served notice on the developer pursuant to SB 800, and after concluding an unsuccessful SB 800 proceeding, initiated an arbitration claim as required by the CC&Rs. However, the HOA failed to comply with a provision in the CC&Rs requiring a majority vote of the owners before initiating a construction defect claim. Realizing the oversight, the HOA obtained a majority vote of the members for purposes of ratifying the decision to initiate the arbitration claim.

The developer moved to dismiss the suit for failure to comply with the CC&Rs. In a Draconian ruling, the Fourth District, citing "public policy," enforced the requirement and dismissed the suit. The HOA's substantial compliance, by obtaining a majority vote to ratify the arbitration claim was not in strict compliance with the CC&Rs and therefore ineffective. Result: The developer was off the hook for a $5 million plus defect claim, leaving the owners on their own to fund the repairs, even though a majority of the owners supported the claim; "public policy" was served.

SB 800 does not permit class action claims.
Kohler Co. v Superior Court (2018) 29 CA5th 55.

Plaintiffs filed a class action against Kohler for defective plumbing components installed in their homes during construction. The claim was not limited to a given development, but filed on behalf of all homeowners with the Kohler plumbing components in question. The decision is a lengthy one that places demands on the reader requiring major caffeination to get through, and then you'll have to try again.

The plaintiffs' apparent underlying strategy, although not specified in the decision, was to file the suit under SB 800 to take advantage of the ability under the Act to recover for defects that have not caused physical injury. Presumably, the majority of the Kohler components had not yet caused injury.

In any event, this is yet another decision in which the court was forced to reconcile ambiguous and inconsistent provisions in the Act (generally regarded as a deplorable piece of legislation). The court's limited holding is that "the Act does not permit class action claims except when those claims address solely the incorporation into the home of a defective component other than a product that is completely manufactured offsite" (at 72).

Release of liability in purchase agreement enforced; no recovery for construction defects.
SI 59, LLC v. Variel Warner Ventures, LLC (2018) 29 CA5th 146.

Defendants constructed improvements at an apartment complex and then sold it in 2007. The purchase agreement included a general release that included construction errors. Plaintiff, a subsequent owner of the apartments, filed suit after discovering leakage from building code violations by the contractors who constructed podium and pool decks.

Civil Code §1668 provides: "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

Because the construction of the decks in violation of the building code was a past event, the court of appeal considered whether §1668 might apply to a past tort. *Held*: We follow the weight of authority recognizing that §1668 applies only to concurrent or future torts.

HOA STANDING:

HOA standing for damage to common areas includes inverse condemnation actions.
Sierra Palms HOA v. Metro Gold (2018) 19 CA5th 1127.

The construction of a municipal railway caused damage to the common area of a condominium development adjacent to the railway. The HOA sued the railway on an inverse condemnation theory. The trial court sustained the railway's demurrer for lack of standing.

Held: Civil Code §5980 confers standing on HOAs to sue for damage to the common areas. This standing applies when there is damage to the common area regardless of the legal theory alleged.

CONTRACTOR DISCIPLINE:

Contractor required to exhaust administrative remedies.
Contractors' State License Board v. Superior Court (2018) 28 CA5th 771.

The CSLB brought a disciplinary proceeding against a contractor, who filed a superior court action for declaratory relief, seeking judicial construction of statutory terms at issue in the administrative proceeding. The CSLB's demurrer, on the ground that the contractor was required to first exhaust his administrative remedies, was overruled by the trial court.

The court of appeal granted writ review of the ruling. *Held*: There is no applicable exception to the requirement of exhausting administrative remedies. The contractor could preserve his contentions during the administrative proceeding and then properly seek judicial review after the proceeding concluded.

PUBLIC CONSTRUCTION CONTRACTS:

Govt Code §1090, prohibiting conflicts of interest in public contracts, applies to independent contractors.
Strategic Concepts, LLC v. Beverly Hills Unified Sch. District (2018) 23 CA5th 163.

Christiansen, the District's director of planning, persuaded the District to change her position from employee to independent contractor, formed Strategic Concepts, and was awarded a $16 million no-bid contract from the District. The District later declared the contract void under Govt Code §1090 (prohibiting conflicts of interest) and §4525 (requiring competitive bidding on specified contracts). Strategic Concepts sued the District and obtained a judgment for $20 million in damages, prejudgment interest and attorney fees.

The court of appeal reversed, holding that §1090 applies to independent contractors, and gave instructions on the application of §4525 in the event of a retrial.

LIABILITY INSURANCE:

Additional insured; no conflict of interest requiring *Cumis* counsel.
Centex Homes v. St. Paul Fire & Marine (2018) 19 CA5th 789.

Centex, the developer/defendant in a construction defect suit filed by homeowners, sued its subcontractors alleging breach of contract to indemnify, defend, and obtain insurance. Centex also sought declaratory relief against one of the subcontractor's (AD Land's) insurers, St. Paul, which had retained panel counsel (Lee) to defend Centex under a reservation of rights. Centex contended that there was a conflict of interest requiring that St. Paul retain *Cumis* counsel (CC §2860) to defend it.

St. Paul moved for summary adjudication, supported by evidence that Lee only represented Centex with respect to its defense of the complaint. Lee did not represent Centex, Ad Land, or St. Paul in connection with the cross-complaint. Lee declared that St. Paul did not place any limitations on his representation of Centex and never dictated or controlled what he could do regarding the prosecution of Centex's cross-complaints. The trial court granted the motion and Centex appealed.

Held: A reservation of rights does not automatically guarantee an insured's right to *Cumis* counsel. It is a case by case determination. The conflict must be significant, not merely theoretical; it must be actual, not

merely potential. Centex relied on §2860's language codifying the right to independent counsel whenever "a possible conflict may arise"; as well as Rule of Professional Conduct 3-310(c)(1), which requires appointment of independent counsel in the event of any potential conflict. However, the court ruled that these authorities are inconsistent with case law pertaining to *Cumis* counsel.

No duty to defend claims excluded under policy.
All Green Electric, Inc. v. Security National Insurance Co. (2018) 22 CA5th 407.

Green was hired to perform electrical work as part of the construction of an MRI and X-ray facility. The machinery in the completed facility wouldn't work because of too much magnetic field in the room. After substantial investigation, expense and lost use of the facility, it was determined that the problem was due to a loose bolt in an electric cabinet that was not fully tightened by Green. Once the bolt was tightened, the problem was resolved. The owner sued all involved, including Green.

Green's insurer properly denied a defense under the "impaired property" exclusion in Green's policy. The exclusion applies to "'Property damage' to 'impaired property' or property that has not been physically injured, arising out of: (1) A defect, deficiency, inadequacy or dangerous condition in 'your product' or 'your work;' or (2) A delay or failure by you or anyone acting on your behalf to perform a contract or agreement in accordance with its terms." The loose bolt was an inadequacy in "your work" and was also a failure to perform the contract by tightening the bolt.

JOBSITE INJURY:

Owner liable for jobsite injury under "retained control" exception

Sandoval v. Qualcomm, Inc. (2018) 28 CA5th 381

Sandoval was severely burned by live circuit breaker while employed by contractor at plant owned by defendant Qualcomm (Owner). Jury returned verdict that Owner negligently retained control over safety conditions at jobsite, under "retained control" exception to general rule that owner is not liable for independent contractor's injuries, which was a substantial factor in Sandoval's injuries.

Court of appeal affirmed. Substantial evidence supported jury finding that Owner negligently exercised conditions of jobsite. Owner created a lockout/tagout procedure before inspections began and held a safety meeting with all parties on the jobsite. Owner agreed to instruct all working parties regarding what was hot and not hot in the switchgear room, being admittedly "critical" knowledge, knowledge Sandoval was not informed of.

AIA STANDARD FORM CONSTRUCTION CONTRACTS:

The standard AIA standard form construction contracts were substantially revised in 2017. The following is not intended to be a comprehensive list of the changes, but simply to provide some highlights that illustrate the nature of the revisions.

INITIAL DECISION MAKER:

The 2017 edition continues to make the Initial Decision Maker (IDM) responsible for rendering initial decisions on Claims. Revised §14.2.2 now states that the Architect will certify whether sufficient cause exists to terminate the Agreement.

Notice. In addition to allowing written notice to be served by personal delivery, by registered or certified mail, or by courier providing proof of delivery, new §16.1 permits service by electronic transmission, if set forth in the Agreement. However, a Notice of Claim cannot be sent electronically.

BIM and other digital data. The 2007 edition stated that the parties shall endeavor to establish protocols governing transmission of documents in digital form. New 2017 editions address the widespread use of Building Information Modeling (BIM). A Contractor may have to rely on BIM information provided by the Architect before these protocols are established, *e.g*., when calculating its bid.

Evidence of owner's financing. Under revised §2.2.1, if the Owner fails to provide reasonable evidence of project financing at Contractors written request, Contractor is not obligated to start work, and the contract time is extended.

Unsafe means or methods. Revised §3.3.1 requires Contractor to give notice and propose alternative means or methods when proposed means or methods are unsafe but does not allow a Contractor to stop work.

Warranty. New §3.5.2 mandates that all material, equipment, or other special warranties required by the Contract documents, 1) be issued in the Owner's name or be transferable to the Owner; and 2) start when substantial completion is issued for that work, which will be determined by the Architect's preparation of the Certificate of Substantial Completion for the Work or designated portion thereof.

Differing site conditions. Revised §3.7.4 reduced the time requirement for a Contractor to give notice of differing site conditions from 21 to 14 days.

Contractor's construction schedule. Revised §3.10.1 requires the Contractor to provide a schedule for the "orderly progression of the work to completion." Further, provides that the schedule shall be revised as required by the conditions of the work project.

Contractors reliance on performance and design criteria. Revised §3.12.10.1 no longer provides that the Contractor was not responsible for the adequacy of the performance and design criteria specified in the contract documents, but adds that the Contractor is entitled to rely upon the adequacy of the performance and design criteria provided in the contract documents. This deletion implies that the contractor is now responsible for ensuring the criteria specified by others is accurate.

Subcontracts must be in writing. Revised §5.3 requires all contracts between contractor and subcontractor to be in writing.

Work by separate contracts. Revised §6.1.1 eliminates the contractor's ability to make a Claim under Article 15 for delays and additional costs resulting from the Owner's action in performing work with its own employees or with separate contractors.

Minor changes in the work. Under former §7.4, the Architect had the authority to bind the owner and the contractor, without consent, to minor changes in the work. Under revised §7.4, the contractor now has an opportunity to reject the recommended changes if it believes the proposed changes will affect the contract price or time.

Delays. Revised §8.3.1 now states that delays for adverse weather conditions must be documents as a Claim, and that all delays outside the control of the contractor extend the contract time only as determined by the Architect, and not through a Change Order.

Indemnity for liens. In addition to requiring the contractor to obtain a bond and indemnify the owner against subcontractor and supplier liens resulting from final payment, new §9.6.8 adds the express requirement that, if the owner has satisfied its payment obligations, a contractor must defend and indemnify the owner against subcontractors and supplier liens. Similar protection is included in the catch-all indemnification provision (§3.18.1).

Termination by contractor. Former §§14.1.1 and 14.1.4 states that the contractor could terminate the contract if work was suspended or delayed for a certain period due to enumerated reasons, provided that such delay was not caused by the contractor, a subcontractor, or any other party "under direct or indirect contact with the contractor". Revised §§14.1.1 and 14.1.4 deletes "under direct or indirect contact with the contractor".

Termination fee provisions. Under revised §14.4.3, the automatic entitlement to reasonable overhead and profits on work not executed has been deleted and replaced with entitlement to a "termination fee, if any, set forth in the Agreement."

Claims. The 2017 version specifies the circumstances in which a contractor may submit a claim. The owner does not need to file a Claim in order to assert liquidated damages (§15.1.1). Claims asserted after the correction of work period do not require a decision by the initial decision maker (IDM). The Architect is still

the IDM, and the IDM's decision is a condition precedent to mediation, arbitration, or litigation (unless 30 days expire without receiving the IDM's decision).

OWNER-ARCHITECT AGREEMENTS:

Retainage. The 2017 editions now provide an entire section on retainage, which prompts the parties to specify: 1) the amount to be withheld from each progress payment made before substantial completion of the work; 2) what pay items are not subject to retainage; 3) any reductions or limitations of retainage; and 4) how and when retainage is paid. "If final completion of the work is materially delayed through no fault of the contractor, the owner shall pay the contractor any additional amounts in accordance with Article 9 of AIA document A201-2017.

Interest on unpaid balances. §5.3 in A101 -2017 and §12.3 in A102-2017 and A103- 2017 now provide that payments due and unpaid under the contract will bear interest from the date the payment is due at a rate that is agreed on by the parties. If the parties do not insert a rate into the contract, then statutory interest in the jurisdiction of the project will be the rate at which any unpaid sums under the contract will accrue interest.

Termination fees. §7.1.1 in A101-2017 and §14.1.3 in A102-2017 and A103-2017 eliminate the contractor's right to recover reasonable overhead and profit when an owner terminates for convenience. Instead, the agreements now provide for a negotiated termination fee. Changes to only A101 and A102.

Contract time. In the 2017 editions of A101 and A102, the contract time starts at commencement of work, not from "date of commencement" as in the 2017 editions. If the construction schedule and the contract time are dependent on timely performance of preconstruction of value engineering services by the contractor before the actual start of work, this language will require revision.

Notice. 2017 Editions of A101 and A 102, now allow for notice via electronic transmission per the new notice provision of §1.6 of A201 2017 (the General Conditions of the Contract for Construction). A101 – 2017 §8.6; A102-2017 §15.6. Note that A201-2017 §1.6.2 continues the requirement in the 2007 edition that claims must still be made in writing via certified mail or courier with proof of delivery.

CHANGES TO A102 AND A103 ONLY:

Owner's right to select subcontractors and suppliers. Section 10.1 of A102 and A103 provides Owner may object to the use of any subcontractor or supplier.

Off-site personnel costs. section 7.2.2.1 A102-2017 and A103-2017 clarifies what is to be included in the cost of off-site personnel working on a project. The new edition prompts owners and contractors to discuss what off-site work will be compensated, to deter later disputes.

Labor rates. will now remain unchanged throughout the duration of the agreement unless changed through a modification of the agreement.

Related party transactions. In § 7.8, A102 and A103 have revised definition of "related party" to include any other entity having "common ownership" or sharing "common management" with contractor, as well as any person, or immediate family member of any person, who has the right to control the business or affair of contractor.

Progress payments. Procedures have been completely rewritten.

Storage costs. Section 7.4.1 now excludes any costs associated with transportation and storage off-site (by including only storage "at the site").

Site office expenses. Section 7.5.4 of A102 and A102 (both 2017) provides that "costs for the contractor's site office, including general office equipment and supplies" is a cost of the work. This revision expands contractor's rights to recover costs for the site office.

Communication and electronic equipment. Section 7.6.6 now limits a contractor's ability to recover, as a cost of work, communications services and electronic equipment to only such equipment that is "located at the site" and only with owner's prior approval.

CHANGES TO A102 ONLY:

"Such things as." The guaranteed maximum price includes matters reasonably inferable from the contracts documents but did not include "such things as" changes in scope, systems, kinds and quality of materials, finishes, or equipment. 2017 version removes "such things as" language.

Cost of work. Owner's approval to any costs comprising the Cost of Work must now be in writing before incurring costs.

Contingency for costs. The 2017 edition specifically addresses contingency for costs, including allocating the scheduling of values for contingency costs and requiring the contractor to submit supporting documentation when transferring contingency to other cost items.

Initial information. 2017 updates moved key information from an optional exhibit into Article I of the from.

Architect's licensing. Revision now includes the Architect's representation that it is properly licensed where the project is located.

Insurance. The 2017 editions contain expanded insurance provisions.

Supplemental and additional services. The 2017 editions include under "Additional Services" extra compensation to Architects for services required to comply with changes in official interpretations of applicable codes, laws, or regulations.

"Cost of Work" is now defined as "the reasonable value of labor, materials, and equipment, donated to or otherwise furnished by, the owner."

Copyright. As modified, copyright ownership and the owner's license to use documents survive the termination of the agreement, but not if the architect rightfully terminates the agreement for cause.

Dispute processes. 2017 edition adds language providing that dispute processes of Article 8 survive termination of the agreement.

Confidentiality. The key changes to confidentiality provisions relate to expanding and clarifying when "confidential" and "business proprietary" information may be shared.

Severability. New forms include a savings provision that allows for severability of contractual obligations to keep the entire contract from being invalidated due to inclusion of an invalid provision.

Compensation. Instead of a blank section for the parties to insert an amount and basis for Architect's compensation, the 2017 editions now provide for compensation on a "stipulated sum," "percentage basis," or through some "other" method. Parties are required to insert an amount, percentage, or describe method of compensation.

Specialty services. October 2017 revisions include amended specialty service agreements and administrative forms.

NEW INSURANCE EXHIBIT:

The 2007 insurance requirements have been moved to a new 2017 Exhibit A. This exhibit divides the insurance coverages carried by the owner and contractor into required coverages and option coverages. Exhibit A requires that the property coverage be on a "builder's all risk" form, covering "direct physical loss or damage." Exhibit A now adds the risk of explosion, and adds that the property insurance "shall also provide for coverage of ensuing loss or resulting damage from error, omission, or deficiency in construction methods, designs, specifications, workmanship, or materials."

Property insurance limits are modified under Exhibit A.

Cancellation of owner's insurance. 2017 edition requires that when the owner becomes aware of impending or actual cancellation or expiration of any required insurance, the owner must give notice to the contractor within 3 business days.

Required period of insurance. Exhibit A modifies the required period of insurance and requires the owner to maintain property insurance until substantial completion and thereafter continue or replace with property insurance written for the total value of the project until expiration of the period for correction of the work.

Types of insurance. Exhibit A also lists several types of insurance the parties may wish to require the owner to maintain. Exhibit A also allows parties to require the owner to insure against cyber loss due to a data security breach.

Required coverages. Under Exhibit A, contractor is required to insure against: Commercial General Liability; Automobile Liability; Workers Compensation; and Employer's liability. If specified risks are involved, contractor has further insurance requirements listed in Exhibit A. All required policies must be maintained until expiration of the period for correction of the work, which is usually 1 year after substantial completion.

Prohibited exclusions. See Exhibit A for prohibited exclusions for contractor's insurance. There are 11 prohibited exclusions.

Cancellation of contractor's insurance. Under CA law, an insurer need only mail notice of cancellation of a commercial insurance policy to named insureds. Courts have held that additional insureds, even if named in a certificate of insurance, were not entitled to notice of cancellation. When a contractor becomes aware of any cancellation/expiration of insurance, the contractor, not insurer must notify the owner within 3 business days. Contractor may achieve the required limits and coverage for Commercial Genera Liability Insurance and Auto Liability insurance through a combination of primary and excess or umbrella liability insurance. Any excess policy shall not require the exhaustion o the underlying limits only through the actual payment of the underlying insurance.

Completed operations coverage. An owner, developer, contractor, or subcontractor can incur liability both while work is in progress and after its completion. Exhibit A requires contractors provide "completed operations" coverage in its commercial general liability policies at least through "correction period" for defective/nonconforming work. 2007 edition required the contractor to provide owner a certificate of insurance before commencement of work and thereafter when policy was renewed or replaced. Exhibit A adds at owner's written request. Exhibit A requires contractor to name the owner, architect and architect's consultants as additional insured for claims caused by contractor's negligence.

Deductibles of self-insured retentions. Exhibit A requires contractor to disclose any deductible or self-insured retention applicable to any of its required policies.

NEW SUSTAINABLE PROJECTS EXHIBIT:

AIA 2017, the Sustainable Project Exhibit, has been developed to replace the Sustainable Projects documents included in the A201 Family of AIA Contract Documents. Exhibit A does not require the contractor to maintain "green" liability coverage.

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SALES, CONVEYANCES & REAL ESTATE BROKERS

Prepared by Len Rifkind (Rifkind Law Group)

LEGISLATION:

SB 695. **Immigration Status**. DRE cannot require an individual to disclose citizenship or immigration status for purposes of licensure. This statute continues the trend in the real estate industry that determination of citizenship is left to the federal government and can create liability for basing business decisions upon immigration status. Bus. & Prof. Code §§30, 1247.6. Effective January 1, 2019.

AB 2138. **Criminal Convictions**. DRE is limited to seven year look back period to consider a criminal conviction to deny a license, and only if the crime is substantially related to qualifications, excepting serious crimes and sex offenders. Bus. & Prof. Code §11345.2. Effective July 1, 2020.

SB 224. **Sexual Harassment**. A plaintiff can allege that the defendant holds himself/herself out as being able to help plaintiff establish a business, service or professional relationship with defendant or a third party. An existing professional relationship is not required. Further, plaintiff does not need to prove the inability to easily terminate the relationship. Further "investors" are included among the group of persons who may be liable to plaintiff for sexual harassment. Give the political climate "me too" the best advice is to not have sex with clients, which is already prohibited by the Professional Rules of Conduct. Further, given the exposure to investors, this may need to be a disclosure issue in investment transactions. Civ. Code §51.9, Gov. Code §§12930, 12948. Effective January 1, 2019.

AB 1289, AB 2884. **Real Estate Law Statutory Language Clean-Up**. Confirms that agents may establish their relationship with brokers as independent contractors. Plain language clean-up. Transferor and transferee are now "seller" and "buyer." "Selling agent" is now "buyer's agent."

Agency Disclosure Form. Many language changes to the form. Please use the most recent form from Professional Publishing and/or CAR. The "third" agency disclosure is no longer required to be delivered from a buyer's agent to the seller with the offer to purchase. No exemption for 5+ multi-family properties, and applies to all commercial property, vacant land, ground leases coupled with improvements.

RETDS/NHD. Effectively eliminates exemption for trustees of a trust to complete this disclosure if the trustee is a natural person and a former owner or occupant of the property within the preceding year. After completion of RETDS Sections I, II and III and delivery to buyer or buyer's agent: Right to cancel is 3 days if by personal delivery, 5 days after deposit in the mail, or 5 days after electronic delivery and electronic delivery is permitted. Same periods apply to the NHD.

Effective January 1, 2019.

CASE LAW:

A gardener who hired a helper to trim trees more than 15 feet in height was not a "nursey person" so as to except her from the definition of "contractor," therefore, property owner could be vicariously liable as employer of helper. *Jones v. Sorenson* (2018) 25 Cal. App. 5th 933.

Facts: Property owner hired her long-time gardener to trim trees on her property, and the gardener in turn hired "Mary Jones," a friend to help. Jones was injured while cutting and trimming a tree that was more than 15 feet tall when she fell from a ladder provided by the gardener and the gardener may or may not have been holding. The gardener was not licensed. Jones alleges the property owned is deemed by law to be the gardener's employer and therefore liable to Jones.

Holding: Generally, a property owner has vicarious liability for hiring an unlicensed contractor. Labor Code sec. 2750.5. Gardener who trims trees less than 15 feet in height does is not a contractor requiring a license. Bus. & Prof. Code sec. 7026.1. Here, the gardener trimming trees more than 15 feet in height was

an unlicensed contractor creating vicarious liability to the owner. The owner contended that her gardener was a "nurseyperson" and exempt from the contractor's license law. The court parsed the difference between "gardener" and "nurseyperson" and concluded a gardener is not a nurseyperson and therefore not exempt from the contractor license requirement for trimming trees over 15 feet.

Take Away: Only hire licensed contractors.

A hirer may be liable when a known hazard *cannot* be remedied through reasonable safety precautions. *Gonzalez v. Mathis* (2018) 20 Cal.App.5th 257.

Facts: Property owner has a large indoor pool with a large rounded skylight overhead that needs to be cleaned periodically. The skylight was screened by a parapet wall leaving a narrow 2-foot ledge between the skylight and the edge of the roof. Property owner hired plaintiff, Luis Gonzalez, who owned and operated Hollywood Hills Window Cleaning Company, which advertised itself as a specialist in "hard to reach windows and skylights." While cleaning the skylight, owner's housekeeper advised water was leaking through. Mr. Gonzalez climbed a ladder to investigate and tell his employees to use less water. On return, Mr. Gonzalez fell off the roof in the narrow 2-foot ledge section, a section of roof he had been on many times in the past.

Holding: Generally, an independent contractor or his employees cannot sue the hirer of the contractor for workplace injuries. *Privette v. Sup. Court* (1993) 5 Cal. 4th 689. The only exceptions arise when the hirer exercised control over the contractor's work and where the hirer failed to warn the contractor about a concealed hazard and neither exception applied here. The court held summary judgment should not have been granted because it is a question of fact whether it was reasonable to hire the contractor where there was a known hazard cannot be remedied through reasonable safety precautions.

Take Away: If there is a dangerous condition, do not let any person, licensed or not access, until the condition is remedied.

Broker standard of care expert not required when the circumstances involving the broker's negligence are within the common knowledge of the layman. *Ryan v. Real Estate of the Pacific, Inc.*, 2019 WL 926101 (February 26, 2019).

Facts: Seller decided to sell their home in La Jolla. Seller hired broker and entered into a listing agreement. During an open house, neighbor informed broker that he intended to remodel his house which would permanently obstruct an ocean view. The planned project would have significant impact on the property for sale, relocate the foundation to within five feet of the common boundary, create a large two-story wing with large windows overlooking the pool area of the property for sale, take two years to complete, and require extensive excavation. Broker never informed seller of neighbor's plans. Seller then sold to an out of town buyer for $3.86M all cash in a 21-day escrow, and broker received a commission for $96,500. Neither broker nor seller disclosed neighbor's plans to buyer. The day after close of escrow, buyer learned of the plans and immediate demanded rescission. Based on advice of the broker, seller refused to rescind. The matter went to arbitration and the arbitrator awarded buyer rescission of the purchase price plus in excess of $1M for damages, interest, attorney fees. Broker had no credible explanation for not disclosing neighbor's material information. Subsequently, seller sued broker for damages. Broker moved for summary judgement because seller had not retained an expert to prove broker had breached his fiduciary duty to sellers. Seller responded an expert was not required because the arbitration findings determined that broker had not met the standard of care.

Holding. California law does not require an expert witness to prove professional negligence in all cases. Here, defendant broker possessed material information that impacted the value of the property. Broker simply chose to remain silent and collect his commission and allow seller to deal with the consequences.

Take Away: Hire an honest broker. If you must sue a broker, make sure your attorney retains a standard of care expert.

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: CA SB 1183 (Civ. Code § 2920.7) clarifies that HOBR successor in interest provisions (Civ. Code § 2920.7), not applicable to reverse mortgages.

Background:

California's Homeowners Bill of Rights ("HBOR") went into effect in 2013 (although it incorporated certain existing statutes governing non-judicial foreclosure). It was designed as emergency legislation to address the "mortgage meltdown" of 2007. At the time it was enacted, the bill contained sunset and other provisions weakening or eliminating HBOR provisions, effective in 2018. Although the 2018 changes were supposed to remain in place indefinitely, the legislature acted again in 2018, this time reenacting the 2013-2017 version of HBOR (plus certain changes enacted after HBOR originally went into effect relating to the rights of successors-in-interest after the borrower's death). The following are the most significant changes:

1. Under Civil Code § 2923.5 (small servicers) and 2923.55 (large servicers), the pre-foreclosure contact requirement does not apply if the borrower or borrower's agent notifies the servicer in writing to cease further communication with the borrower. The notice to cease communication must explicitly pertain to the loan. The borrower may rescind the case communication in writing triggering the contact requirement.

2. Civil Code § 2923.6 (large servicers only) in effect during the 2013-2017 HOBR required that a servicer stop any foreclosure action if a borrower "submitted" a complete loan modification application. A borrower could appeal a denial adding more delay. This resulted in creative borrowers submitting serial loan modifications and appeals just before a scheduled sale to delay. The only limitation on the borrower's rights to do this would be if the servicer determined that there was no material change in the borrower's financial condition since the last application. **Under the new version of HBOR**, the complete application must be submitted at least five business days before the sale date. (Note that the statute continued to raise many unanswered questions that were not clarified when the statute was revised. For instance, does "submitted" mean sent (including mail) by borrower received by servicer? If a mod application is timely submitted but is incomplete, does servicer have to stop sale and provide borrower with a reasonable time to complete the application? What does "material change in borrower's financial circumstances" mean? What does "specific reasons for investor disallowance" mean? How much detail is required?)

3. Under Civil Code § 2923.7 (large servicers only) in effect during 2013-2017, if a borrower made a request for a foreclosure prevention alternative, it was unclear whether the servicer had to provide the borrower with a single point of contact ("SPOC") whether or not the borrower requested one. Under the 2019 legislation, a SPOC must be provided even if the borrower does not request one.

4. Before 2018, there were several versions of Civil Code § 2924.11 (first lien, owner occupied only) which applied to foreclosure in the context of an approved foreclosure prevention alternative (modification, forbearance, repayment plan, short sale, deed in lieu of foreclosure, etc.) ("FPA"). For 2019, if a FPA approved in writing (including by first lien investor, junior lienholder, and mortgage insurer, and provision of proof of funds or financing if required), the following apply:

- As long as borrower is in compliance with an approved FPA, a NOD or NOS may not be recorded or, if already recorded, the property may not be sold. An approved FPA is one that has been approved in writing by all parties, including, for example, the first lien investor, junior lienholder,

and mortgage insurer, as applicable, and proof of funds or financing has been provided to the servicer.

- A NOD must be rescinded and a foreclosure sale cancelled, as applicable, upon the borrower executing a permanent FPA; however, if the FPA is a short sale, this is required only when short sale has been approved by all parties and proof of funds or financing provided to lender.

- The servicer must provide the borrower with a copy of a fully executed FPA agreement.

- No charge is allowed for an FPA application, processing or any other fee for a modification or other FPA.

- Late fees may not be charged while complete modification application is pending (including any appeal period after the denial of a modification application).

- If a first lien loan modification or other FPA is has been approved in writing and servicing is transferred, the new servicer must honor the FPA.

5. Under Civil Code § 2924.26 (added in 2018), a title company, not acting as trustee, is not liable for recording NOD or NOS for a violation of Section 2923.5 or 2924.11 if it does so in good faith and in the ordinary course of business. This replaces Civil Code § 2924.25.

CASE LAW:

Caught in the Twilight Zone: Claims Brought under Original HOBR Governed by Standards under Revised HOBR, Absent Statutory Savings Clause. Jacobik v. Wells Fargo Bank, N.A., No. 17-CV-05121-LB, 2018 WL 1184812, at *4 n.17 (N.D. Cal. Mar. 7, 2018). Absent a savings clause in a statute, repeal of statutory enactments must apply retroactively to pending cases (Plaintiff's request that court determine standards applicable to denial of loan modification application based on HOBR provisions in effect at time of denial, as opposed to time of lawsuit (where standards requiring NPV review applicable), denied. Case unpublished but discusses general principals and controlling 9th Circuit authority.

Surplus Foreclosure Sale Distributions to Borrower Mandated, even if Borrower Challenges Foreclosure Sale Purchase by Third Party: Placer Foreclosure, Inc. v. Aflalo (2018) 23 Cal.App.5th 1109 [233 Cal.Rptr.3d 694]. Holding that an interpleader by a foreclosure trustee where there were surplus sale proceeds instead of distributing surplus proceeds to the Borrower was not appropriate, even when the borrower was challenging the underlying foreclosure sale to a BFP. Since the purchasing BFP was not an interested party or a party entitled to notice under the foreclosure/interpleader statute (Civ. Code §2924k), failing to distribute the proceeds to the borrower (who was next in line for distribution) on the basis of the lawsuit between borrower and BFP was improper. Accordingly, the interpleader was improper. The Trustee had an obligation under the statute to distribute the proceeds unless there was a bona fide dispute, and the Trustee's request for attorney's fees and discharge of liability were denied.

Record Trustee's Deed or "Do Not Pass Go", Do Not Obtain Eviction Judgement." Dr. Leevil, LLC v. Westlake Health Care Center (Cal. 2018) 241 Cal.Rptr.3d 12. The California Supreme Court resolved a split in authority in the lower districts, and held that a purchaser at a foreclosure sale cannot take action to evict occupants unless and until there is a recorded Trustee's Deed Upon Sale.

The Court held that the unlawful detainer (eviction) statue does not allow a foreclosing owner to proceed until the owner perfects title. Title is perfected by recording, so any action taken to evict before this occurs, is in violation of the statute. The recording gives record notice to the world, even though the foreclosure statute can be argued to independently validate the sale the day it is held.

It should also be noted that the Court reaffirmed the summary nature of the unlawful detainer proceeding. The Court confirmed that the question of perfection of title specifically links the eviction statute to an inquiry of

whether the procedural requirements under the foreclosure statute have been properly satisfied, but that this does not result in an expansion of jurisdiction in a summary eviction proceeding to include general challenges to the validity of the trust deed or to the primary loan obligation.

***Contempt Citations for Bankruptcy Discharge Violations may be Subject to Defense based on Subjective Belief of Creditor, even if Unreasonable: Lorenzen v. Taggart (In re Taggart)*, 888 F.3d 438 (9th Cir. April 23, 2018).** Cert granted per Taggart v. Lorenzen (U.S., Jan. 4, 2019, No. 18-489) 2019 WL 98543, at *1.

9th Circuit Expands Time for Borrower to Affect TILA Rescission: (*Hoang v. Bank of America*, N.A., F.3d, Case No. 17-35993, 2018 WL 6367268 (9th Cir. 2018)). Under the Truth in Lending statute (15 USC §1635(a), a borrower can rescind a covered loan within three days after loan consummation. However, if the lender fails to give the required TILA disclosures, the time to rescind is three years from loan consummation. A borrower only has to provide notice of rescission, not file suit. It is up the Lender to then wind up the rescission (borrower pays all allowed sums, lender rescinds loan).

The court found that since only notice of rescission needs to be provided to toll the time necessary to rescind the loan (as opposed to filing suit to toll), that federal courts considering rescission claims can borrow from a limitations period of the state where the borrower resides, in this case Washington state. Since WA has a six-year statute of limitations on contract actions, the time to bring suit under a TILA rescission claim is 9 years (3 years for the borrower to provide notice), six more under the WA statute to file suit. **Note:** Damage claims under the TILA statute have a one-year statute of limitations and suit must be filed.

Four-year federal Catchall Statute of Limitations Governs Wrongful Foreclosure Claims under the Servicemembers Civil Relief Act (McGreevey v PHH Mortgage Corp (9th Cir 2018) 897 F3d 1037.

Lender commenced foreclosures after loan default in January 2009. Homeowner called to active duty in May 2009 and was released from military duty in July 2010. Homeowner notified the lender of his military service and asked for a refinance, which was refused and a foreclosure sale was held in August 2010. Six years later the homeowner sued the Lender and Trustee, alleging that under the prior Servicemembers Civil Relief Act (SCRA) that no sale could occur either during the period of military service, or 9 months after service, absent a court order or waiver by the service member. The SCRA did not have a statute of limitations and the Court found that 28 USC §1658(a) generally applied to allow a four-year statute of limitations and the claim was dismissed.

HOBR Rights Allowed to a "Successor" and Limitations on Servicers only Apply if Successor Complies with Statutory Notification and Application Provisions. Simpson v. GMAC Mortgage, LLC (N.D. Cal., June 21, 2018, No. 18-CV-02111-MMC) 2018 WL 3076922, at *2. Statutory prohibitions on servicer recording a notice of default after determining there was a successor to a deceased borrower, only applicable if successor complies with statutory requirements to establish successor rights and rights for loss mitigation alternatives under HOBR. Court cited statutory requirements for successor to notify servicer of claimed rights, and the response obligations of the servicer to then provide a reasonable period of time to document the claim and upon receipt of such documentation to provide the successor with information on the loan (See §2920.7a). The court held there were no allegations in the Complaint to establish that the successor properly notified the servicer, so the NOD was proper and the Complaint was dismissed with leave to amend.

Rigging Foreclosure Bids Violates §1 of the *Sherman* Act (U.S. v Joyce (9th Cir 2018), 895 F3d 673.

Respondent Joyce was charged with restraining trade in violation of the Sherman Act (15 USC §1) by participating in a bid-rigging scheme re foreclosures in Contra Costa County. Some of the acts alleged were:

- Refraining from bidding against each other on selected properties.
- Agreeing not to compete to buy selected properties.
- Negotiating, making, and receiving payoffs for agreeing not to compete with co-conspirators.
- Holding second private auctions to determine payoff amounts and to choose who would be awarded

the selected property.

Joyce sought to have the charges adjudicated by a different standard ("rule of reason"), which would have allowed him to assert legitimate justifications for his actions, instead of the stricter standard related to price fixing under the Sherman Act. In essence, Joyce wanted to offer evidence that foreclosing banks in essence did the same thing by credit bidding on properties and gaining the equity. As a matter of first impression the Ninth Circuit affirmed that bid-rigging is a form of price fixing and a per se violation of the Sherman Act.

Apparent Intention of Parties, not the Order of Recording Deeds of Trust, Dispositive of Lien Position and Surplus Claim (*MTC Fin. Inc v Nationstar Mortgage* (2018) 19 CA 5th 811. Original Lender made two loans a larger balance loan and a smaller balance HELOC loan Both loans were subsequently sold and assigned to different lenders. The HELOC was mistakenly recorded first. Overriding traditional notions that the order of recording dictates the lien priority on real property, the court relied on the "apparent intent of the parties" in finding that the HELOC was in fact a second position loan even though recorded first. This became critical when the lender (Nationstar) foreclosed the smaller loan and there were surplus proceeds. If the smaller HELOC loan (which was recorded first) was deemed a first deed of trust, the lender with the second trust deed would have had a priority right to distribution over other claimants (Per the surplus funds statute, CC §2924k). The Court looked beyond the recording dates and found that the foreclosed loan was intended to be a second position lien and treated it that way. Therefor under the surplus funds statute the foreclosing lender was deeded the HELOC first DOT, and the surplus went to the other junior lienors.

EASEMENTS, ADVERSE POSSESSION & BOUNDARIES

Prepared by Chris Skelton (Rifkind Law Group)

CASE LAW:

The First Amendment only applies to public entities; a private organization may own an easement to maintain a religious symbol, and if a city accepts land subject to that easement the city has the obligation to solve the Establishment Clause problem.
Lions Club v. City of Albany (N.D. Cal. 2018) 323 F.Supp.3d 1104

Nearly fifty years ago Hubert and Ruth Call allowed the Lions Club to set up a 20-foot tall cross on top of the couple's privately-owned land on an Albany hilltop. A developer offered to purchase the land a few years later as part of a complicated deal to obtain entitlements for construction on a different part of the hilltop—the developer planned to purchase the property and then deed it to the City of Albany for a public park, in exchange for the city's issuance of the developer's permits for the other project. The Calls agreed to sell only on condition that the Lions Club be allowed to permanently maintain the cross, so deeded the Lions Club a permanent "easement for ingress and egress to maintain the existing cross standing" on the property. The Calls duly recorded this grant deed before deeding the land to the developer.

The land was used as a park for decades, until a group of "East Bay Atheists" began challenging the cross on establishment clause grounds. After the City had power shut off to the normally-illuminated cross during the Christmas period (allegedly because of safety reasons), the Lions Club filed suit against the City, alleging a conspiracy between the City and the Atheists.

The Northern District first found that the Lion's Club easement was valid; a private property owner has a clear right to erect a religious symbol on their property (absent any valid zoning restrictions), and a right to convey that property subject to an easement for that religious symbol. While the City claimed it was unaware of the easement when it accepted the land, as noted the Lion's Club easement was recorded first so the City was at least on constructive notice.

Applying the federal test for Establishment Clause violations, the court found the large, 20-foot, permanent Christian cross violated the First Amendment. The Court rejected the City's attempt to portray itself as a victim of the situation, stressing that the Establishment Clause only applies to public entities—the court rejected the City's assertions that the easement somehow became invalid when the land became a public park. Since the City accepted the property for a park it has an obligation to address the Establishment problem, either by condemning the easement (and paying fair market value), transferring the land with the cross to a private party, or some other method. The court left the details of these transactions open but explained the City must avoid any further Establishment Clause issues, and noted that the court was willing to oversee any transfer.

If a plaintiff cannot satisfy the adverse possession requirements (including payment of taxes), it should not seek in the complaint to exclude the other property owner's use and possession of the relevant parcel.
Hansen v. Sandridge Partners, L.P. (2018) 22 Cal.App.5th 1020

A farmer claimed a prescriptive easement over a 10-acre portion of the adjacent landowner's property upon which he had planted pistachio trees and had installed a drip irrigation system. The trial court denied the farmer's request for a prescriptive easement but granted an equitable easement of limited time and scope; the Court of Appeal reversed. It held that an equitable easement was improper because the farmer's encroachment was negligent: prior to planting the pistachio trees, the farmer knew a lot line issue existed but did not investigate further. It also held a prescriptive easement was improper because the farmer's complaint sought to establish his right to farm the property "to the exclusion of Defendants" and therefore the farmer was trying to obtain title to the property (not just use it). As such, the farmer had to satisfy the adverse possession requirements, including the payment of taxes upon the land (which the farmer had not done).

An access easement is not restricted to its historic use if the easement grant specifies its precise location, width, and length, along with its purpose.
Zissler v. Saville (2018) 29 Cal.App.5th 630

The trial court ruled that an easement grant that specified precise location, width, and length, along with its purpose, was otherwise ambiguous because the grant did not specify frequency of use. Based thereon, the trial court limited the easement based on historic use. The Court of Appeal reversed, holding that historic frequency of use did not create ambiguity in light of the presumption that the parties to an express right-of-way easement contemplated normal future development.

1. An express easement grant is not ambiguous because of a failure to specify how frequently a road can be used.
2. The reasonable contemplation of the parties to an express right-of-way easement presumptively includes normal future development within the scope of the basic purpose.
3. Although historic use is a valid and, indeed, necessary consideration in determining the scope of a prescriptive easement, no case law considers historic use determinative in defining the scope of an express and unambiguous appurtenant easement.

The Court of Appeal drew a distinction between general or prescriptive easements that are not specific as to how they burden the servient estate versus express, specific easements. As to the former, evidence of historic use is clearly relevant. But as to the latter, if the grant instrument is specific, historic use is not relevant to interpreting limitations on the easement.

A plaintiff can claim a prescriptive easement even if she has an already-existing easement over the land; to establish that the use was adverse, the plaintiff must just allege that she exceeded the legal scope of her existing easement.
McBride v. Smith (2018) 18 Cal.App.5th 1160

The owner of property in Napa, Kathleen McBride, sued her neighbors for interfering with her rights to an easement over their property. The easement was granted for "a secondary right-of-way over the existing roadway surface . . . for the purpose of emergency ingress and egress," and specifically provided it should not be the primary means of accessing the property. After McBride tried four different attempts to amend her complaint, the trial court dismissed without leave to amend. The First District upheld this dismissal as to McBride's trespassing claim, explaining that trespass is unlawful interference with possession, not use, and here McBride did not own the property or even have exclusive rights to it. The court noted that the claim could in some circumstances be appropriate for unlawful interference or encroachment on her easement rights, but here the evidence McBride provided showed that the owners of the servient tenement had not interfered with her right to use the easement.

The court of appeal, however, concluded that McBride had adequately stated causes of action for nuisance and prescriptive easement, and so reversed the dismissal on these claims. The definition of "nuisance" in California is significantly broader than trespass, and "interference with the interest in the private use and enjoyment of the land does not require interference with the possession." The court noted the pleadings were somewhat unclear, but McBride could state a claim for nuisance if she pleaded (and later proved) that the defendants' actions on the easement interfered with McBride's enjoyment of her own property. (She could not allege nuisance as to her use of the easement itself, because the pleadings established she did not have "free use" of the easement.)

McBride also stated a claim for prescriptive easement by alleging the well-established elements of that claim: "use of the property which has been open, notorious, continuous and adverse for an uninterrupted period of five years." The existence of the easement does not preclude her claim—while use with the owner's permission would not be adverse, if the use violated the terms of the easement (e.g. if the owner could have sued to stop her use) that qualifies as adverse. Because the easement was limited to secondary access, and McBride alleged she had openly used the easement for primary access for at least five years, she adequately stated a claim.

Affirming in part and reversing in part trial court's judgment that easement had been extinguished by adverse possession.
McLear-Gary v. Scott (2018) 25 Cal.App.5th 145

Property owner in Mendocino County sought a prescriptive and implied easement along a skid trial on two adjacent properties, and the adjacent landowners contended that any such easement had been extinguished by adverse possession. The easement holder held the adjacent landowners had not established an essential element of adverse possession (timely payment of taxes during the five-year statutory period) because they had made one lump sum payment of several years' worth of delinquent taxes. The Court of Appeal reversed the trial court's holding that such a lump sum payment constituted a timely payment but otherwise affirmed the trial court's judgment that the relevant CC&R's did not grant an express easement, and any easement was for pedestrian purposes only.

On the adverse possession issue, Civil Code section 325, subdivision (b) states: "In no case shall adverse possession be considered established under the provision of any section of this code, unless it shall be shown that . . . .the party or persons, their predecessors and grantors, have **timely paid** all state, county, or municipal taxes that have been levied and assessed upon the land for the period of five years during which the land has been occupied and claimed." (emphasis added). The adjacent landowners had not paid taxes on time for four years but instead made a lump sum payment within the five-year statutory period. The Court of Appeal held (including based on relevant legislative history) that "timely" within the meaning of that statute meant payments made "continuously throughout" the five-year time period and not in one lump sum during that period.

On the express easement issue, the Court held that the provision in the CC&R's – that each owner shall have an easement for ingress and egress to and from any Parcel – applied only to the initial ranch parcels and not to any subdivisions to them (including the subdivided parcel owned by the plaintiff). It held that the trial court's interpretation of the CC&R's was not based solely on the written instrument and was therefore governed by a substantial evidence standard.

On the scope of easement issues, the Court held that use of the easement for vehicular purposes was infrequent and a vehicular easement would substantially burden the adjacent landowners' use of the property. As a result, the plaintiff could not meet the elements of a prescriptive easement for vehicular purposes.

LAND USE

Prepared by Chris Skelton (Rifkind Law Group)

LEGISLATION:

SB 1227: New Student Housing Density Bonus

SB 1227 amends the State Density Bonus Law by adding a bonus for eligible student housing developments in which at least 20 percent of units, or rental beds, are restricted to lower-income students for 55 years. The legislation is intended to ensure that student housing projects can become eligible for a density bonus regardless of whether they include apartment-style units or dormitory-style bedrooms. To qualify, all student housing units must be used exclusively for students enrolled full time at an accredited institution of higher education, and the developer must enter into an operating agreement or a master lease with one or more such institutions. The development also must provide a priority for its affordable units for lower-income students experiencing homelessness.

Cities and counties are required to grant qualifying projects a density bonus equivalent to 35 percent of the student housing units or rental beds, as well as any other benefits for which the projects qualify under the Density Bonus Law, including incentives or concessions, waivers or reductions of development standards, and limitations on parking requirements.

AB 2372: New Floor Area Ratio Density Bonus

AB 2372 authorizes, but does not require, cities and counties to offer a floor area ratio bonus in lieu of a density bonus awarded based on dwelling units per acre under the State Density Bonus Law. The new legislation defines "floor area ratio bonus" as an allowance for an eligible housing development to use a floor area ratio over the otherwise maximum allowable density permitted under the governing land use regulations.

To become eligible for a floor area ratio bonus under AB 2372, a development must (1) be located in a city or county that voluntarily has established a procedure by ordinance to grant such a bonus; (2) comprise a multifamily housing development of five or more residential units; (3) be located on an urban infill site within a transit priority area, or within one-half mile of a major transit stop; (4) be located on a site zoned to allow residential or mixed-use development with a minimum planned density of at least 20 dwelling units per acre, with no land zoned for low-density residential or exclusively nonresidential use; (5) comply with the Density Bonus Law's replacement requirements for preexisting rental units; (6) include at least 20 percent very low-income units; and (7) comply with height requirements established by the zoning district. Despite establishing these specific criteria, AB 2372 also states that cities and counties electing to offer a floor area ratio bonus may do so under terms that differ from these.

AB 2753: Required Determinations Under the Density Bonus Law

AB 2753 requires cities and counties to provide applicants under the State Density Bonus Law with additional information when giving notification that an application is deemed complete. At that time, the applicant must be provided with a determination as to (1) the amount of the density bonus for which the applicant is eligible; (2) the parking ratio for which the applicant is eligible, if so requested; and (3) whether the applicant has provided adequate information for the local government to make a determination regarding any incentives, concessions, or waivers or reductions of development standards requested by the applicant.

AB 2797: Density Bonus Law and the California Coastal Act

AB 2797 amends the State Density Bonus Law to specify that its benefits must be granted in a manner consistent with both the Density Bonus Law and the California Coastal Act. The Legislature stated that its intent in enacting AB 2797 is to harmonize the two statutes to ensure that the Density Bonus Law can be used in the coastal zone while also ensuring protection of coastal resources and access. The legislation supersedes a recent judicial decision, *Kalnel Gardens, LLC v. City of Los Angeles*, 3 Cal. App. 5th 927 (2016), in which the Court of Appeal held that the Density Bonus Law was subordinate to the Coastal Act.

SB 765: Revisions to SB 35 Streamlining Legislation

SB 765 makes several limited modifications to SB 35, a housing streamlining bill enacted in late 2017. In specified circumstances, SB 35 provides a streamlined, ministerial approval process for multifamily residential

developments that include affordable housing. SB 765 clarifies that certain projects can become eligible for SB 35 streamlining by dedicating at least 50 percent of their units to low-income housing, where the local jurisdiction is not approving enough units for either very low-income households or low-income households. In addition to making other minor modifications to SB 35, SB 765 exempts qualifying subdivision applications from compliance with CEQA and extends to them a streamlined review process.

AB 3194: Expanded Application of the Housing Accountability Act
AB 3194 expands the circumstances under which a city or county must determine that a proposed housing development project is consistent with applicable zoning standards under the Housing Accountability Act. The Act already prohibited a city or county from disapproving housing projects that comply with applicable objective general plan, zoning, and subdivision standards and criteria, unless the local agency could make certain findings. AB 3194 provides further that a proposed housing development may not be deemed inconsistent with applicable zoning standards or criteria if (1) the project is consistent with objective general plan standards, but (2) the zoning for the project site is inconsistent with the general plan.

SB 828: Changes to the Regional Housing Needs Allocation Process
SB 828 makes significant changes to the Regional Housing Needs Allocation process. The bill prohibits the use of prior underproduction of housing or stable population numbers in a city or county from the previous regional housing needs cycle as a basis for justifying a reduction in the city's or county's share of the regional housing need. SB 828 also requires the California Department of Housing and Community Development to use new information in determining a region's existing and projected housing need, including the percentage of households that are overcrowded or cost burdened, and the rates of overcrowding and housing cost burden for a comparable or healthy housing market.

AB 1771: Changes to the Regional Housing Needs Allocation Process
AB 1771 makes several further modifications to the Regional Housing Needs Allocation process. Among other changes, the legislation requires councils of governments, in allocating the regional housing need, to consider (1) the percentage of existing households at various income levels that are paying more than 30 or 50 percent of their income in rent, (2) the rate of overcrowding, (3) units that were lost during any recent state of emergency and have not yet been rebuilt or replaced, and (4) the region's greenhouse gas emissions targets. Regional Housing Needs Allocation plans also now must affirmatively further fair housing. Additionally, AB 1771 requires councils of governments to publish a draft allocation methodology on their websites and to submit the draft allocation methodology to the California Department of Housing and Community Development for review before its adoption.

SB 1035: General Plan Safety Elements - Flood, Fire and Climate Change
Existing law (Government Code section 65302(g)(2) - (4)) requires jurisdictions to update their general plan safety elements to address fire risks, flood risks, and climate change adaptation and resilience policies. SB 1035 requires planning agencies to review and update their general plan safety elements addressing these topics on a more specific schedule than under prior law:

After the initial revision of the safety element pursuant to paragraph (2), (3), and (4), the planning agency shall 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 eight 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.

SB 1333: Charter Cities Now Subject to Key Provisions of Planning and Zoning Law
Based on a legislative finding that addressing the lack of affordable housing is of vital statewide importance, and that ensuring housing for all income levels is a matter of statewide concern, SB 1333 makes sweeping changes to the former inapplicability of many Planning and Zoning Law provisions to charter cities. The following Government Code provisions now apply to charter cities:

- § 65300.5 - general plan internal consistency;
- § 65301.5 - general plan adoption a legislative act reviewable under CCP section 1085;
- §§ 65359, 65454 - specific plan consistency with general plan;
- § 65450 - specific plans for systematic implementation of general plan;
- § 65455 - zoning, tentative map, parcel map, and public works project consistency with specific plan;
- § 65460.8 - transit village plan consistency with general plan;
- §§ 65590, 65590.1 - low- and moderate-income housing within the Coastal Zone;
- Article 10.6 (commencing with section 65580) - housing elements;
- § 65852.150 - accessory dwelling units;
- §§ 65852.25, 65863.4 - reconstruction, restoration or rebuilding of multifamily dwelling involuntarily damaged or destroyed;
- § 65860 - consistency of zoning ordinance with general plan;
- § 65863 - regional housing needs; local share;
- § 65863.6 - growth limitation ordinances;
- § 65863.8 - notice of Mobile home park conversion application;
- §§ 65866, 65867.5 - development agreements.

SB 100: New Targets for California Renewables Portfolio Standard Program
Existing law required retail sellers of electricity to procure a minimum of 33 percent of their electricity from renewable energy resources by December 31, 2020, 40 percent by December 31, 2024, 45 percent by December 31, 2027, and 50 percent by December 31, 2030.

SB 100 increases the 2024 - 2030 standards, requiring 44 percent renewables by December 31, 2024, 52 percent by December 31, 2027, and 60 percent by December 31, 2030.

In addition, SB 100 provides: “It is the policy of the state that eligible renewable energy resources and zero-carbon resources supply 100 percent of all retail sales of electricity to California end-use customers and 100 percent of electricity procured to serve all state agencies by December 31, 2045.”

For both the interim and the 2045 RPS standards, SB 100 allows waivers for specified conditions if those conditions “are beyond the control of the retail seller and will prevent compliance.” Examples include inadequate transmission capacity, insufficient supply of eligible renewable energy resources available to the retail seller, unanticipated increase in retail sales due to transportation electrification, and inability to meet Energy Commission-imposed limits on costs of renewable energy procurement. In each case, the retail seller must demonstrate its efforts to anticipate and avoid these conditions.

SB 100 also makes special provisions for retail sellers that procure much of their electricity from hydroelectric projects.

AB 1668 and SB 606: Water Management Planning
Existing law required the state to achieve a 20 percent reduction in urban per capita water use by December 31, 2020 and required urban water suppliers to adopt Urban Water Management Plans every five years. AB 1668 and SB 606 represent the state’s efforts to move beyond 2020, incorporate lessons from the 2012-2016 drought, and “make water conservation a California way of life.” Among the bills’ many provisions are several that may be of particular interest to sponsors of development projects.

AB 1668 creates a statewide standard for indoor residential water use until January 1, 2025: 55 gallons per day per person. Compliance is to be assessed at the aggregate supplier level, not at the customer level. From 2025 to the beginning of 2030, the standard will be either 52.5 gallons per day or a greater amount recommended by

the State Water Resources Control Board and the Department of Water Resources. Beginning in 2030, the standard will be either 50 gallons per day or a greater amount recommended by the Board and the Department.

The Department, in cooperation with the Board, is required to recommend performance measures for "CII" (construction, industrial, institutional, and large landscape water) users, and standards for residential and CII landscapes, by October 1, 2021, and to adopt the performance measures and standards by June 30, 2022.

SB 606 increases the obligations of urban retail water suppliers, requiring them to:

- Calculate their water use objectives and actual use by November 1, 2023, and every November 1 thereafter;
- Provide different information in their Urban Water Master Plans, particularly with respect to water shortages;
- Forego *any* water grant or loan if the supplier does not comply with the new UWMP requirements.

In addition, the governing body of a distributor of a public water supply now must, rather than may, declare a water shortage emergency if the governing body finds that the ordinary demands and requirements of water consumers cannot be satisfied without depleting the water supply of the distributor to the extent that there would be insufficient water for human consumption, sanitation and fire protection.

The Department has held public listening sessions on its implementation process for AB 1668 and SB 606 and is providing updates on its website, water.ca.gov.

AB 2923: BART Transit-Oriented Development

To encourage housing near high-capacity transit, AB 2923 requires the Bay Area Rapid Transit District to adopt new transit-oriented development (TOD) zoning standards for each of its stations, with narrow exceptions. The zoning standards will establish minimum local zoning requirements for height, density, parking, and floor area ratio only, for TOD development on BART property. BART must conduct CEQA review for the new standards. If for any reason BART does not adopt new zoning standards for a station by July 1, 2020, then Table 1 of BART's 2017 TOD Guidelines will apply until BART adopts new standards for that station.

Local jurisdictions where BART stations are located must amend their zoning ordinances to conform to the BART zoning standards. If local zoning remains inconsistent with the BART TOD zoning standards after July 1, 2022, the TOD zoning standards will become the zoning for any BART-owned parcels that are at least 75 percent within one-half mile of any existing or planned BART station entrance within the BART district, so long as the area is represented on the BART board.

AB 2923 includes detailed provisions for affordable housing, coordination with local jurisdictions, parking, and public outreach.

AB 1804: CEQA Exemption for Infill Residential or Mixed-Use Housing Projects in Counties

In 1998, CEQA Guidelines section 15332 created a categorical exemption from CEQA for infill developments on sites no larger than five acres. This exemption is restricted, however, to projects that are proposed within city limits.

AB 1804 adds a similar exemption to the CEQA statute itself, where the proposed project site is located in an unincorporated area of a county. In addition to the five-acre limit and standard requirements for categorical exemptions, the new exemption is restricted to residential or mixed-use housing projects, and imposes minimum residential density requirements. This new exemption will remain in effect until January 1, 2025.

AB 2341: Narrow Exception to Requirement to Analyze Aesthetic Impacts

AB 2341 excuses a lead agency from analyzing the aesthetic impacts of a very narrow class of projects: those that involve the refurbishment, conversion, repurposing, or replacement of an existing building where 1) the building is abandoned or dilapidated or has been vacant for more than one year; 2) the building is in an urbanized area; 3) the project includes the construction of housing; 4) any new structure does not substantially exceed the height of the existing structure; and 5) the project does not create a new source of substantial light or glare. This relief does not apply to a project with potentially significant aesthetic effects on historical or cultural resources, or on an official state scenic highway. The legislation remains in effect until January 1, 2024.

AB 2782: Lead Agency May Consider Project Benefits in CEQA Document's Description and Evaluation of Proposed Project
AB 2782 adds Public Resources Code section 21082.4, which provides: "In describing and evaluating a project in an environmental review document prepared pursuant to this division, the lead agency may consider specific economic, legal, social, technological, or other benefits, including regionwide or statewide environmental benefits, of a proposed project and the negative impacts of denying the project. Any benefits or negative impacts considered pursuant to this section shall be based on substantial evidence in light of the whole record."

AB 734 and AB 987: CEQA Streamlining for Professional Sports Projects
Bills enacted in 2018 create CEQA streamlining for a stadium and mixed-use development project for the Oakland Athletics (AB 734) and a proposed basketball arena and entertainment complex in Inglewood (AB 987). Prerequisites for obtaining CEQA streamlining are detailed for each project; both bills include detailed environmental and prevailing wage/living wage requirements. Under both bills, streamlining would result in any CEQA litigation, including any appeals, being resolved, "to the extent feasible," within 270 days of the filing of the certified record of proceedings with the court.

SB 1153: Withdrawal of Initiative Petitions by Proponents
Citizens may propose an initiative measure by circulating a petition for signature, and presenting enough valid signatures to force action by the jurisdiction's council or board. If the signatures are sufficient, the council or board has three choices: (1) adopt the measure without change; (2) place the measure on the ballot; or (3) order a report to be completed within 30 days and then opt for one of the first two choices. Under SB 1153, initiative proponents may withdraw their petition, even if it has already qualified for the ballot, any time up to the 88th day before the election. The bill does not address the possibility that decision-makers might adopt the measure, resulting in no election. The bill presents an interesting opportunity for settlement negotiations. Even after initiative proponents have established that they have sufficient signatures, and even after the measure has qualified for the ballot, proponents could reach an agreement with those who would oppose the initiative measure to withdraw the measure, and those who signed the petition need not be consulted.

AB 655: Building Permit Generally Freezes Building Code for 12 Months Rather than 180 Days
Existing law provides that statewide, model, and local building code changes apply only to construction under building permits applied for after the changes come into effect. Existing law provided that this freeze on building code changes remained in effect so long as: a) no emergency was proclaimed pursuant to the Emergency Service Act; b) work under the building permit began within 180 days of the permit's issuance and was not abandoned; and c) the permit was not suspended or revoked due to error or incorrect information supplied.

AB 655 changes the second of these provisos, allowing the building permit holder 12 months rather than 180 days to begin work under the building permit while applying the building codes that applied on the date the holder applied for the building permit.

CASE LAW:

PLANNING AND ZONING:

Development agreement may not be adopted by initiative.
Center for Community Action and Environmental Justice v. City of Moreno Valley, 26 Cal. App. 5th 689 (2018)

Based on the language and legislative history of the Development Agreement Statute (Gov't Code §§ 65864–65869.5), the court held that a development agreement may not be adopted by initiative. The court found it significant that the statute provided that a development agreement is "subject to referendum" but was silent as to initiatives and concluded that its reference to the "legislative body" indicated its intent to delegate power to approve development agreements exclusively to local governments. The court also reasoned that the initiative process was inconsistent with the concept of a development agreement as a contract because an initiative provides no opportunity for the local government to negotiate the agreement's terms.

Tigers not permitted as pets in a residential zoning district.
Hauser v. Ventura County Board of Supervisors, 20 Cal. App. 5th 572 (2018)

The County of Ventura denied a conditional use permit that would have allowed tigers to be kept on a 19-acre property located within a half-mile of a residential area. The County found that keeping tigers on the property was not compatible with planned uses in the area and was detrimental to public health and safety. The owner challenged the decision, arguing that the use was compatible with the County's open space zoning and that escaped tigers posed little risk to the public. The court disagreed, pointing to substantial evidence in the administrative record supporting the County's decision, including neighbors' concerns about the tigers supported by evidence of other large-cat attacks, the owner's lack of formal training, and the property's proximity to residential units.

General Plan given deference over strict interpretation of Tiberland Act.
High Sierra Rural Alliance v. County of Plumas, 29 Cal. App. 5th 102 (2018).

Petitioner argued that a county general plan update conflicted with the Timberland Act by impermissibly determining that all residences were compatible with land zoned for timberland provided the property was at least 160 acres. Petitioner contended that the Timberland Act required the county to conduct case-by-case compatibility determinations based on necessity and compatibility with underlying timber operations. The court held that a general plan policy requiring a finding that a residence or structure was compatible with the Timberland Act was sufficient and did not need to recite the precise requirements of the Act.

Medical marijuana asked to leave since it was not deemed a legal non-conforming use under "medical office" designation prior to City's adoption of marijuana regulations.
J. Arthur Properties, II, LLC v. City of San Jose, 21 Cal. App. 5th 480 (2018)

The owners of a medical marijuana collective opened a business on a site zoned for commercial office use. At that time, the zoning code was silent on medical marijuana use but allowed medical offices at the site. Subsequently, the City of San Jose enacted a zoning ordinance allowing medical marijuana use in certain zoning areas, not including commercial office areas. The City sent a compliance order requiring the owners discontinue their business. The owners sued, arguing they should be allowed to continue the marijuana collective as a legal, nonconforming use because their business qualified as a medical office. The court rejected the owners' broad interpretation of the zoning code's definition of medical office, emphasizing that medical marijuana collectives do not involve on-site patient treatment by a physician or other medical professional.

10-year waiting period for any eviction of tenants as required under local zoning ordinance was a violation of the Ellis Act.
Small Property Owners of San Francisco Institute v. City and County of San Francisco, 22 Cal. App. 5th 77 (2018)

San Francisco enacted an ordinance modifying the City's Planning Code to allow alteration of nonconforming residential units but imposed a 10-year waiting period for units that had been the subject of a "no fault" eviction. The court concluded the ordinance was preempted by the Ellis Act, which prevents local laws from imposing a prohibitive price on a landlord's ability to exit the residential rental business. The ordinance reached beyond the City's authority to regulate land use because it did not regulate the particulars of a proposed alteration, but instead penalized property owners protected by the Ellis Act. While the Ellis Act does not prohibit municipalities from imposing mitigation measures on landlords to alleviate any adverse impact from displacement, there was no evidence the 10-year wait period helped displaced tenants.

40,000 SF cap on businesses was reasonable General Plan policy adopted by the City Council in pursuing goals for small businesses and pedestrian-oriented retail.
Visalia Retail LP v. City of Visalia, 20 Cal. App. 5th 1 (2018).

Petitioner challenged a new general plan policy that required Neighborhood Commercial areas to be anchored by a grocery store and prohibited businesses greater than 40,000 square feet. Petitioner argued that the size limit conflicted with other policies and goals in the general plan, including a goal to promote infill development. The

court concluded that the city council could reasonably decide to restrict the nature of infill development in some areas to pursue other goals, such as encouraging smaller businesses or promoting pedestrian-oriented retail.

City rezoning a single parcel to allow mixed use development was acceptable under the Charter despite petitioner's claim that amendments could only be made to a "geographic area" and that a single parcel could not satisfy that requirement.
Westsiders opposed v. City of Los Angeles, 27 Cal. App. 5th 1079 (2018)

The City amended its general plan to change the land use designation of a five-acre former car dealership to allow a mixed-use development close to a new light rail station. The City's charter allowed amendment of the general plan "by geographic areas, provided that the part or area involved has significant social, economic or physical identity." Plaintiffs contended that the project site could not qualify under these criteria because "geographic area" referred to a region, and a single lot could not qualify as a region. Citing the principle that a court may not construe a charter as restricting municipal power without a clear mandate to that effect in the charter itself, the court found no "clear and explicit limitations [or] restrictions" in the charter regarding the size of the "geographic area" that may be the subject of an amendment. The court also rejected plaintiff's argument that a car dealership could not qualify as property having significant social, economic or physical identity. It concluded that the City could properly analyze the site's identity based on the proposed construction, not its prior use. The City satisfied the charter's requirements through its findings that the site was one of the largest underutilized sites in the area and would provide the first major transit-oriented development in West Los Angeles.

COASTAL ACT:

Judicial review of any decision of the Coastal Commission must be by writ of mandate under Section 1094.5 filed within 60 days of the decision.
Beach and Bluff Conservancy v. City of Solana Beach, 28 Cal. App. 5th 244 (2018)

Plaintiffs brought an action for declaratory relief and traditional mandate under Code of Civil Procedure section 1085 challenging several policies the City's Land Use Plan, which the Coastal Commission had earlier certified under the Coastal Act. The court held that none of the claims could properly be considered because the exclusive remedy under the circumstances was a petition for writ of mandate under Code of Civil Procedure § 1094.5. The court relied on Public Resources Code § 30801, which states that judicial review of any decision of the Coastal Commission must be by writ of mandate under Section 1094.5 filed within 60 days of the decision. The court reasoned that any post-approval facial challenge to a local land use policy under the Coastal Act "is essentially a challenge to the Commission's quasi-judicial certification decision." As such, the court said, the challenge must be by timely petition under Section 1094.5. The fact that the *City* had been acting legislatively when it enacted the policies at issue here did not alter the fact that an administrative mandamus proceeding against the Commission (with the City named as a necessary party) was plaintiff's exclusive remedy.

HOA's ban on short-term rentals constituted "development" under the Coastal Act – the Ban was contrary to the Act since it restricts coastal access. Short-term rentals should be regulated by City or CC, but not the HOA.
Greenfield v. Mandalay Shores Community Association, 21 Cal. App. 5th 896 (2018)

A homeowners' association for a beach community adopted a resolution banning short-term rentals. Plaintiff-homeowners sued to prevent enforcement of the ban on the ground that the association needed a coastal development permit. The court agreed, finding that the ban constituted a "development" under the Coastal Act. Observing that a goal of the Act was to maximize public access to the coast, the court reasoned the ban prevented non-residents from vacationing—as they had for decades—through the short-term rental of beach homes and hence created a "monetary barrier to the beach." Thus, whether short-term rentals should be regulated, the court said, needed to be decided by the City or the Coastal Commission, not the homeowners' association.

The Coastal Commission was empowered to exercise independent judgment in determining not only whether a master plan amendment conforms with the Act's policies, but also whether the plan "carries out those policies."
San Diego Unified Port Dist., v. Cal Coastal Commission, 27 Cal. App. 5th 1111 (2018)

The Coastal Commission rejected the Port's request for certification of an amendment to its master plan to allow construction of a 175-room hotel because it did not adequately protect lower-cost access to coastal recreational opportunities. The court upheld the decision, observing that the Commission was empowered to exercise independent judgment in determining not only whether a master plan amendment conforms with the Act's policies, but also whether the plan "carries out those policies." The Commission had a statutory mandate to consider "the manner of public access" on a case-by-case basis and properly exercised this mandate in deciding that the amendment did not adequately protect lower-cost visitor and public recreational opportunities, including overnight accommodations.

INITIATIVE/REFERENDUM:

Citizens may bring a referendum to challenge a zoning ordinance even if the referendum would temporarily leave in place zoning inconsistent with the general plan.
City of Morgan Hill v. Bushey, 5 Cal. 5th 1068 (2018)

The California Supreme Court resolved a split among the courts of appeal, concluding that citizens may bring a referendum to challenge a zoning ordinance even if the referendum would temporarily leave in place zoning inconsistent with the general plan. To put such a referendum on the ballot, there must be other consistent zoning designations available or the local government must have other ways of making the zoning consistent with the general plan. The court reasoned that while simultaneous modifications to the general plan and zoning code are preferred, state law does not require it. Additionally, the court differentiated a referendum from an ordinance or initiative enacting inconsistent zoning. It observed that a referendum setting aside a zoning ordinance that would have resolved a general plan inconsistency "simply keeps that inconsistency in place for a certain time — until the local government can make the zoning ordinance and general plan consistent in a manner acceptable to a majority of voters."

Referendum did not enact new inconsistent zoning, but instead sought to preserve the status quo.
San Lafayette v. City of Lafayette, 20 Cal. App. 5th 657 (2018)

The City of Lafayette amended its general plan to designate a parcel as residential and approved a zoning amendment to conform the parcel's zoning to the general plan. Project opponents filed a referendum petition to set aside the newly enacted zoning ordinance. The City refused to put the referendum on the ballot, arguing that it was legally invalid because it would result in zoning inconsistent with the general plan.

The court disagreed, reasoning that the referendum did not enact new inconsistent zoning, but instead sought to preserve the status quo. While the referendum did challenge the City's choice of zoning for the parcel, it did not hinder the City's ability to choose another conforming zoning designation.

LITIGATION:

The court held that a second action by citizens to challenge expansion of a Wal-Mart store based on specific policies of the general plan was barred by res judicata because the first action contemplated and had an opportunity to pursue the same claim representing a substantially similar interest.
Atwell v. City of Rohnert Park, 27 Cal. App. 5th 692 (2018)

The Sierra Club and a local conservation group challenged the City's approval of the expansion of a Wal-Mart store, including a claim that the project was inconsistent with specific policies of the general plan. They ultimately dropped that claim and instead successfully pursued a CEQA claim. Three individuals later filed a second suit raising the same general plan claim. The court held that the action was barred by res judicata. The general plan issue had been raised in the prior litigation and need not actually have been litigated and decided for res judicata to apply. Further, there was privity between the petitioners in the two lawsuits since both alleged claims on behalf of "citizens, taxpayers, property owners, and electors" of the City and the petitioners in the second action did not contend that their interests were not adequately represented in the first.

Weiss v. People ex rel Dep't of Transp.,
20 Cal. App. 5th 1156 (2018)
Eminent domain concept of pretrial procedure to decide liability under CCP §1260.040 does not apply to inverse condemnation actions. The Court of appeal reversed the trial court's grant of a condemning agencies motion under CCP §1260.040. That statute was determined to apply only to eminent domain proceedings, not to inverse condemnation actions. The Court rejected the agencies' request that it "import §1260.040 into the body of inverse condemnation law as a matter of judicial development. The reasoning was importing the meaning of that statute would constitute a novel summary mechanism on liability, as opposed to adequate compensation, in actions the legislature did not intend to cover. The court appeared to put a thumb on the scale in reasoning that such a mechanism, applying §1260.040, would not promote settlement; rather it would operate "either as a bludgeon to end the plaintiff's case or a nullity that does nothing to reduce the scope of trial if the plaintiff establishes a prima facie case of liability," which works against it purpose of promoting settlement.

FEES & TAXES:

The City's decision to change the impact fee for schools based on gross square footage calculation method to implement the statutory mandate did not violate the plaintiff's vested rights.
1901 First Street Owner v. Tustin Unified School District, 21 Cal. App. 5th 1186 (2018)

The City of Tustin calculated school impact fees for apartment buildings using a "net rentable" method, including only the square footage of individual apartment units, while excluding everything else in the building. The school district objected, arguing that state law required all space within the perimeter of the building to be a part of the calculation, not just rented space. The City changed its calculation to conform to the school district's interpretation and the building owner sued. The court rejected the owner's argument that the calculated square footage of an apartment building should be limited to individual units, reasoning that the enumerated space exclusions in the statute only applied to outdoor areas. The court also concluded that the City's decision to change the impact fee calculation method to implement the statutory mandate did not violate the plaintiff's vested rights.

TAKINGS:

City's denial of the requested rent increase did not amount to a taking even though it resulted in a 24.8% reduction in property value.
Colony Cove Properties v. City of Carson, 888 F.3d 445 (9th Cir. 2018)

Plaintiff purchased a $23 million mobile home park, $18 million of which was financed through a loan. Subsequently, the City adopted an ordinance changing the method of calculation of allowable rent for mobile homes. The new rent control formula no longer factored in changes in debt service expenses, which caused the City to grant the owner smaller rent increases than it requested. The court rejected the owner's regulatory takings claims against the City. Citing prior cases finding that diminution in property value in excess of 75% did not constitute a regulatory taking, the court found that denial of the requested rent increase did not amount to a taking even though it resulted in a 24.8% reduction in property value. Additionally, the court concluded that, under the facts of the case, the owner's reliance on the City continuing its past practice of calculating debt service in future rent increases did not create a reasonable investment-backed expectation.

CEQA:

CEQA's categorical exemption for continued operation of existing facilities applied to a 7-year lease extension for nuclear power plant operations through 2025.
World Business Academy v. California State Lands Commission, 24 CA 5th 476 (2018)

The court rejected CEQA challenges to a State Lands Commission lease extension, allowing the Diablo Canyon nuclear power plant to continue operating through 2025.

Pacific Gas & Electric Company plans to cease operating Diablo Canyon in 2025, when the plant's federal licenses will expire. The plant's cooling water intake and discharge structures are on state-owned submerged and tidal lands, for which the Commission had issued leases to PG&E expiring in 2018 and 2019. The

Commission granted PG&E a consolidated lease extension through 2025, relying on CEQA's categorical exemption for continued operation of existing facilities.

CEQA's categorical exemptions are subject to several exceptions that can force a lead agency to prepare a negative declaration or an environmental impact report. The "unusual circumstances" exception applies "where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." Here, Diablo Canyon opponents argued that continued operation of the state's last nuclear power plant was rife with unusual circumstances that could cause significant environmental effects.

To show that the unusual circumstances exception applies, normally a challenger must show both (1) unusual circumstances; and (2) a reasonable possibility of a significant environmental effect due to those unusual circumstances. Here, the Commission had made no finding regarding unusual circumstances. With no finding before it, the court of appeal elected to assume unusual circumstances did exist and then proceeded to the second half of the test: whether there was a fair argument that the lease extension would cause significant environmental impacts.

The court began by holding that the baseline for its analysis consisted of existing operations under the lease. In so doing, the court followed an earlier case that applied the same rule with respect to Central Valley Project water contract renewals.

The court then reviewed each factor the challenger claimed raised a fair argument of significant environmental effects—Diablo Canyon's size, location, impacts on human health and marine life, fuel rod storage, reactor embrittlement, risks from seismic events and terror attacks, and status as the state's last remaining nuclear plant—and found that none of these conditions would be changed by the lease extension. Because there was no fair argument of significant environmental effects from the extension, the court held the Commission did not violate CEQA.

The court's opinion is instructive in two respects. First, it reinforces precedent holding that however damaging an existing environmental condition is alleged to be, that condition is still the baseline under CEQA, and only a project-caused worsening of that condition is a CEQA concern.

Baseline for construction of new home is what is in existence at the time of decision-making, not a date prior to demolition of a potentially historic structure on the site.
Bottini v. City of San Diego, 27 CA 5th 281 (2018)

The court held that the CEQA baseline for construction of a new home should not have been set at a date prior to demolition of a potential historic structure on the site, where the demolition had already occurred before the permit application for the new home had been submitted.

The Bottinis applied to the City of San Diego for a Coastal Development Permit to construct a single-family home on a vacant lot. City staff determined that the project was categorically exempt under CEQA's Class 3 exemption for construction of a single-family home. On appeal, however, the city council found that full environmental review was necessary because the Bottinis had demolished a 19th-century cottage on the lot shortly before applying for the CDP. The city had itself previously concluded that cottage was not a historic resource, declared the structure to be a public nuisance, and authorized the Bottinis to demolish it. Nevertheless, the city council retroactively declared the cottage "historic," concluded that the demolition should be considered part of the new home project, and found that there was a reasonable possibility that CEQA's "historical resources" and "unusual circumstances" exceptions precluded use of the categorical exemption.

The Bottinis sued, contending that the city's baseline determination violated CEQA and that the city's decisions violated the Bottinis' due process rights and resulted in a regulatory taking.

With respect to the CEQA claims, the appellate court disagreed with the city's determination that the "CEQA project" included both the demolition and the proposed construction of a single-family residence. Reasoning that CEQA applies prospectively, and not to completed work, the court held that the correct baseline was the condition of the property when the Bottinis filed their permit application. At that time, the property was a vacant lot.

Using the correct project baseline, the court said, the Class 3 exemption clearly applied to the Bottinis' proposed single-family residence, and the historical resource and unusual circumstances exceptions were inapplicable.

The court of appeal upheld Santa Cruz County's use of a Category 3 (small facilities and structures) CEQA exemption to approve a distributed antenna system for the provision of cell service.
Aptos Residents Association v. County of Santa Cruz, 20 CA 5th 1039 (2018)

The court of appeal upheld Santa Cruz County's use of a CEQA exemption to approve a distributed antenna system (often referred to as a DAS) for the provision of cell service.

The court found that the project fit squarely within the intended scope of CEQA's Class 3 categorical exemption for small facilities and structures. The court also rejected petitioners' arguments that there was an applicable exception that would have precluded the use of the exemption.

Background
The project involved 10 microcell transmitters that would be used as part of Crown Castle's distributed antenna system. Each microcell consisted of a two-foot by one-foot antenna mounted on an extender pole that would be attached to an existing utility pole. Crown Castle submitted a separate permit application for each microcell. Raising concerns about health and aesthetics, residents began mounting opposition to the project.

The county jointly considered the applications for the microcells and determined that they fell within the Class 3 exemption for small structures. After conducting site visits and reviewing photo simulations, the county concluded that the microcells would not result in any significant visual or other environmental impacts. Residents filed suit, contending that the county's approval of the project violated CEQA.

The Court's Decision
The residents' petition claimed that the county violated CEQA in several ways: by improperly segmenting the project, by finding that the project fell within the Class 3 exemption, and by using an exemption where an exception barred an exemption. The court of appeal found these claims unavailing.

Improper segmentation. The court rejected petitioners' contention that because Crown Castle applied for a separate permit for each microcell, the project was improperly segmented. The county expressly considered the project to be the entire group of microcells and found that the Class 3 exemption was applicable to all of the microcells. The fact that Crown Castle filed a separate permit for each microcell unit was irrelevant.

Applicability of exemption. The Class 3 categorical exemption applies to "limited numbers of new, small facilities or structures" including "electrical, gas, and other utility extensions." The court found the project to fall squarely within the class of projects intended to be covered by this exemption, recognizing that the exemption extends to multiple small structures in scattered locations.

Exceptions to the use of the exemption. Petitioners urged the court to find applicable several exceptions that would have precluded the use of the Class 3 exemption. The court declined, finding that that petitioners failed to meet their burden to identify evidence supporting an exception.

Cumulative impact exception. The cumulative impact exception bars an exemption where the cumulative impact of "successive projects of the same type in the same place, over time is significant." Petitioners claimed that this exception should apply because AT&T intended to implement its own distributed antenna system in the area at some time in the future. The court rejected this argument as amounting to "mere speculation," given that petitioners provided no evidence that AT&T was actually pursuing a project or any evidence of the location of AT&T's proposed facilities.

Location exception. The CEQA Guidelines prohibit use of the Class 3 exemption if the activity may have an impact on an environmental resource of "hazardous or critical concern where designated, precisely mapped, and officially adopted pursuant to law by federal, state or local agencies." The county's zoning of the project area as "Residential Agricultural" did not meet this requirement because nothing in the zoning ordinance specifically designated the zone as "an environmental resource of hazardous or critical concern."

Unusual circumstance exception. Under the CEQA Guidelines, an exemption cannot be used where there is "a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." The court found nothing unusual in microcells being built in rural areas, because such areas "clearly need utilities, including cell coverage."

See also, *Don't Cell Our Parks v. City of San Diego,* 21 CA 5th 338 (2018)

Negative Declarations

Claims of significant noise impact unsupported by expert opinion, fact, or reasonable inference do not provide grounds for challenging a negative declaration.
Jensen v. City of Santa Rosa, 23 CA 5th 877 (2018)

Claims of significant noise impact unsupported by expert opinion, fact, or reasonable inference do not provide grounds for challenging a negative declaration.

The project, called the Dream Center, would provide emergency shelter for homeless youth and transitional housing for young adults, as well as counseling, health, education, and job placement services. The center would also provide outdoor recreational activities for residents, including a basketball area, pottery throwing area, and garden. The center would occupy a vacant building formerly used as a hospital. A wooden fence and landscaping separated the rear parking lot from an adjacent residential neighborhood.

The City of Santa Rosa adopted a negative declaration and approved a rezoning and conditional use permit for the project. Conditions of approval limited parking in the rear lot to employees during normal operating hours. The city's negative declaration relied on a noise study prepared by an engineering firm. The noise study concluded that noise impacts would be less than significant because noise would not exceed standards in the city's general plan or noise ordinance, and noise levels would not be increased more than 5 dBA Ldn above existing conditions. (Ldn is the average day/night noise level.) The petitioners, who lived near the project, asserted that there was a fair argument the project would cause significant noise impacts from vehicles in the rear parking lot and from outdoor recreation activities. The petitioners based their main arguments on their own calculations, using data taken from a noise study for a different project in the city called Tower Market, a 24-hour convenience store and gas station.

The court held that no substantial evidence supported the petitioners' claims.

First, the court found that the petitioners misused noise data from the Tower Market study. The petitioners took the Tower Market study's noise level estimates for passing vehicles and argued that these estimates exceeded maximum noise levels that they had calculated. The court explained that the petitioners' calculations showed very little about noise impacts because they did not predict the average noise level over time. Further, the court noted, this methodology was not backed up by expert opinion.

Second, the court concluded the petitioners' argument regarding parking lot noise was grounded on speculation and hypothesis rather than fact, expert opinion, or reasonable inference. The petitioners asserted that cars and trucks could drive through the rear parking lot at all hours of the day and night. The court explained, however, that this claim was "most improbable and not a fair inference from the evidence," particularly in light of the project characteristics and the conditions of approval. The court also noted that it was "obvious" that Tower Market and the Dream Center were not similar projects: The rear parking lot at the Dream Center would have much less frequent car traffic (especially at night, when employees would not be allowed to park in the rear parking lot) and would have minimal or nonexistent truck traffic, as compared to a 24-hour market and gas station.

Third, the court rejected the petitioners' interpretation of the city's noise ordinance. The city's noise ordinance set forth base ambient noise levels based on a property's zoning and time of day. The petitioners treated these noise levels as thresholds of significance. The noise ordinance, however, specified that the base noise levels

were intended to be used for comparative purposes, and noise level is one of 12 factors to be considered in determining whether a noise impact violates the noise ordinance.

Finally, the court rejected the petitioners' arguments that the noise from outdoor recreation activities (basketball, pottery, and gardening) would be significant. The court held that the petitioners' methodology was "vague" and hard to grasp, was not a "legitimate factual or scientific basis for finding a significant impact," and was "not supported by expert opinion."

In this case, the petitioners' only evidence of significant noise impacts was their own calculations and opinions. The court held that this was not enough to support a fair argument of significant impact. The take-home message is that petitioners challenging a negative declaration based on noise impacts or other technical issues have to support their arguments with expert opinion if they are to prevail.

Dollar store in historic landmark not welcome. Court addresses three important questions relating to evaluation of aesthetic impacts in a negative declaration and the effect of comments by members of the public about such impacts.
Georgetown Preservation Society v. County of El Dorado, 30 Cal.App.5th 358

Georgetown, a former gold rush camp located in the Sierra Nevada foothills, is a state historical landmark. The county approved a Dollar General chain discount store on Main Street, within the town's historic commercial district, relying on a mitigated negative declaration. Local residents objected, commenting that the building did not belong in a historic community, that the store's size and appearance would have a negative aesthetic impact, and that the design of the building was incompatible with nearby historic buildings.

Not surprisingly, the county's decision to approve the project was followed by a lawsuit claiming that an EIR should have been prepared to evaluate the project's significant aesthetic effects. The court of appeal ruled for the opponents, and in its opinion, it issued rulings on three important questions relating to evaluation of aesthetic impacts in a negative declaration and the effect of comments by members of the public about such impacts.

Design review by the lead agency is not a substitute for CEQA compliance. The county had determined that the new store would not have adverse aesthetic impacts because it satisfied the criteria in the county's Historic Design Guide. On appeal, the county and developer argued that subjective opinions of several residents about the aesthetic merits of the project should not override the county's design review determinations. The court ruled, however, that design review under the zoning code is not a substitute for review of a project under CEQA. The design review process can provide relevant evidence, but when the agency is considering a negative declaration, it does not shield the project from review of its impacts under the fair argument standard.

Public comments can establish a fair argument that aesthetic impacts may be significant. The county and developer contended that public commentary by nonexperts should not be enough to support a fair argument that the project may cause significant aesthetic impacts. They argued that subjective opinions about aesthetic issues, standing alone, signal a public controversy but are not evidence that the impact is significant. The court disagreed, noting that a number of persons objected to the size and appearance of the building, asserting that it was too big and too boxy or monolithic to blend in and that its presence would damage the look and feel of the historic town center. The county should have taken account of this body of evidence, according to the court, because it related to nontechnical matters on which residents were capable of giving an opinion, such as the building's size and general appearance. Further, its evidentiary value was enough to satisfy the "fair argument" test, which triggers an EIR. As the court put it: "Despite the subjective nature of aesthetic concerns, it is clear that the project may have a significant adverse environmental impact."

A lead agency cannot argue that evidence in the record was unfounded or not credible unless it made specific findings to that effect. When considering comments relating to potential environmental impacts, a lead agency may disregard evidence that is unfounded or not credible for other reasons. Here, the county argued that it had properly discounted the public comments the court cited due to their lack of foundation or creditability. The court held, however, that in order to preserve attacks on comments based on lack of foundation or credibility, the lead agency must have made findings showing it had rejected the evidence for those reasons. The county had not done so here.

Conclusion. Criticisms of a project's design or complaints about its attractiveness, standing alone, are not enough to show a significant aesthetic impact. While CEQA is concerned with adverse impacts on the human environment, it is unconcerned with aesthetic values that are merely a matter of personal preference. In this case, the evidence was sufficient to persuade the court that the aesthetic objections to the project rested on broader community values: The court found there was sufficient evidence "to show this project in this location might significantly impair the central district's unique and treasured Gold Rush character."

For additional discussion on aesthetic issues related to historic overlay districts, see also, *Protect Niles v. City of Fremont,* (2018) 25 CA 5th 1129 (1st Dist.).