ARTICLE:

THE 21ST CENTURY ROAD TO HOUSING ACT: PUBLIC LAW NO. 119-101 AND ITS IMPLICATIONS FOR THE REAL ESTATE INDUSTRY

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On July 11, 2026, the 21st Century ROAD to Housing Act (the Act) became Public Law No. 119-101 without the President's signature.[1] The Act spans twelve titles and fifty-nine sections addressing housing access and supply, ranging from zoning and planning to construction and accessibility to affordability and banking. It is the most significant federal housing legislation enacted in more than a decade.[2] The Act originated as H.R. No. 6644, the "Housing for the 21st Century Act,"[3] and was shaped by Executive Order 14376, "Stopping Wall Street from Competing with Main Street Homebuyers," signed by President Trump on January 20, 2026,[4] which directed the U.S. Department of Housing & Urban Development (HUD) and the Federal Housing Finance Agency (FHFA) to identify restrictions on institutional acquisition of single-family homes, providing the policy framework for Title X of the Act. Passed with overwhelming bipartisan support, the Act reflects both the political salience of housing affordability and the populist appeal of restricting institutional homebuying, with Senators Tim Scott (R-SC) and Elizabeth Warren (D-MA) among its principal sponsors.[5]

This article begins with a discussion of the legislative history that led to Public Law No. 119-101's enactment, followed by an analysis of the various titles with particular emphasis on two titles of greatest consequence to the real estate industry: Title II—"Building More in America," which constitutes the Act's principal supply-side reform package; and Title X—"Home-Ownership for Main Street America," which imposes a categorical prohibition on single-family home acquisitions by large institutional investors.

An important point to note at the outset: Section 1202 of the Act provides that "no additional funds are authorized to be appropriated to carry out this act." This provision, contained in Title XII—"Miscellaneous," is a limitation that means the Act's new programs and mandates depend on existing appropria-

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tions, agency reprogramming, or future legislation, a constraint that recurs throughout this article.

Legislative History

Representative J. French Hill (R-AR-2) introduced H.R. No. 6644 on December 11, 2025, as the "Housing for the 21st Century Act," with six titles and thirty-eight sections focused on housing supply, manufactured housing, and HUD programs.[6] The House Financial Services Committee reported it favorably on January 15, 2026, and the House passed it on February 9 by 390-9 under suspension of the rules, reflecting broad bipartisan support.[7]

The Senate replaced the House text with a comprehensive substitute, passed 89-10 on March 12, 2026.[8] The substitute renamed the bill the "21st Century ROAD to Housing Act," an acronym for "Renewing Opportunity in the American Dream," expanded it to eleven titles and forty-three sections, and added the institutional investor prohibition, banking reforms, and veterans' housing provisions.[9] The House agreed to the Senate amendment on May 20, 2026, further expanding the bill to twelve titles and fifty-six sections;[10] after additional changes, the Senate passed it 85-5 on June 22, 2026,[11] and the House approved it 358-32 on June 23, 2026, producing the twelve-title, fifty-nine-section final bill.[12]

The Congressional Budget Office concluded that the House version of the bill would not increase the deficit, a finding consistent with the Act's reliance on existing funding authority.[13] Despite the legislation's overwhelming bipartisan support, President Trump dismissed the bill as "of minor importance," cancelled a planned White House signing ceremony, and refused to sign it unless Congress first passed the SAVE America Act, a strict voter identification bill.[14] The bill was presented to the President on June 29, 2026, and became law without signature on July 11, 2026, after the constitutional ten-day period elapsed.[15]

Overview of All Twelve Titles

The following overview briefly identifies the function of each title in the Act before turning to detailed analyses of Titles II and X.

Title I—Opportunities for Housing. Through seven sections encompassing a diverse array of reforms, Title I aims to improve housing access.[16] Section 101 overhauls housing counseling requirements under existing HUD programs,

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while Section 102 directs HUD to develop guidelines and award grants for single-staircase residential building designs. For rural infill development projects, Section 103 creates a targeted exemption from the National Environmental Policy Act (NEPA) for the Secretary of Agriculture when providing certain assistance related to the construction or modification of farm housing and other housing in rural areas located on an infill site. For purposes of this section, an "infill site" is defined as a site that is already served by existing infrastructure (including water lines, sewer lines, and roads) but expressly excludes sites whose only infrastructure is a road, sites at high risk for fires or flooding, and greenfields.[17] Section 103 offers a narrow but meaningful benefit to California developers building U.S. Department of Agriculture-assisted housing on infrastructure-served infill sites in rural areas, particularly the Central Valley, the Inland Empire, and Northern California, by eliminating the federal NEPA environmental review layer, thereby reducing project timelines and costs.[18]

Section 104 mandates the creation of a publicly accessible database of federal lands potentially suitable for housing development. A four-year pilot program for Federal Housing Administration (FHA) small-dollar mortgages designed to serve borrowers in lower-cost markets underserved by conventional lending is established under Section 105. Section 106 authorizes a three-year pilot program for temperature sensor technology in HUD-assisted housing.

Finally, Section 107 directs HUD's Assistant Secretary for Policy Development and Research to publish, within three years of enactment, voluntary guidelines and best practices for state and local zoning and land use policies aimed at supporting adequate housing production, though the guidelines are intended to serve as models that states and localities could voluntarily adopt to modernize their own zoning frameworks and carry no preemptive force.[19]

Title II—Building More in America. Constituting the Act's principal supply-side package, Title II addresses community investment, Community Development Block Grant (CDBG)[20] construction eligibility and incentives, NEPA streamlining, housing innovation, adaptive reuse, FHA multifamily financing, and the Rental Assistance Demonstration (RAD) among other things. It is analyzed in detail below.[21]

Title III—Manufactured Housing for America. Through four sections, Title III addresses regulatory barriers to manufactured and modular housing.[22] Eliminating the permanent chassis requirement for manufactured homes, Sec-

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tion 301 may expand the market for factory-built housing by permitting placement on permanent foundations. Section 302 directs a federal review of barriers to modular construction, and Section 303 increases FHA Title I loan limits for manufactured housing while extending eligibility to accessory dwelling units. Section 304 reauthorizes the Preservation and Reinvestment Initiative for Community Enhancement (PRICE) Act, [23] a federal competitive grant program administered by HUD that provides funding to preserve and revitalize manufactured housing communities and units, focusing on long-term housing affordability for low and moderate-income residents.[24]

Title IV—Accessing the American Dream. Focusing on mortgage lending and appraisal reform, Title IV is made up of five sections. Section 401 directs the Consumer Financial Protection Bureau to produce a report on loan originator compensation structures; a study of small-dollar mortgage availability is mandated under Section 402. Appraisal reform measures comprise Section 403, including revisions to eligibility criteria for appraisers authorized to perform appraisals for federally-related mortgage loans, expansion of the national registry of state certified and licensed appraisers to include credentialed trainees, and authorization of grants for appraiser training and diversification. Section 404 provides for a ten-year pilot escrow account program serving up to 5,000 families. Section 405 harmonizes physical inspection requirements across the Low-Income Housing Tax Credit, HOME Investment Partnerships, and Rural Housing Service programs, a reform that may reduce compliance burdens for affordable housing operators.[25]

Title V—Program Reform. Several existing federal housing programs are overhauled under Title V. Section 501 reforms the HOME Investment Partnerships program, most notably by raising the income eligibility threshold to 100 percent of area median income (AMI), while Section 502 addresses rural housing program reforms. The McKinney-Vento Homeless Assistance Act is amended by Section 503, which extends the shelter waiver for fiscal years 2027 through 2030. For the first time, Section 504 provides statutory authorization for the CDBG Disaster Recovery program, establishing a three-year authorization period and creating an Office of Disaster Management and Resiliency within HUD. Section 505 expands the Moving to Work demonstration program by twenty-five additional public housing authorities.[26]

Title VI—Veterans and Housing. Directed at veterans' housing access, Title VI contains three provisions. Section 601 requires the Uniform Residential

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Loan Application to include notification of Veterans Affairs (VA) loan eligibility for qualifying applicants. Disability-related income is excluded from income calculations used for HUD-Veterans Affairs Supportive Housing eligibility under Section 602. Finally, Section 603 mandates that lenders provide borrowers with notices detailing the relative terms of FHA and VA loan products.[27]

Title VII—Oversight and Accountability. Several oversight mechanisms are established under Title VII. The HUD Secretary must appear annually before the relevant congressional committees to testify on HUD's operations, programs, and oversight activities, as required by Section 701. Section 702 mandates monthly reporting on the status of the Mutual Mortgage Insurance Fund. Updates to the United States Interagency Council on Homelessness strategic plan are required under Section 703, and Section 704 addresses appraisal reconsideration procedures.[28]

Title VIII—Accountability, Coordination, Studies, and Reporting. Complementing the oversight provisions of Title VII, Title VIII proceeds through five sections: interagency data sharing (Section 801); a memorandum of understanding on environmental review coordination (Section 802); a study of the Moving to Work program's outcomes (Section 803); Government Accountability Office studies on various housing program issues (Section 804); and enhanced oversight of public housing authorities (Section 805).[29]

Title IX—Strengthening Community Banks' Role in Housing. Title IX addresses community banking reform through nine sections. While not directly housing provisions, these reforms to community bank regulation are intended to enhance mortgage credit availability in underserved markets.[30] Title IX's provisions include: increased deposit insurance treatment of custodial deposits (Section 901); a tiered increase in the reciprocal deposits threshold (Section 902); raising the asset threshold for the 18-month examination cycle from $3 billion to $6 billion (Section 903); reformed credit union board composition requirements (Section 904); and bank failure reporting requirements (Section 905). Additionally, Section 906 creates a mentor-protégé program for community banks; Section 907 streamlines the de novo bank chartering process; Section 908 authorizes a capital standards phase-in period for newly chartered institutions; and Section 909 directs a study of rural depository institution needs.

Title X—Home-Ownership for Main Street America. Title X prohibits

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large institutional investors (entities with investment control of more than 350 single-family homes) from purchasing additional single-family homes, subject to eleven exceptions. Substantial penalties are imposed for violations. Effective 180 days after enactment, this provision is analyzed in detail below.[31]

Title XI—Central Bank Digital Currency. Although Title XI does not directly regulate housing, it was inserted into this comprehensive housing package as a legislative rider reflecting concerns against a Fed-issued digital dollar.[32] Through at least 2030, Title XI prohibits the Federal Reserve from issuing or creating a retail central bank digital currency or any substantially similar digital asset, whether directly or through intermediaries. A rule of construction clarifies that no provision of the Act authorizes such issuance absent a separate act of Congress.[33]

Title XII—Miscellaneous. General provisions applicable to the Act as a whole are contained in Title XII, including Section 1202, which provides that no additional funds are authorized to be appropriated to carry out the Act. As noted in the introduction, this limitation constrains the Act's practical implementation to existing funding streams and future discretionary appropriations.[34]

The following sections provide an in-depth analysis of Titles II and X, which together represent the most consequential provisions of the Act for the real estate industry.

Analysis: Title II—Building More in America

Title II of the 21st Century ROAD to Housing Act, captioned "Building More in America," constitutes the statute's principal supply-side reform package: a collection of eleven substantive sections that attempt to reduce barriers to housing production through a combination of expanded financing mechanisms, environmental review streamlining, programmatic innovation, and fiscal incentives (and disincentives) for local jurisdictions that approve housing development.[35] Whether these provisions will meaningfully alter development pipelines will depend on implementation details, appropriations, and factors that remain largely beyond the reach of federal legislation, such as local land use regulation, construction costs, labor availability, and prevailing interest rates. It is also important to remember that Section 1202's no-additional-funds constraint applies here, meaning that the programmatic expan-

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sions authorized in Title II must compete for existing appropriations or await future congressional action.

Section 201—Increasing Housing in Opportunity Zones

Section 201 authorizes HUD to assign additional weight to grant applicants whose proposed projects are located within a designated qualified opportunity zone under section 1400Z-1 of the Internal Revenue Code of 1986 (Opportunity Zones).[36] This provision layers federal grant funding on top of existing Opportunity Zone tax incentives, amplifying the attractiveness of investment in economically distressed census tracts.[37] For institutional investors, this creates a dual advantage: projects in Opportunity Zones may enjoy both favorable capital gains treatment and enhanced prospects for federal assistance.

Section 202—Whole-Home Repairs Act

Section 202 authorizes HUD to establish a pilot program providing grants to state and local governments, which in turn distribute grants to eligible homeowners (households at or below 80 percent of area median income, or AMI) and forgivable loans to eligible small landlords (those owning fewer than 10 rental properties with no more than 25 total units) for essential home repairs, accessibility modifications, and energy-efficiency upgrades.[38] Although Section 202 is principally a residential program targeting closely held landlords, it carries several indirect implications for real estate practitioners: the forgivable loan mechanism creates a recorded lien against residential property that is extinguished only after three years of post-repair affordability compliance, requiring commercial lenders underwriting loans secured by small multifamily properties to account for lien priority, subordination, and title encumbrance in their diligence.[39] Investors in housing eligible for this pilot program must evaluate how the three-year compliance period and associated restrictions may affect property valuations, disposition timelines, and exit strategies.

Section 203—Community Investment and Prosperity Act

Section 203 amends 12 U.S.C.A. § 24 for national banks and 12 U.S.C.A. § 338a for state member banks to increase the cap on public welfare investments (PWIs) from 15 percent to 20 percent of total assets.[40] Prior to the Act's passage, national banks were constrained to allocating no more than 15 percent of their total assets to PWIs. The five-percentage-point increase represents, in aggregate, tens of billions of dollars in additional investment capacity across the national banking system.[41]

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The implications of Section 203 are significant, particularly for affordable housing finance and community development. PWIs are the principal vehicle through which banks invest in Low-Income Housing Tax Credit (LIHTC) equity, New Markets Tax Credit investments, historic tax credit projects with community development characteristics, small business investment companies and rural business investment companies.[42] In 2024, banks supplied approximately $23.1 billion, and a survey of 22 banks representing over $14 billion in LIHTC investment found that more than 42 percent of those investments ($6.1 billion) came from institutions nearing the prior 15 percent cap.[43] The extent to which the cap increase translates into an increase in investment volume or pricing shifts will depend on several factors, including whether a given institution is actually constrained by the current cap, the availability of desirable projects, tax appetite, interest rates, and other regulatory capital constraints.[44]

Section 204—Addition of Affordable Housing Construction as an Eligible Activity

Section 204 amends Section 105(a) of the Housing and Community Development Act (HCDA) of 1974 (42 U.S.C.A. § 5305(a)) to add the new construction of affordable housing as an eligible activity under the CDBG program.[45] Prior to enactment, HUD's regulations[46] expressly prohibited the use of CDBG funds for new housing construction because new construction was not included on the exclusive list of eligible activities in Section 105(a) of the HCDA.[47] The statute defines "affordable housing" by cross-reference to Section 215 of the Cranston-Gonzalez National Affordable Housing Act (42 U.S.C.A. § 12745), and caps new construction expenditures at twenty percent of amounts allocated to the recipient.[48]

With Section 204 in place, CDBG funds may now serve as gap financing for new affordable housing construction projects, enabling communities to deploy federal block grant dollars alongside LIHTC equity, HOME Investment Partnerships funds, and conventional debt.[49] The 20 percent expenditure cap means that, for a typical entitlement community receiving five million dollars in annual CDBG allocations, up to one million dollars could be directed to new affordable construction—a modest but consequential source of subsidy in an era of constrained public funding.[50]

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Section 205—Better Use of Intergovernmental and Local Development (BUILD) Housing Act

Section 205 amends the Department of Housing and Urban Development Act,[51] by authorizing HUD to designate certain housing assistance as funds for a "special project" for purposes of NEPA, thereby enabling states, local governments, and tribal entities to assume responsibility for the project's environmental review obligations.[52] The legislative history confirms that Congress intended these reforms to "make it easier to build and afford housing" by "lowering costs by removing unnecessary federal requirements" and "increasing local flexibility over housing decisions."[53]

For the real estate industry, Section 205 carries both immediate procedural significance and longer-term structural implications.[54] Under the previous regulatory framework, projects proposed for HUD assistance or FHA mortgage insurance had to undergo federal NEPA review, a process that adds a minimum of six to eight weeks often much longer, to project timelines and frequently delays predevelopment activity.[55] Section 205's "special project" designation is expected to simplify environmental reviews by delegating environmental review responsibilities to state, local, and tribal governments that would already be conducting their own environmental reviews.[56]

In California, projects that receive a "special project" designation under Section 205 may still have to undertake environmental review under CEQA.[57] For projects that do not qualify for a CEQA exemption or streamlining provision, Section 205 may have limited practical effect on overall project timelines in California because the state-level CEQA review will remain the binding constraint; however, the overall cost of entitlement should still be reduced by the elimination of federal NEPA review. But for projects that qualify as a special project under Section 205 *and* for a CEQA exemption (such as the urban infill exemption), the combined effect could be substantial, potentially eliminating or greatly simplifying environmental review at both the federal and state levels and significantly accelerating housing production.[58]

Section 206—Unlocking Housing Supply Through Streamlined and Modernized Reviews Act

Section 206 restructures the environmental review framework applicable to housing-related activities funded or assisted by HUD.[59] The provision was designed to "make it easier to build and afford housing" by "lowering costs by

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removing unnecessary federal requirements" and reducing regulatory delays that have historically impeded housing development; the sponsors similarly characterized the pre-existing regime as "not properly tailored to the size and scale of housing projects," noting that environmental reviews could "slow housing projects by months—or even years."[60]

More specifically, Section 206 requires HUD to expand and reclassify housing-related activities under NEPA administrative regulations at 24 C.F.R. Parts 50 and 58 into three streamlined tiers: (1) exempt activities, including tenant-based rental assistance, affordable housing predevelopment costs, and emergency repairs; (2) categorical exclusions not subject to further review, covering rehabilitation of one-to-four-unit residential buildings; and (3) categorical exclusions subject to further review, encompassing new construction of 5-15 dwelling units, scattered-site projects, rehabilitation of 5-15-unit buildings, office-to-residential conversions (with a regulatory size cap of approximately twenty percent building expansion), open-space acquisitions, and infill housing construction on previously disturbed land of five acres or less.[61]

For the real estate industry, the elimination or reduction of NEPA review timelines, often exceeding six to eight weeks for covered projects, promises important reductions in predevelopment time and cost savings for qualifying activities.[62] Of particular consequence to the commercial real estate sector is the new categorical exclusion for office-to-residential conversions, a key driver of adaptive reuse activity.[63] The statute's broad infill definition encompasses a substantial inventory of urban commercial parcels and positions the statute as a potentially transformative tool for urban redevelopment.[64] Small multifamily developers also benefit from the categorical exclusion status now available for 5-15-unit new construction projects.[65]

In California, the NEPA exemption does not preempt CEQA obligations, which theoretically tempers the practical significance of Section 206 for California real estate development.[66] That said, where a project qualifies for both a CEQA exemption (such as the urban infill housing exemption) and Section 206's expanded NEPA categorical exclusions, the cumulative impact of eliminated or simplified environmental review at both the state and federal levels could materially accelerate the pace of housing development.

The practical benefits of Section 206 remain prospective: HUD has confirmed that the Act requires formal rulemaking to amend 24 C.F.R. Parts 50

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and 58, and all environmental reviews must continue to follow existing regulatory requirements until that rulemaking is completed.[67] The statute sets no deadline for HUD to promulgate implementing regulations, and as of this writing, HUD has issued neither a proposed rule nor interim guidance.[68] Moreover, because the Act specifies that many of its environmental review provisions "shall apply only to funds appropriated after the effective date of HUD's rulemaking," it remains unclear whether existing projects in the pipeline can avail themselves of the streamlined categories.[69]

Practitioners should anticipate a transitional period of substantial regulatory ambiguity: key open issues include the exact unit cap for office conversions (to be set by regulation), the threshold for "substantial rehabilitation," the interaction between Section 206 categorical exclusions and continuing obligations under other federal environmental statutes, and whether state and local jurisdictions will adopt parallel streamlining for non-federally funded projects.[70]

Section 207—Grants for Planning and Implementation Associated with Affordable Housing

Section 207 establishes a five-year competitive grant program directing HUD to award grants to states, cities, local governments, tribal governments, and regional planning agencies for planning and implementation activities associated with affordable housing.[71] Critically, grant funds may not be used for construction, alteration, or repair work; instead, Section 207 targets the upstream planning constraints that impede commercial development pipelines, such as zoning analysis, land-use regulation review, and housing-strategy development.[72] This design addresses a recognized structural bottleneck: the thousands of permitting jurisdictions nationwide that lack the resources to independently analyze and reform their zoning and entitlement frameworks.[73]

For the real estate industry, Section 207 creates a federally funded modernization effort for local regulatory frameworks that could help accelerate entitlement timelines.[74] From a practical standpoint, the grant program presents both near-term opportunities and significant unresolved issues for practitioners.[75] Developers, commercial lenders, and investors operating in jurisdictions that secure planning grants should monitor community planning processes closely, as grant-funded zoning reforms may unlock density, reduce discretionary review requirements, and reshape project feasibility assessments, particularly if HUD ties eligibility for other new programs to completion of a Section 207 plan.[76]

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Since Section 1202 of the Act provides that the Act authorizes but does not appropriate funding, the politics surrounding HUD's budget may result in reallocation from existing programs rather than net-new investment.[77]

Section 208—Innovation Fund

Section 208 establishes a seven-year competitive grant program, administered by the Secretary of Housing and Urban Development, that directs awards ranging from $250,000 to $10 million to metropolitan cities, urban counties, local governments, and Indian tribes that have demonstrated objective, measurable increases in local housing supply.[78] The program authorizes appropriations of $200 million per year for fiscal years 2027 through 2031, although Section 1202 of the Act expressly provides that no additional funds are authorized, leaving actual funding contingent on the annual appropriations process.[79] Notably, Section 208 introduces the federal concept of "attainable housing," defined as housing serving households earning not more than 120 percent of AMI, provided that the majority of units are affordable to households at or below 60 percent of AMI. This targeting mechanism extends federal reach beyond traditional "affordable housing" thresholds into the workforce and missing-middle segments historically underserved by federal programs.[80]

For real estate practitioners, the provision creates a purposeful new incentive structure that may accelerate local regulatory reforms, including zoning liberalization, density increases, and streamlined entitlement processes, directly affecting the feasibility and risk profile of multifamily and mixed-use development projects in participating jurisdictions.[81] The "attainable housing" threshold at 120 percent of AMI broadens the universe of federally supported projects, potentially creating new financing pathways and investor interest in workforce housing developments that occupy a gap between market-rate and subsidized housing.[82] HUD has not yet issued a Notice of Funding Opportunity, implementing regulations, or guidance, though the statute requires establishment of the program within one year of enactment, and practitioners should closely monitor the forthcoming rulemaking for definitions of competitive criteria, reporting obligations, and eligible expenditures.[83] Key unsettled issues include whether Congress will appropriate sufficient funds to make the program relevant, how HUD will define and measure "housing supply growth" for eligibility purposes, whether the performance-based model will disadvantage communities facing structural barriers to production, and how the Innovation

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Fund will interact with Opportunity Zone designations under Section 201, which may compound development incentives in designated census tracts.[84]

Section 209—Accelerating Home Building Act

Section 209 authorizes HUD to award competitive grants to local governments, municipal membership organizations, and Indian tribes for the selection and implementation of pre-reviewed residential construction designs, known as "pattern books," for low-rise and mid-rise mixed-income housing of no more than 25 dwelling units.[85] Drawing on existing local practices in which pre-approved designs expedite permitting, the provision reflects a supply-side legislative strategy to reduce soft costs and development timelines by standardizing the design-approval process across jurisdictions.[86] Grants are limited to the design selection and pre-approval process itself and may not fund construction, alteration, or repair work, with a 10-percent set-aside for rural areas.[87] Notably, the Act does not authorize a specific dollar amount; appropriators must provide funding through annual appropriations, creating near-term uncertainty about the program's viability and scale.[88]

For developers and lenders, the potential reduction in permitting timelines and entitlement risk for qualifying projects is substantial, though the program's practical significance remains contingent on future appropriations and the promulgation of implementing regulations.[89] As one commentator has observed, "while this approval could open opportunities to develop affordable housing, it is limited only to the design selection itself, and leaves the funding necessary to implement a pre-selected housing program to others."[90]

Section 210—Revitalizing Empty Structures Into Desirable Environments (RESIDE) Act

Section 210 establishes a five-year competitive pilot grant program within the HOME Investment Partnerships Program, administered by HUD's Office of Community Planning and Development, authorizing awards of $1 million to $10 million to participating jurisdictions to acquire, remediate, and convert vacant commercial and industrial buildings (including warehouses, factories, malls, strip malls, and hotels) into "attainable housing" for households at or below 120 percent of AMI, with a majority of units affordable to households at or below 60 percent AMI.[91] Eligibility is narrow: a "vacant and abandoned building" must either have been cited for code violations with no corrective action for 90 or more days, or be subject to court-ordered receivership or nuisance

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abatement related to abandonment.[92] The House Financial Services Committee describes the provision as a targeted response to commercial vacancy and blight, repurposing underperforming commercial real estate assets to address chronic housing undersupply.[93]

For real estate stakeholders, income-targeting requirements materially affect underwriting assumptions, rent projections, and investor return models compared with market-rate adaptive reuse.[94] Priority for projects in economically distressed communities and qualified Opportunity Zones could layer grant capital with Opportunity Zone tax benefits, potentially enhancing after-tax returns on commercial-to-residential conversions.[95] As of September 2026, HUD has issued no implementing guidance, Notice of Funding Opportunity, or Section 210-specific rulemaking, and the program remains entirely dependent on appropriations because the statute authorizes no dedicated funding.[96] Practitioners therefore face several unknowns: whether and when Congress will appropriate funds; what waivers HUD will exercise; how the statutory vacancy definition will interact with divergent state and local standards; and whether the five-year sunset (effective September 30, 2031, with a post-termination congressional report due around March 2032) provides sufficient certainty for adaptive-reuse projects' typically long development timelines.[97]

Section 211—Housing Affordability Act

Section 211 restructures the FHA's multifamily mortgage insurance programs by approximately tripling or quadrupling the per-unit dollar limits under multiple sections of the National Housing Act governing rental housing, cooperatives, and condominiums.[98] The provision further replaces the Consumer Price Index for All Urban Consumers (CPI-U) with the Census Bureau's Price Deflator Index of Multifamily Residential Units Under Construction as the inflation benchmark for annual adjustments to those limits, thereby tying future escalation to actual construction costs rather than general consumer inflation, and mandates a study on the impact of the increased loan limits.[99]

For the real estate industry, the recalibration is substantial: illustratively, per-unit limits for non-elevator rental buildings increase from $38,025 to $167,310 for a studio and from $50,310 to $221,364 for a two-bedroom,[100] which the Mortgage Bankers Association characterizes as a "long-overdue update" that will "capture the true cost of apartment construction and immediately leverage private capital for new affordable homes," making FHA-insured financing

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feasible in high-cost markets and expanding the pipeline for multifamily development.[101]

Section 212—Rental Assistance Demonstration Program

Section 212 makes the Rental Assistance Demonstration (RAD) program permanent federal housing policy and raises the unit conversion cap from 455,000 to 555,000 units.[102] Originally a limited pilot program under the Consolidated and Further Continuing Appropriations Act of 2012, RAD lets public housing authorities convert public housing units to long-term Section 8 Project-Based Rental Assistance or Project-Based Voucher contracts, replacing unpredictable annual appropriations with stable, escalating revenue that can support private debt and equity investment.[103] The statute also codifies tenant protections, including a mandatory lease and management plan addendum for properties undergoing conversion.[104]

For the real estate industry, the higher cap expands the pipeline of RAD conversion-eligible properties, which may be recapitalized with conventional debt, FHA-insured loans, four percent or nine percent Low-Income Housing Tax Credit equity, HOME funds, CDBG, and tax-increment financing.[105] HUD currently administers the program under Notice PIH-2019-23 (Rev. 4), but practitioners should anticipate updated rulemaking implementing guidance addressing the expanded cap.[106]

Section 213—Build Now Act

Section 213 establishes a performance-based fiscal mechanism that adjusts CDBG entitlement allocations under Section 106 of the Housing and Community Development Act of 1974[107] according to each jurisdiction's "housing growth improvement rate" (HGIR), a metric comparing annualized housing-unit growth across two consecutive five-year windows.[108] Communities whose HGIR meets or exceeds the median among all CDBG recipients, or whose current growth rate reaches at least four percent ("extremely high-growth recipients"), receive bonus allocations funded by a ten-percent penalty levied on underperforming jurisdictions, with limited exemptions for low-cost communities, high-vacancy markets, disaster-affected areas, and jurisdictions lacking zoning authority.[109] In other words, cities that fail to build stand to lose federal funding, while cities that do develop will see a monetary benefit. The Senate Banking Committee's section-by-section analysis characterized the provision as a "pilot program to incentivize housing development of all types," to redirect

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federal community-development resources toward jurisdictions that demonstrably accelerate housing production.[110]

Not all local jurisdictions will be subject to these provisions. The Act only applies to certain metropolitan cities and urban counties[111] that receive funds under section 106 of the Housing and Community Development Act of 1974[112] and are considered to be high-cost markets.[113] There are also exceptions for jurisdictions that have high rental vacancies (like San Francisco), and that are the subject of a major disaster or emergency declaration (like Los Angeles following the fires in January 2025).[114]

Despite these exceptions, the Build Now Act's "carrot and stick" approach stands to create consequential downstream effects: penalized jurisdictions face diminished CDBG-funded infrastructure and community development support that historically underpins commercial project feasibility, while bonus recipients gain enhanced resources that may improve local development conditions and, critically, create financial pressure on local governments to relax zoning restrictions, shorten permitting timelines, and adopt density-friendly land-use policies, each of which directly benefits commercial development and repositioning activity.[115] Investors and lenders underwriting projects in CDBG entitlement communities must now account for a jurisdiction's HGIR trajectory as a material variable in due diligence, as a community's position relative to the median will affect the availability of federal community-development funding.[116]

Analysis: Title X—Home-Ownership for Main Street America

Another key title of the Act is Title X (Section 1001). It is significant in that it prohibits "large institutional investors" (LIIs) from "purchasing" single-family homes (i.e., structures with two or fewer dwelling units, excluding manufactured homes), effective January 7, 2027, and sunsetting January 7, 2042.[117] LIIs are defined as for-profit entities with direct or indirect investment control of 350 or more single-family homes, and "purchase" is defined expansively to include any acquisition, whether by transfer, merger, construction, foreclosure, or bulk purchase, regardless of whether cash consideration is exchanged.[118] Violations carry civil penalties of up to $1 million or three times the purchase price, whichever is greater, enforceable by the Secretary of the Treasury or the Attorney General.[119] Section 1001 preserves eleven categories of excepted purchases and grandfathers all pre-enactment holdings without a divestiture requirement, a

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notable concession from the earlier Senate version's controversial seven-year forced divestiture mandate. Excepted purchase categories include build-to-rent development programs, renovate-to-rent programs meeting a 15 percent improvement threshold, homeownership programs, debt satisfaction and foreclosure, purchases from other LIIs, and a two-year transition window for acquisitions from non-LIIs.[120]

For the real estate industry, Section 1001 reshapes the institutional single-family rental (SFR) and build-to-rent (BTR) investment landscape in several material respects. The BTR exception preserves development pipelines for SFR Real Estate Investment Trusts (REITs), and the provision permitting LIIs to purchase from other LIIs under Section 1001(a)(2)(H) encourages growth through consolidation, enabling larger SFR REITs to acquire smaller institutional portfolios via contribution or merger, potentially on a tax-deferred basis.[121] Because manufactured housing and multifamily properties fall outside the statute's scope, these asset classes may attract redirected institutional capital as alternative growth avenues.[122]

Commentators have observed that LIIs retain "substantial latitude to continue to expand their [single-family home] rental inventory" under the excepted purchase categories.[123] Rulemaking authority rests with the U.S. Treasury, in consultation with HUD and FHFA, but is expressly constrained: the statute bars regulations that would amend statutory definitions, narrow excepted purchases, expand the class of LIIs, or alter the 350-home threshold.[124] Even though the section is not effective until January 2027, its requirements will likely become operative before implementing regulations are finalized given the typically lengthy rulemaking timeline.[125] LIIs face immediate compliance obligations, including notification to HUD within 180 days of enactment and annual portfolio data reporting, neither of which is subject to the 15-year sunset.[126] Significant interpretive questions remain for practitioners, including the undefined temporal scope of "newly constructed" property, whether that status survives subsequent transfers, the application of the "in concert" language to joint venture structures for purposes of the 350-home threshold, and whether post-enactment restructuring of pre-existing holdings may jeopardize grandfathering protections.[127]

Conclusion

The 21st Century ROAD to Housing Act is the most significant piece of

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federal housing legislation enacted in decades.[128] Its scope is remarkable: from NEPA streamlining for HUD-assisted projects, to banking regulatory reform for community development lending, to the unprecedented prohibition on institutional acquisition of single-family homes, the Act touches virtually every segment of the housing market and every category of market participant. For real estate practitioners, the Act affects multiple practice areas: land use, securities, banking regulation, tax, and transactional real estate.

Yet the Act's supply-side aspirations are constrained by structural limitations that may ultimately determine whether the legislation produces material results. The no-new-appropriations provision of Section 1202 means that the Act's innovations must be implemented within existing budgetary resources. The express prohibition on federal preemption of local zoning authority and the Innovation Fund's inability to mandate or supersede local land use decisions means that the single greatest barrier to housing supply, restrictive local zoning, remains untouched by federal law. The environmental review streamlining provisions, while welcome, are limited to HUD-assisted projects and do not extend to the broader universe of privately-financed development that accounts for the vast majority of new housing construction.[129]

The near-term market impact of Title X will hinge on how SFR REITs and private equity funds restructure around the 350-home threshold—whether through portfolio dispositions, entity restructuring, or strategic reallocation toward excepted purchase categories. Over the longer term, the Act's legacy will be shaped by whether its supply-side provisions produce meaningful housing inventory. And the Act's durability will turn on whether the purchase prohibition can survive the constitutional challenges it is almost certain to face, or whether it will join the growing catalog of ambitious but ultimately unenforceable federal interventions in residential real estate markets.

In the final analysis, the act is a significant but incomplete step toward addressing the nation's housing affordability crisis. It represents the most ambitious assertion of federal authority over housing markets since the Fair Housing Act, but its ultimate impact will depend less on the text of the statute than on the quality of its implementation, the creativity of the market's response, and the willingness of future Congresses to provide the resources and regulatory authority that this Act, by design or by political necessity, withheld. Given the deeply local nature of land use regulation and zoning, it may ultimately fall to state and local governments, through their own legislative reforms, incentive

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programs, and regulatory flexibility, to translate federal ambitions into the tangible housing supply and affordability gains that the crisis demands.

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[15]U.S. Const., art. I, § 7, cl. 2 ("If any Bill shall not be returned by the Pres-

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ident within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law").

[16]Pub. L. No. 119-101, §§ 101-107.

[17]Pub. L. No. 119-101, § 103.

[18]This exemption does not affect the applicability of CEQA, which applies to discretionary projects approved or undertaken by California state or local agencies. In some cases, a project will be subject to both CEQA and NEPA, in which case environmental review could still be required for certain projects despite the NEPA exemption. Pub. Resources Code, §§ 21000-21189.3; see also Miller & Starr, California Real Estate (4th ed. 2026) §§ 26:1, 26:2.

[19]Pub. L. No. 119-101, § 107; see also Jones et al., *The 21st Century ROAD to Housing Act (P.L. 119-101)*, CRS Product R49354 (Sept. 17, 2026), available at https://www.congress.gov/crs-product/R49354 (last accessed Oct. 1, 2026).

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[22]Pub. L. No. 119-101, §§ 301-304.

[23]Pub. L. No. 119-101, § 304.

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[26]Pub. L. No. 119-101, §§ 501-505.

[27]Pub. L. No. 119-101, §§ 601-603.

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[29]Pub. L. No. 119-101, §§ 801-805.

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[119]Pub. L. No. 119-101, § 1001(a)(3); Burgess et al, *supra*, fn. 118; Sievers & Zief, *supra*, fn. 117.

[120]Pub. L. No. 119-101, § 1001(a)(2); Bajaj et al., *Zooming in on The 21st Century ROAD to Housing Act: Impact on Single-Family Rental REITs*, Mayer Brown LLP (July 24, 2026), available at https://www.mayerbrown.com/en/insights/publications/2026/07/zooming-in-on-the-21st-century-road-to-housing-act-impact-on-single-family-rental-reits (last accessed Oct. 1, 2026); Business et al., *supra*, fn. 118.

[121]Bajaj et al., *supra*, fn. 120.

[122]Bajaj et al., *supra*, fn. 120; CRS Report R49015, Institutional Investors and Single-Family Housing: In Brief (July 24, 2026), available at https://www.congress.gov/crs-product/R49015 (last accessed Oct. 1, 2026).

[123]Holland & Knight, *supra*, fn. 49.

[124]Pub. L. No. 119-101, § 1001(c); Latham & Watkins LLP, *supra*, fn. 117; Bajaj et al, *supra*, fn. 120.

[125]Burgess et al, *supra*, fn. 118.

[126]Pub. L. No. 119-101, § 1001(d)-(e); Latham & Watkins LLP, *supra*, fn. 117; Sievers & Zief, *supra*, fn. 117.

[127]Bajaj et al, *supra*, fn. 120; Burgess et al, *supra*, fn. 118.

[128]Haas et al, *Congress Passes 21st Century ROAD to Housing Act*, Holland & Knight Alert (Aug. 25, 2026), available at https://www.hklaw.com/en/insights/publications/2026/08/congress-passes-21st-century-road-to-housing-act (last accessed Oct. 1, 2026).

[129]Pub. L. No. 119-101, § 107.

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CASE BRIEFS:

ADJOINING LANDOWNERS

BECAUSE THERE IS NO STRICT LIABILITY FOR LOSS OF LATERAL SUPPORT UNDER THE COMMON LAW OR CIV. CODE, § 832 ABSENT EXCAVATION BY DEFENDANT, UPHILL NEIGHBORS' CLAIM AGAINST DOWNHILL NEIGHBORS ARISING FROM FAILED RETAINING WALL WAS PROPERLY DISMISSED WHERE THERE WAS NO EVIDENCE OF EXCAVATION.

Quinn v. Coulton, 121 Cal. App. 5th 1124, 346 Cal. Rptr. 3d 320 (1st Dist. 2026)

This case involves two sets of uphill and downhill neighbors: Elizabeth Quinn and Caroline Ayres, and Greg Gruszynski and Derrlyn Tom (the uphill neighbors); and Elysa Stein and Neil Straghalis, and Mary Coulton (the downhill neighbors). The two sets of properties were separated by a retaining wall that failed in 2022 during a 100-year rainstorm that caused 10 cubic feet of dirt and debris to slide from the uphill backyards into the downhill backyards. The San Francisco Department of Building Inspection (DBI) issued notices of violation for unsafe building conditions to the owners of all four properties and required them to rebuild the retaining wall. DBI abated the notices of violations several months later, then the uphill neighbors sued the downhill neighbors for nuisance, negligence, and "loss of lateral and subjacent support," seeking compensation for property damage, repair costs, loss of use and value, and emotional distress. The downhill neighbors cross-complained for nuisance, negligence, and trespass, as well as compensation for property damage, loss of use, and emotional distress.

In 2024, Coulton made two $5,000 offers of compromise pursuant to Civ. Proc. Code, § 998, one to Quinn and Ayres jointly, and one to Gruszynski and Tom jointly. Neither were accepted, and Coulton filed a motion for judgment on the pleadings seeking to have the cause of action for removal of lateral support dismissed. The uphill neighbors opposed, arguing that under common law they had an "absolute right" to lateral support, which they asserted was codified by Civ. Code, § 832. Coulton countered that § 832 only applied in the context of excavation of a neighboring property and therefore did not apply here, where no excavation had occurred or even been alleged. The court denied the motion, explaining that the uphill neighbors had, at a minimum, stated a cause of action for negligence, but

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noted that the exceptions in § 832 were not applicable because excavation was not an issue in the case. Stein and Straghalis settled, and Coulton, as the sole remaining defendant and cross-complainant, filed a motion in limine to exclude claims for strict liability, which she anticipated the uphill neighbors would argue § 832 authorizes, or for negligence per se based on § 832. The trial court agreed and stated it would not be giving that instruction to the jury.

Because the uphill neighbors had voluntarily dismissed, with prejudice, their nuisance and negligence claims against Coulton earlier the same day, the trial court entered judgment for Coulton, who then filed a memorandum of costs seeking over $32,000 in expert fees pursuant to Civ. Proc. Code, § 998. The uphill neighbors moved to tax costs on the basis that Coulton's § 998 offers to compromise were "invalid as a matter of law" because Coulton made two offers jointly to two sets of two people, meaning there was no way to ascertain an individual plaintiff's share. In response to Coulton's assertion that a common interest between the parties supported the § 998 offers, the uphill neighbors pointed out that Quinn and Ayres were legally separated when they received the § 998 offer, while Gruszynski and Tom were never married to each other. The trial court agreed with Coulton, finding the § 998 offers to be valid, and the uphill neighbors appealed both the judgment and the order on their motion to tax costs.

The two issues presented on appeal were whether the uphill neighbors had a valid strict liability lateral support claim, and whether Coulton's expert fees should have been taxed due to her joint § 998 offers. With respect to the first claim, the court of appeal rejected the uphill neighbors' assertion that, "under common law, the right to lateral support exists independently of excavation activities." Reviewing the origin of the common law right to lateral support as well as § 832, the court cited *Wharam v. Investment Underwriters*, 58 Cal. App. 2d 346, 349, 136 P.2d 363 (2d Dist. 1943), which recognized a landowner's absolute right to lateral support from other coterminous owners *who excavated* upon that landowner's property. "This liability for excavation irrespective of negligence is referred to as strict liability." Quoting *Holtz v. Superior Court*, 3 Cal. 3d 296, 301, fn. 3, 90 Cal. Rptr. 345, 475 P.2d 441 (1970). Although § 832 eliminated strict liability for excavation in certain circumstances, liability for property damage remained where a landowner negligently excavated.

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Such liability is not eliminated by the transfer of the excavated property to a third party. Citing *Platts v. Sacramento Northern Ry.*, 205 Cal. App. 3d 1025, 1030-1031, 253 Cal. Rptr. 269 (1st Dist. 1988). For this reason, a third party taking title and possession after such excavation is not liable for subsequent damages. Citing *Lee v. Takao Bldg. Development Co.*, 175 Cal. App. 3d 565, 569, 220 Cal. Rptr. 782 (2d Dist. 1985). Thus, the court here summarized the default common law rule as " 'the party who removes the [lateral] support is absolutely liable for damages caused by subsidence' and a subsequent owner will not be liable absent independent negligence." Quoting *Platts v. Sacramento Northern Ry.*, 205 Cal. App. 3d at 1030-1031.

Because the uphill neighbors here disavowed that their claim was based on negligence, and because Coulton conducted no excavation activity, the uphill neighbors' strict liability claim failed. The court disagreed with the uphill neighbors that *Sager v. O'Connell*, 67 Cal. App. 2d 27, 29-30, 153 P.2d 569 (1st Dist. 1944) held that "mere inaction [is] enough to find the defendant liable for failure to provide lateral support" because the neighbors in that case *did* act negligently by allowing lateral support to weaken. Thus, *Sager* actually undermined the strict liability argument. The court also rejected the uphill neighbors' attempt to characterize *Lee* as distinguishing between lateral support for a building versus land which the court here found not to have been a determinative factor in *Lee*.

Finally, the court disagreed with the uphill neighbors that "the right to lateral support can also be framed as negligence per se," pointing out that "California does not recognize an independent cause of action for negligence per se; rather, it is an evidentiary presumption used to establish one of the several elements necessary to prove negligence." Citing *Rosales v. City of Los Angeles*, 82 Cal. App. 4th 419, 430, 98 Cal. Rptr. 2d 144 (2d Dist. 2000). When the uphill neighbors voluntarily dismissed their negligence claim, they eliminated the basis for applying negligence per se. Further, the negligence per se claim was also premised on § 832 and therefore failed because there was no excavation in this case—"a prerequisite under both common law and Civil Code section 832."

The final section of the opinion addressed expert fees that the uphill neighbors contended should have been taxed because Coulton's two § 998 offers were made to multiple plaintiffs with individual claims. Such unallocated offers have been

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"uniformly recognize[d] as invalid . . . where the offer is conditioned on acceptance by all" (quoting *Gonzalez v. Lew*, 20 Cal. App. 5th 155, 161, 228 Cal. Rptr. 3d 775 (2d Dist. 2018)) because they can be confusing and make it difficult to determine the reasonableness of the offer or even deter settlement where an offer recipient is "at the mercy" of corecipients. The court found Coulton's offers implicated both of these concerns. There is an exception to the general rule that such offers are invalid where there is a " 'unity of interest' such that there is a single, indivisible injury." Quoting *Peterson v. John Crane, Inc.*, 154 Cal. App. 4th 498, 505, 65 Cal. Rptr. 3d 185 (1st Dist. 2007). While a unity of interest has been found between married plaintiffs, Coulton did not make that argument; instead, her assertion of unity of interest rested on the fact that the uphill neighbors filed the same operative pleading with the same causes of action and provided allegedly identical discovery responses. The court was not persuaded given that the uphill neighbors filed suit in their individual capacities and each sought unique emotional distress damages. Because the burden was on Coulton and she failed to meet it, the court of appeal directed the trial court to enter an order striking her expert witness costs but otherwise affirmed.

>> *See Miller & Starr, California Real Estate 4th, Ch. 17, Adjoining Landowners, §§ 17:19, 17:20, 17:23, 17:25, 17:26; Ch. 40, Remedies, §§ 40:36, 40:78, 40:79.*

AGENCY

SELLER'S PROVISION OF A STATUTORY TRANSFER DISCLOSURE STATEMENT AND ENVIRONMENTAL DISCLOSURES WAS NOT A CONDITION PRECEDENT TO BUYER'S PERFORMANCE WHERE PURCHASE AGREEMENT CONTAINED NO EXPRESS CONDITIONAL LANGUAGE, AND SELLER'S REFUSAL TO ALLOW A PHASE II ASSESSMENT DID NOT EXCUSE OR INDEFINITELY SUSPEND BUYER'S PERFORMANCE GIVEN EXPRESS DISCLAIMER OF CONTINGENCY.

Nasey v. Fell Holdings LLC, 122 Cal. App. 5th 509, 347 Cal. Rptr. 3d 341 (1st Dist. 2026), review filed, (Sept. 18, 2026)

For a summary of this case see SPECIFIC CONTRACTS

>> *See Miller & Starr, California Real Estate 4th, Ch. 1, Contracts, § 1:104; Ch. 2, Specific Contracts, §§ 2:23, 2:26, 2:27, 2:28; Ch. 3, Agency, §§ 3:60, 3:62; Ch. 39, Hazardous Substances, §§ 39:4, 39:5, 39:6, 39:18.*

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REAL ESTATE BROKER AND AGENT ACTING AS DUAL AGENTS IN FAILED TRANSACTION DID NOT BREACH THEIR FIDUCIARY DUTIES WHERE BUYER WAS AN EXPERIENCED INVESTOR WITH A "TEAM" OF ADVISORS, BROKER DISCLOSED THE DUAL AGENCY IN ALL AGREEMENTS, WHICH BUYER SIGNED, AND THERE WAS NO EVIDENCE DISCLOSURE OF SPECIFIC PREVIOUS DEALS WOULD HAVE MATERIALLY AFFECTED BUYER'S AGREEMENT.

Urban Sunrise LLC v. Vogt, 122 Cal. App. 5th 1261, 348 Cal. Rptr. 3d 254 (3d Dist. 2026)

Susan Kerr, who was managing member of Urban Sunrise, LLC, met with real estate agent Ryan Smith about purchasing property in South Lake Tahoe in December 2020. Kerr represented that she had previously invested in commercial properties and had a "team," including a mortgage broker, insurance broker, accountant, and attorney, assisting her. Smith told Kerr that his colleague, real estate broker David Vogt (doing business as Tahoe Investment Properties), had a client that might be willing to sell property off market. In January 2021, Urban Sunrise entered into two exclusive buyer representation agreements with Vogt and Smith, both of which disclosed that Vogt might need to act as a dual agent and also provided that "Buyer agrees to seek legal, tax, insurance, title or other desired assistance from appropriate professionals."

Urban Sunrise then entered into five purchase agreements and other documents for the purchase of five South Lake Tahoe properties from Charles G. (Charles) in April 2021 as part of a 1031 exchange. All but one of the properties were not listed for sale with any real estate company. Each purchase agreement identified Tahoe Investment Properties as representing both buyer and seller and therefore a dual agent and identified Vogt and Smith as dual agents, and Kerr signed five agency disclosures to that effect. The purchase agreements also reiterated that buyer and seller agreed to seek legal, tax, insurance, title, and other assistance from appropriate professionals. Urban Sunrise also was aware that it needed fire insurance in order to finance the properties, and Charles disclosed that the price for insurance was higher than the year before because of recent fires.

Urban Sunrise removed all contingencies except loan and appraisal but then needed an extension for lender commitment letters. Vogt communicated to Smith that Charles was willing to grant the extension but required a nonrefundable release of the earnest money deposit ($184,000),

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plus the nonrefundable deposit of another $1 million due to another transaction with a firm close date that would otherwise require him to sell or refinance assets. Vogt also provided a letter to Kerr, which Smith forwarded the same day, that explained all of this in detail for the stated purpose of helping Kerr "understand what [Vogt's] experience is with Charles, the seller, and why he has been so persistent with timelines." Vogt stated that "he had represented Charles 'in perhaps 12 deals over the past 3-4 years,' . . . [and] '[e]very transaction I have had with Charles has been easy. . . . In short, he does things right, and he's the type of client I LOVE.' " In closing, Vogt wrote, "I hope this helps you understand better what is happening outside your escrows, and what is driving his need for clarity, and timelines." Approximately an hour after Vogt sent this email, Kerr signed the addenda. One week later, Urban Sunrise authorized the release of $1 million from escrow to the sellers, but they were ultimately unable to close on the properties due to difficulty obtaining fire insurance.

Urban Sunrise and Kerr (collectively, Plaintiffs) sued Vogt and Smith (collectively, Defendants) for breach of fiduciary duties by: failing to disclose Vogt's prior relationship with Charles; encouraging Plaintiffs to execute the third addenda; acting as an attorney in preparing the third addenda while representing both sides; engaging in unauthorized practice of law drafting the third addenda; failing to investigate material facts relating to fire insurance cost and availability; and providing historical information for the properties without disclosing that costs would likely change. Vogt cross-complained for breach of contract, breach of the covenant of good faith and fair dealing, and quantum meruit. The trial court granted Defendants' motion for summary judgment, finding no triable issues of material fact that they breached their fiduciary duties. The court then ordered Urban Sunrise to pay Vogt $492,800 in commission plus interest, attorney's fees, and costs.

On Plaintiffs' appeal, the court recited the elements of breach of fiduciary duty: "the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach." Quoting *Knox v. Dean*, 205 Cal. App. 4th 417, 432, 140 Cal. Rptr. 3d 569 (4th Dist. 2012). Real estate brokers and agents are subject to both statutory and common law duties. The latter includes a duty to learn and disclose the material facts affecting the principal's decision. Citing *Field v. Century 21 Klowden-Forness Realty*, 63 Cal. App. 4th 18,

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25-26, 73 Cal. Rptr. 2d 784 (4th Dist. 1998). However, a broker's duty may be limited by contract, so the extent of a broker's duties must be determined in light of the agreement between the parties. Here, Plaintiffs alleged Vogt failed to disclose an extensive prior relationship with Charles. The court acknowledged that real estate brokers and agents have a duty not to engage in dual representation without full disclosure to both principals, but it also noted the disclosure form set forth in Civ. Code, § 2079.16, which states that "the duties of a dual agent do not relieve the buyer or the seller from 'the responsibility to protect their own interests.' " The broker and agent must also share nonconfidential information relating to the dual agency, including prior relations between the agent and the other party.

Despite Appellants' claims, the court found Kerr to be an experienced real estate investor with a team of advisors, and that she both knew of, and benefited from, Vogt's relationship with Charles in that it allowed Kerr access to properties that had not yet been listed for sale. The term "client," which Vogt used to describe Charles, indicated an existing business relationship, and Plaintiffs signed five separate purchase agreements disclosing the dual agency. On these facts, the court found that Defendants met their initial burden of demonstrating that the breach of fiduciary duty allegation lacked merit. This shifted the burden to Plaintiffs to show that the disclosure of the dozen or so transactions between Vogt and Charles would have been material to their decision regarding dual agency. The court found Plaintiffs did not meet that burden since they asserted the information would be material to a reasonably prudent buyer, which is not the proper standard for disclosure of dual agency. Citing *Anderson v. Thacher*, 76 Cal. App. 2d 50, 68, 172 P.2d 533 (2d Dist. 1946) (agent must make a full disclosure of all material facts surrounding the transaction that might affect the decision of *the principals*). Further, Kerr did not try to speak to Vogt before almost immediately signing the third addenda. Finding no triable issue of fact that disclosure of a specific transaction between Vogt and Charles would have been material to Plaintiffs, the court found summary judgment to be appropriate.

Next, the court assessed whether Defendants had a duty to disclose additional insurance information, as Plaintiffs argued based on statements by their consultant. The court found that Plaintiffs knew Urban Sunrise would need fire insurance to finance

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the properties, and that Kerr had held herself out as experienced in these types of transactions. Further, sellers quickly disclosed that insurance for the properties would be much higher than the previous year due to the recent fire season, and Plaintiffs received disclosures that the property was in a very high fire hazard severity zone. Again, the court found no triable dispute that Plaintiffs were advised about potential insurance issues, particularly where the purchase agreements stated that Plaintiffs would seek insurance assistance from appropriate professionals.

Next, the court addressed the claim that Vogt acted as an attorney in drafting the third agenda, which Plaintiffs alleged constituted an unwaivable conflict of interest. Based on the facts recited by the court, it found that Charles, not Vogt, had prepared the specific language for the extension, and it found no other instances in the record that Vogt provided legal services to Plaintiffs. The court also rejected that merely by being both a real estate broker and an attorney, Vogt had an attorney-client relationship with Plaintiffs. Lastly, the court found the evidence did not support that Vogt recommended or encouraged Plaintiffs to sign the third addenda. Rather, his email to Kerr simply explained Charles's motivations with respect to the terms relating to the requested extension. Accordingly, the court affirmed the judgment.

>> *See Miller & Starr, California Real Estate 4th, Ch. 1, Contracts, §§ 1:62, 1:66; Ch. 3, Agency, §§ 3:6, 3:23, 3:24, 3:26, 3:27, 3:28, 3:29, 3:40, 3:58; Ch. 4, Broker Regulation, § 4:26; Ch. 5, Broker Compensation, § 5:55.*

BROKER COMPENSATION

REAL ESTATE BROKER AND AGENT ACTING AS DUAL AGENTS IN FAILED TRANSACTION DID NOT BREACH THEIR FIDUCIARY DUTIES WHERE BUYER WAS AN EXPERIENCED INVESTOR WITH A "TEAM" OF ADVISORS, BROKER DISCLOSED THE DUAL AGENCY IN ALL AGREEMENTS, WHICH BUYER SIGNED, AND THERE WAS NO EVIDENCE DISCLOSURE OF SPECIFIC PREVIOUS DEALS WOULD HAVE MATERIALLY AFFECTED BUYER'S AGREEMENT.

Urban Sunrise LLC v. Vogt, 122 Cal. App. 5th 1261, 348 Cal. Rptr. 3d 254 (3d Dist. 2026)

For a summary of this case see AGENCY

>> *See Miller & Starr, California Real Estate 4th, Ch. 1, Contracts, §§ 1:62, 1:66; Ch. 3, Agency, §§ 3:6,*

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3:23, 3:24, 3:26, 3:27, 3:28, 3:29, 3:40, 3:58; Ch. 4, Broker Regulation, § 4:26; Ch. 5, Broker Compensation, § 5:55.

BROKER REGULATION

REAL ESTATE BROKER AND AGENT ACTING AS DUAL AGENTS IN FAILED TRANSACTION DID NOT BREACH THEIR FIDUCIARY DUTIES WHERE BUYER WAS AN EXPERIENCED INVESTOR WITH A "TEAM" OF ADVISORS, BROKER DISCLOSED THE DUAL AGENCY IN ALL AGREEMENTS, WHICH BUYER SIGNED, AND THERE WAS NO EVIDENCE DISCLOSURE OF SPECIFIC PREVIOUS DEALS WOULD HAVE MATERIALLY AFFECTED BUYER'S AGREEMENT.

Urban Sunrise LLC v. Vogt, 122 Cal. App. 5th 1261, 348 Cal. Rptr. 3d 254 (3d Dist. 2026)

For a summary of this case see AGENCY

>> *See Miller & Starr, California Real Estate 4th, Ch. 1, Contracts, §§ 1:62, 1:66; Ch. 3, Agency, §§ 3:6, 3:23, 3:24, 3:26, 3:27, 3:28, 3:29, 3:40, 3:58; Ch. 4, Broker Regulation, § 4:26; Ch. 5, Broker Compensation, § 5:55.*

CEQA

ENVIRONMENTAL IMPACT REPORT FOR GEOTHERMAL POWER PLANT VIOLATED CEQA WHERE IT CONTAINED CONFLICTING INFORMATION ABOUT PROJECT'S INTENDED LIFESPAN, SPECULATED ABOUT SOURCES OF WATER NECESSARY FOR PROJECT, FAILED TO MEANINGFULLY DISCUSS MITIGATION MEASURES, AND FAILED TO ADDRESS HOW THE PROJECT'S IMPACT ON WATER FLOW WOULD AFFECT AIR QUALITY.

Comite Civico del Valle v. County of Imperial, 122 Cal. App. 5th 1171, 348 Cal. Rptr. 3d 432 (4th Dist. 2026)

This case relates to Imperial County's approval of a geothermal power plant, a lithium extraction facility, and related facilities near the Salton Sea. The project was proposed by several developers collectively referred to as "CTR," and sought to "use wells to bring up hot geothermal brine lying beneath the Salton Sea," the steam from which would be used to generate geothermal energy at CTR's HKP1 power plant, which in turn would extract lithium and other products and compounds from the brine to sell. The geothermal brine would then be injected back into the geothermal reservoir. Critically, the project would require approximately

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6,500 acre-feet per year (AFY) of raw water, supplied by the Imperial Irrigation District (IID), in order to operate. The County released a draft EIR as well as a draft water supply assessment (WSA) dated June 2023 and September 2023, and took public comments until November 30, 2023. The California State Lands Commission and IID raised numerous issues. The County revised the WSA, issued a revised DEIR and final EIR, and approved the project after a December 2023 public hearing.

Comite Civico del Valle (Comite Civico) appealed to the County Board of Supervisors, which denied the appeal. Comite Civico and Earthworks (collectively Appellants) then filed a petition for writ of mandate challenging approval of the project and certification of the EIR. The trial court denied the petition and an appeal followed. Reviewing CEQA, the court of appeal noted the legislative intent that it be interpreted to provide the greatest possible protection to the environment (CEQA Guidelines, § 15003, subd. (f)), and that an EIR is required if a project "may have a significant effect on the environment." Quoting *California Building Industry Assn. v. Bay Area Air Quality Management Dist.*, 62 Cal. 4th 369, 382, 196 Cal. Rptr. 3d 94, 362 P.3d 792 (2015).

Appellants challenged the EIR's representation that the project would have an adequate water supply. Most significantly, the EIR included conflicting information as to whether the project's intended lifespan was 30 or 50 years. Although Appellants did not exhaust this argument, the court found that IID did, and it agreed that the project's lifespan was described inconsistently throughout the EIR. "Given the pervasive references to a 30-year Project lifespan in the FEIR [citation], we cannot agree with Respondents that the 30-year references were mere 'scrivener errors.' "

Accepting CTR's contention that the intended lifespan was, in fact, 50 years, the court examined whether the evidence was sufficient to support the County's conclusion that IID could provide adequate water for that time period. Appellants pointed to Colorado River water allocation laws, persistent drought conditions, and the Interim Water Supply Policy (IWSP) as factors militating against sufficient supply for a 50-year project lifespan. The water available to IID from the Colorado River for non-agricultural projects was 18,620 AFY as of November 2023, but the court emphasized that it was a hypothetical supply rather than one waiting to be tapped. In fact, IID rejected the claim in the DEIR that the proj-

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ect's anticipated need of 299,960 total AF could be met by conservation and other methods undertaken by IID. Further, IID explained that "[t]he water supply assessment can't extend beyond 30 years (through 2053) because the Water Supply Assessment template created by IID and Imperial County does not extend beyond 2055. Therefore, there is no 50-year water supply assessment that can be applied to this project." IID characterized the DEIR's water supply statements as "all inaccurate," and stated that CTR would need to conserve or generate the 6,500 AFY the project required. However, the court found no evidence of any conservation plan or project. Rather, the final EIR merely speculated that future conservation measures and conversion of some agricultural to non-agricultural land uses would ensure that IID could provide the necessary water.

Because the project was an industrial water use project (Wat. Code, § 10912, subd. (a)(5)), the EIR was required to analyze necessary water supply and infrastructure. In addition, CEQA requires not only information on how water will be supplied to a project, but what the impacts of supplying that water will be. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 434, 53 Cal. Rptr. 3d 821, 150 P.3d 709 (2007). Future water sources must also be identified and cannot be speculative or unrealistic, though they need to not be "guaranteed." *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer*, 144 Cal. App. 4th 890, 908-909, 50 Cal. Rptr. 3d 799 (3d Dist. 2006). Addressing these requirements, the court immediately took issue with the conflicting lifespan descriptions in the EIR. It found no credible evidence to support that IID could provide a 50-year water supply. Moreover, CTR did not analyze other likely water sources that could meet the needs of the remaining project term. Although they discussed mitigation measures, they did not assert that those measures were intended to address any shortfall in reaching the 50-year lifespan. Thus, the court found that "the final WSA 'leaves too great a degree of uncertainty regarding the long-term availability of water for this project,' " (quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th at 439), and that the EIR's claim that the project had a sufficient source of water for 50 years was not supported by substantial evidence and therefore did not satisfy CEQA. This constituted a prejudicial abuse of discretion because the lack of information

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precluded informed decisionmaking and public participation.

In addition to insufficient evidence of future water availability, the court also found the EIR failed to address threats to short-term water availability. For example, in its water supply mitigation measure (UTIL-1), the EIR stated that if IID did not receive its usual Colorado River apportionment, the applicant would "work with IID to ensure any reduction in water availability can be managed by the Project." Both IID and the court found this to be unacceptable since a federal reduction of the water allotted to IID would proportionally reduce the amount for the project. Appellants argued that UTIL-1 violated CEQA by: issuing a revised version after the FEIR; only listing what the project "may" do if water cutbacks occur; failing to analyze the potential consequences of groundwater pumping as a mitigation measure; proposing proportionate cutbacks in production while maintaining that reducing the size of the project is infeasible; and not analyzing impacts to the Salton Sea of using recycled drain water as a mitigation measure. The court disagreed with CTR that the impacts were too speculative for meaningful review, noting that "the possibility of a government mandated water supply reduction is entirely foreseeable" and precisely why mitigation measures were proposed. Further, any use of groundwater or drain water could cause significant environmental impacts, which the EIR did not discuss at all.

The court also faulted the EIR for not including evidence that the mitigation measures were "feasible." Guidelines, § 15126.4, subd. (a)(1). While some specific mitigation details can be deferred where it is initially infeasible or impractical to include them, this is only appropriate where "the agency '(1) commits itself to the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3) identifies the type(s) of potential action(s) that can feasibly achieve that performance standard and that will be considered, analyzed, and potentially incorporated in the mitigation measure.' " Even assuming the first two prongs, the court did not find substantial evidence that the mitigation measures were feasible based on EIR descriptions of the availability of groundwater and drain water. Similarly, the EIR contained no discussion of the mitigation measures relating to reducing production and did not explain conflicting statements about there being no feasible way to scale the project down. Accordingly, the court found the EIR failed in its discussion of mitigation

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measures for a future water supply shortage.

Turning to air impacts analysis, the parties agreed that reduction of inflows to the Salton Sea, which exposes the playa causing it to release airborne chemicals, is the main source of air pollution in the area. Yet, according to Appellants, the EIR contained no discussion of the impacts of reducing water flow into the Salton Sea. CTR asserted that the project would obtain its 6,500 AFY from IID and that therefore production and water flow-related poor air quality impacts were hypothetical and speculative. The court noted that while deference is required if a factual conclusion is supported by substantial evidence, no such evidence supported that the impacts here were hypothetical or speculative, particularly where CTR had not responded to IID's comment that the project would result in adverse air impacts. See Pub. Resources Code, § 21091, subd. (d)(1); Guidelines, § 15088. It also observed that if IID water was diverted to non-agricultural uses, drainage into the Salton Sea would necessarily be reduced because the project recycled water instead of releasing it. The court found CTR's responses to consist of "[c]onclusory statements unsupported by factual information," and that the impacts had not been addressed in a 2009 negative declaration as CTR asserted. Because the court found that the EIR did not adequately respond to comments, it did not constitute a good faith effort at full disclosure.

In unpublished portions of the decision, the court of appeal concluded the EIR's analysis of cumulative water supply impacts and that the County's tribal consultations were adequate. But because the EIR's discussions of water supply and air quality were not, the court reversed the order in part and directed the trial court to grant part of the petition for writ of mandate consistent with this opinion.

>> *See Miller & Starr, California Real Estate 4th, Ch. 26, CEQA, §§ 26:4, 26:14, 26:15, 26:18, 26:22.*

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COMMON INTEREST DEVELOPMENTS

ORDINANCE BANNING SHORT-TERM RENTALS BUT ALLOWING COMMON INTEREST DEVELOPMENTS TO OPT OUT OF RESTRICTION WAS NOT PREEMPTED BY THE DAVIS-STERLING ACT WHERE OPT-OUT PROVISION DID NOT REQUIRE AMENDMENT OF GOVERNING DOCUMENTS, AND THE CITY DID NOT ACT ARBITRARILY OR CAPRICIOUSLY WHERE ORDINANCE WAS RATIONALLY RELATED TO ADDRESSING CONCERNS REGARDING NUISANCES.

Parsons v. City of Indian Wells, 122 Cal. App. 5th 1077, 348 Cal. Rptr. 3d 129 (4th Dist. 2026), as modified, (Sept. 3, 2026) and as modified on denial of reh'g, (Sept. 22, 2026) and review filed, (Oct. 7, 2026)

In 2014, after decades of trying to regulate short-term rentals (STRs) due to noise and other nuisances, the City of Indian Wells issued a temporary moratorium on all STRs. This was followed by Ordinance No. 689 in 2015, which grandfathered in certain existing STRs. When this proved ineffective due to owners subverting the ordinance, the City declared the operation of STRs to be a public nuisance and adopted Ordinance No. 710 to phase them out, with the goal of all rentals eventually having a 29-night minimum. However, the City then implemented a carve-out for homes inside common interest developments (CID) where a majority of members voted to opt out of the 29-night minimum stay requirement. This, too, became problematic because small groups of homeowners in CIDs where the majority did not want to opt out began creating their own CIDs within the larger CID in order to take advantage of the opt-out provision. Ordinance Nos. 725 and 733 addressed that by requiring a minimum of four separate but contiguous separate interests for a CID to be entitled to opt out and requiring larger CIDs to vote to approve such operations if located within their boundaries.

Matthew and Rebecca Parsons own residential property within the Eldorado Barranca Property Owner's Association (Barranca POA), a CID in the City, and they allegedly invested $1.5 million in their property in order to operate it as an STR. In 2015, their property was grandfathered under Ordinance No. 689, and they voiced concerns about further restrictions on STRs. The Parsons sued the governing board of Barranca POA in 2018 for allegedly refusing to support their right to operate an STR. Although the governing documents contained no minimum stay requirement, the board had not yet certified a successful opt-

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out vote. While their lawsuit was pending, the Parsons and two other noncontiguous Barranca POA property owners formed the Fairway Tennis Maintenance Association and then certified a successful opt-out vote to allow STRs. When the City denied the permit, the Parsons filed a petition for writ of mandate alleging that the City had a ministerial duty to issue the permit. In their fourth amended petition, the Parsons alleged that the CID opt-out procedure constituted an unconstitutional delegation of authority to private parties, and that it was preempted by the Stirling-Davis Act. Gov. Code, § 4740. In their trial brief, the Parsons added that the ordinance's voting procedure conflicted with Gov. Code, §§ 4270 and 4275, which require a majority vote of all eligible owners, not just voting members, to amend a CID's declaration. Finally, they alleged that the City harassed and targeted them and acted in an arbitrary and capricious manner in enacting Ordinance No. 732.

In response, the City argued that there was no preemption because the ordinance did not require a CID to amend its governing documents, and that there was no unconstitutional delegation of authority because the City established a clear legislative policy regarding the operation of STRs, with the ordinance establishing procedural guidelines and safeguards. The trial court found that because the opt-out procedure in Ordinance No. 732 did not require a quorum of CID members, it conflicted with Gov. Code, §§ 4270 and 4275. It also found that the ordinance would restrict homeowners from operating STRs even if they previously had that right and was therefore preempted by the Act. Citing *Brown v. Montage at Mission Hills, Inc.*, 68 Cal. App. 5th 124, 283 Cal. Rptr. 3d 215 (4th Dist. 2021). The court therefore ruled that the City had a ministerial duty to issue a permit to the Parsons. However, it found that the Parsons had not established that the City acted arbitrarily and capriciously, and it found no evidence the ordinance had been enacted to harass, intimidate, or otherwise deprive the Parsons of the right to rent their property. The City appealed.

After questioning the Parsons' contention that the City forfeited arguments based on the "home rule" doctrine, the court of appeal exercised its discretion to address the City's arguments based on the doctrine. Thus, it examined the application of preemption principles to charter cities such as Indian Wells. Under the California Constitution, a city's charter supersedes all inconsistent laws relating to municipal

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affairs. *Anderson v. City of San Jose*, 42 Cal. App. 5th 683, 698, 255 Cal. Rptr. 3d 654 (6th Dist. 2019). However, state laws prevail over local enactments even in a charter city and even with respect to municipal affairs if the subject matter is of statewide concern. *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*, 36 Cal. 3d 591, 600, 205 Cal. Rptr. 794, 685 P.2d 1145 (1984). When state and local laws conflict, courts use "a four-factor test to determine whether the home rule doctrine permits or bars state law preemption": 1) can the regulated activity be characterized as a municipal affair?; 2) is there an actual conflict between state and local law?; 3) does the state law address a matter of "statewide concern"?; and 4) is the state law " 'reasonably related to . . . resolution' of that concern [citation] and 'narrowly tailored' to avoid unnecessary interference in local governance"? If so, the local measure is preempted. *People ex rel. Bonta v. City of Huntington Beach*, 115 Cal. App. 5th 962, 968, 338 Cal. Rptr. 3d 644 (4th Dist. 2025).

The court of appeal had "no difficulty concluding a local ordinance addressing STR's regulates a 'municipal affair.' " While there is no specific definition of "municipal affair," local zoning and land use regulations have long been considered municipal affairs. Citing *New Commune DTLA LLC v. City of Redondo Beach*, 115 Cal. App. 5th 111, 126, 337 Cal. Rptr. 3d 782 (2d Dist. 2025), review filed, (Nov. 20, 2025). And courts presume such a regulation is not preempted by state statute absent a clear indication of such intent by the Legislature. Citing *City of Riverside v. Inland Empire Patients Health & Wellness Center, Inc.*, 56 Cal. 4th 729, 742-743, 156 Cal. Rptr. 3d 409, 300 P.3d 494 (2013).

Thus, the court next addressed whether there was an actual conflict between the ordinance and the Act. The Parsons argued that the local ordinance required what the Act prohibited. The Act governs creation and operation of CIDs, which are created by a declaration that can only be amended by a vote of a percentage of members of the CID. As relevant here, Gov. Code, § 4740, subd. (a) provides, "An owner of a separate interest in a common interest development shall not be subject to *a provision in a governing document or an amendment to a governing document* that prohibits the rental or leasing of any of the separate interests in that common interest development to a renter, lessee, or tenant unless that governing document, or amendment thereto, was effective prior to the date the owner acquired title to their separate interest." (Italics by the

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court). However, as the court pointed out, this provision only applies to prohibitions on such rentals by the CIDs themselves, and "simply does not address whether a city may ban, restrict, or otherwise regulate STR's by ordinance, or whether a CID may vote to opt out of such a restriction on the operation of STR's in a manner that does not amend the governing documents."

The legislative history also contained no indication of an intent "to insulate CID's from generally applicable zoning restrictions on STR's, or to prohibit a CID's members from opting out of those restrictions." The court distinguished *Brown*, which had been relied upon by the trial court, on the basis that the CID in that case amended its governing documents to prohibit STRs, which *did* conflict with Gov. Code, § 4740. It further observed that *Brown* did not address the applicability of Gov. Code, § 4740 to municipally imposed restrictions not contained in a CID's governing documents. Thus, it was not authority for the trial court's decision, and the court of appeal here found no conflict between the ordinance and Gov. Code, § 4740 because the ordinance merely allowed members of a CID to opt out of the STR prohibition. Accordingly, the court did not need to address whether Gov. Code, § 4740 addresses a matter of statewide importance and whether the ordinance was narrowly tailored.

Next, the court addressed whether delegating authority under the opt-out provision violated the Parsons' due process rights. Both state and federal law govern the delegation of regulatory powers from local governments to private parties, and it is unconstitutional when an administrative agency is granted "unrestricted authority to make fundamental policy decisions." However, it is generally permissible to "delegate to private parties the decision whether to consent or withhold consent to the law based on local needs." Citing *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S. Ct. 403, 58 L. Ed. 2d 361 (1978). This is the type of delegation the court found here: "The opt-out provision merely delegates to CID members the authority to decide whether 'to waive the protection' of the 29-day minimum state requirement for rentals." This gave CID members the ability to decide for themselves whether the minimum stay requirement made sense for their community. The court emphasized that a successful opt-out vote was not irrevocably binding because a future vote could always repeal the opt-out. It therefore found no violation of due process.

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Finally, the court found the City did not act in an arbitrary or capricious manner, disagreeing with the Parsons that there was a "complete absence of any evidence" to support the ordinance. As a quasi-legislative act, the court found the ordinance to have a "reasonable or rational basis," and it would not substitute its own judgment. The court reiterated that the CID's governing documents were not amended by the ordinance, and the ordinance was supported by the City's finding that STRs were a nuisance. As to the requirement that a new CID contain four or more continuous parcels to qualify for the opt-out provision, the court found it to be reasonable in order to fairly reflect those who would be impacted by a proposed STR and prevent a "bare minimum" CID from circumventing the will of the larger CID and the intent behind the ordinance. The court also found no evidence that this requirement was designed "solely to prevent the Parsons from obtaining an STR permit." Accordingly, the judgment was reversed.

>> *See Miller & Starr, California Real Estate 4th, Ch. 16, Covenants, § 16:42; Ch. 19, Landowners' Liability, §§ 19:7, 19:29; Ch. 21, Land Use, §§ 21:2, 21:41; Ch. 28, Common Interest Developments, §§ 28:72, 28:101, 28:109.*

CONTRACTS

SELLER'S PROVISION OF A STATUTORY TRANSFER DISCLOSURE STATEMENT AND ENVIRONMENTAL DISCLOSURES WAS NOT A CONDITION PRECEDENT TO BUYER'S PERFORMANCE WHERE PURCHASE AGREEMENT CONTAINED NO EXPRESS CONDITIONAL LANGUAGE, AND SELLER'S REFUSAL TO ALLOW A PHASE II ASSESSMENT DID NOT EXCUSE OR INDEFINITELY SUSPEND BUYER'S PERFORMANCE GIVEN EXPRESS DISCLAIMER OF CONTINGENCY.

Nasey v. Fell Holdings LLC, 122 Cal. App. 5th 509, 347 Cal. Rptr. 3d 341 (1st Dist. 2026), review filed, (Sept. 18, 2026)

For a summary of this case see SPECIFIC CONTRACTS

>> *See Miller & Starr, California Real Estate 4th, Ch. 1, Contracts, § 1:104; Ch. 2, Specific Contracts, §§ 2:23, 2:26, 2:27, 2:28; Ch. 3, Agency, §§ 3:60, 3:62; Ch. 39, Hazardous Substances, §§ 39:4, 39:5, 39:6, 39:18.*

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REAL ESTATE BROKER AND AGENT ACTING AS DUAL AGENTS IN FAILED TRANSACTION DID NOT BREACH THEIR FIDUCIARY DUTIES WHERE BUYER WAS AN EXPERIENCED INVESTOR WITH A "TEAM" OF ADVISORS, BROKER DISCLOSED THE DUAL AGENCY IN ALL AGREEMENTS, WHICH BUYER SIGNED, AND THERE WAS NO EVIDENCE DISCLOSURE OF SPECIFIC PREVIOUS DEALS WOULD HAVE MATERIALLY AFFECTED BUYER'S AGREEMENT.

Urban Sunrise LLC v. Vogt, 122 Cal. App. 5th 1261, 348 Cal. Rptr. 3d 254 (3d Dist. 2026)

For a summary of this case see AGENCY

>> *See Miller & Starr, California Real Estate 4th, Ch. 1, Contracts, §§ 1:62, 1:66; Ch. 3, Agency, §§ 3:6, 3:23, 3:24, 3:26, 3:27, 3:28, 3:29, 3:40, 3:58; Ch. 4, Broker Regulation, § 4:26; Ch. 5, Broker Compensation, § 5:55.*

COVENANTS

ORDINANCE BANNING SHORT-TERM RENTALS BUT ALLOWING COMMON INTEREST DEVELOPMENTS TO OPT OUT OF RESTRICTION WAS NOT PREEMPTED BY THE DAVIS-STERLING ACT WHERE OPT-OUT PROVISION DID NOT REQUIRE AMENDMENT OF GOVERNING DOCUMENTS, AND THE CITY DID NOT ACT ARBITRARILY OR CAPRICIOUSLY WHERE ORDINANCE WAS RATIONALLY RELATED TO ADDRESSING CONCERNS REGARDING NUISANCES.

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EMINENT DOMAIN

WHEN CONSIDERING PRIVATELY OWNED PUBLIC UTILITY'S OBJECTION TO TOWN'S RIGHT TO TAKE IN EMINENT DOMAIN PROCEEDING, TRIAL COURT MUST DETERMINE WHETHER THE UTILITY OWNER REBUTTED THE PRESUMPTION THAT THE STATUTORY REQUIREMENTS WERE MET BY APPLYING A PREPONDERANCE OF THE EVIDENCE STANDARD OF REVIEW, RATHER THAN ABUSE OF DISCRETION.

Town of Apple Valley v. Apple Valley Ranchos Water, 20 Cal. 5th 838, 347 Cal. Rptr. 3d 590, 595 P.3d 450 (2026)

This case addresses the proper standard of judicial review when a public entity exercises its power of eminent domain to take a privately owned public utility. The Eminent Domain Law allows acquisitions "only for a public use." Civ. Proc. Code, § 1240.010. The public entity must show three things: 1) "[t]he public interest and necessity require the project"; 2) "[t]he project . . . will be most compatible with the greatest public good and the least private injury"; and 3) the property is "necessary for the project." Civ. Proc. Code, § 1240.030, subds. (a)-(c). In addition to these "public necessity elements," if the property is already in public use, the public entity must show that the proposed use is "more necessary" than the current use. Civ. Proc. Code, § 1240.610. The public entity must satisfy certain procedural requirements, including the adoption of a resolution of necessity as a prerequisite to commencing an eminent domain proceeding. Civ. Proc. Code, § 1245.220.

A validly adopted resolution of necessity typically "conclusively establishes" the public necessity elements (see Civ. Proc. Code, § 1245.250), but there is an exception for property taken by a local public entity where the property described in the resolution of necessity is not entirely contained within the public entity's boundaries. In that case, instead of conclusively establishing the public necessity elements, they are presumed to be true, and this presumption affects the burden of proof. Civ. Proc. Code, § 1245.250, subd. (c). Another exception applies when the state seeks to take property that is already in public use for the same or another public use. Instead of conclusively establishing the "more necessary public use" element, such use is again presumed with the presumption affecting the burden of proof. Civ. Proc. Code, § 1240.640. According to the legislative history, this presumption is rebuttable. Citing

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Sen. Legis. Com. com., 19 West's Ann. Code Civ. Proc. (2007 Ed.) foll. § 1240.640, p. 390 [1975 Addition]. Similar presumptions apply to the taking of privately owned public utility property ("utility presumptions"). Civ. Proc. Code, §§ 1240.250, subd. (b), 1240.650, subd. (c).

A property owner may always challenge a resolution of necessity in court either by a petition for writ of mandate before the eminent domain proceeding (Civ. Proc. Code, § 1245.255, subd. (a)(1)), or after commencement of the eminent domain proceeding by objecting to the right to take. Civ. Proc. Code, § 1245.255, subd. (a)(2). Further, a resolution of necessity does not create either a conclusive or rebuttable presumption of public necessity if its adoption or contents involved gross abuse of discretion by the governing body. Civ. Proc. Code, § 1245.255, subd. (b). "[G]ross abuse of discretion may be shown by a lack of substantial evidence supporting the resolution of necessity." Quoting *City of Saratoga v. Hinz*, 115 Cal. App. 4th 1202, 1221, 9 Cal. Rptr. 3d 791 (6th Dist. 2004). Separately, a defendant in an eminent domain proceeding can challenge the public entity's right to take their property—regardless of whether the entity adopted a valid resolution of necessity—on such grounds as that the taking is not for a more necessary public use. Civ. Proc. Code, §§ 1250.360, 1250.370.

Here, the Town of Apple Valley (the Town) sought to take over the privately owned water utility after it was sold and rates increased significantly. The Town approved two resolutions of necessity, one covering the water system within its boundaries, the other outside its boundaries, then initiated eminent domain proceedings. The private owner, Liberty Utilities (Liberty), "objected to the taking under [Civ. Proc. Code, §§ 1250.360 and 1250.370], arguing that the public necessity and more necessary public use elements were not met," but not challenging the validity of the resolutions of necessity themselves. Rather, Liberty argued that the elements had not been conclusively established and that the resolutions only created a rebuttable presumption in the context of privately owned public utility property.

Before the trial, "the parties litigated what the trial court termed the 'standard of review' applicable to the rebuttable presumptions for a taking of utility property." Civ. Proc. Code, §§ 1245.250, subd. (b), 1240.650, subd. (c). The Town argued for the gross abuse of discretion standard in § 1245.255, subd. (b), while Liberty contended that standard did not ap-

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ply where the court first had to decide the existence of the four elements. Rather, Liberty argued that its burden was to disprove any of the elements by a preponderance of the evidence. The court agreed with Liberty, and following a 67-day trial, found the Town did not have the right to acquire the water system because "Liberty had overcome the rebuttable presumptions and disproven two of the public necessity elements as well as the more necessary public use element."

The court of appeal reversed, finding that the trial court should have used a gross abuse of discretion standard. The California Supreme Court granted review to resolve the conflict between the court of appeal's decision below and *Pacific Gas & Electric Co. v. Superior Court*, 95 Cal. App. 5th 819, 833, 313 Cal. Rptr. 3d 764 (3d Dist. 2023), which raised similar issues and in which the court found that because "PG&E was not challenging the validity of the resolution," it "was not required to demonstrate a gross abuse of discretion in its adoption." Instead, a challenge to the right to take under Civ. Proc. Code, §§ 1250.360 and 1250.370 required only disproving one of the elements by a preponderance of the evidence.

Examining the statutory language, the Supreme Court first observed "that nothing in the plain language of the statute supports the Town's argument for applying a gross abuse of discretion standard to a challenge to the taking of public utility property." That standard is for review "*of the validity of the resolution*," not a challenge to the Town's right to take Liberty's property. The Town responded that the gross abuse of discretion standard should still apply "because any challenge to a public entity's right to take private property necessarily aims at the validity of its resolution of necessity." The Court found the plain language of the statute to refute this argument because a challenge to the right to take is distinct from an objection to the resolution of necessity. It also emphasized that the resolution of necessity is not the only avenue for a challenge; an owner may also challenge the public entity's right to take on the basis that the public necessity elements have not been satisfied. The latter type of challenge is governed by different provisions than a challenge to a resolution of necessity, primarily Civ. Proc. Code, §§ 1245.250 and 1240.650 in the context of utility takings.

Having determined that gross abuse of discretion was not the correct standard, the Court sought to determine what standard does apply. It started with the fact that the util-

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ity presumptions affect the burden of proof on the questions of public necessity and more necessary use. "Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the evidence." Quoting Evid. Code, § 115. Given that the Eminent Domain Law explicitly equates eminent domain proceedings with other civil actions, the Court found this to be the proper standard. "Thus, absent statutory indications to the contrary . . . questions of public necessity and more necessary public use are factual questions to be resolved by the trial court, as the trier of fact, under a preponderance of the evidence standard. The burden falls on the party seeking to challenge the condemnation."

Next, the Court found its "straightforward understanding of the rebuttable presumptions" to be supported by case law involving the rebuttable presumption for extraterritorial takings. See *Prang v. Los Angeles County Assessment Appeals Bd.*, 15 Cal. 5th 1152, 1170, 321 Cal. Rptr. 3d 351, 548 P.3d 1002 (2024). While the presumptions did not use identical language, they both lacked conclusive effect. Thus, the Court found them to be analogous. It found similar support in legislative history, which contained "no indication whatsoever of a legislative intent to apply the gross abusive discretion standard in a challenge to the taking of utility property."

The Court then considered the Town's argument that it should still adopt a gross abuse of discretion standard to avoid separation of powers concerns. The Town relied on *Anaheim Redevelopment Agency v. Dusek*, 193 Cal. App. 3d 249, 260, 239 Cal. Rptr. 319 (4th Dist. 1987), which concerned "excessive judicial interference" with legislative decisionmaking. The fundamental problem identified by the Court here was that *Dusek* and the other cases relied on by the Town involved a public entity's decision to adopt a resolution of necessity, while Liberty's challenge was to the condemnation itself. Thus, even if the Town's resolutions of necessity were a "legislative act" to which a court must defer, that legislative act was not at issue here. Further, judicial review of legislation is not at odds with the separation of powers.

The Court also rejected the Town's argument that the statutory amendments adding the rebuttable presumptions "merely repealed a prior limitation on the evidence a challenger may introduce in an eminent domain proceeding," noting that if that was what the Legislature intended, it could have said so. The Town's approach was also "simply

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unworkable" according to the Court. It pointed out that "layering the gross abuse of discretion standard onto the rebuttable utility presumptions would render those presumptions a nullity: a property owner who demonstrated the nonexistence of the required elements by a preponderance of the evidence would still not have thereby demonstrated 'that the [public entity's] findings are not supported by substantial evidence.' " The Court ultimately found "nothing illogical about prescribing two different standards for adjudicating two different kinds of challenges." Finally, the Court disagreed with the Town that public entities' decisions would be subjected to inappropriate judicial scrutiny and advised the Town to take the issue up with the Legislature.

On the issue of remand, the Court rejected the Town's suggestion that the court of appeal's decision should stand based on other reversible errors by the trial court because it was not clear the trial court relied on the grounds that were allegedly the basis for the errors. The Court found the Town to be "conflat[ing] the resolution of necessity with the right to take" when the Town asserted that "Liberty could not rebut the rebuttable presumptions without considering the resolution's 'underlying findings/objectives.' " The Court then left the issue of post-resolution evidence to the trial court on remand and reversed the judgment.

>> *See Miller & Starr, California Real Estate 4th, Ch. 24, Eminent Domain, §§ 24:6, 24:7, 24:8, 24:9, 24:10, 24:11, 24:19, 24:59, 24:69.*

HAZARDOUS SUBSTANCES

SELLER'S PROVISION OF A STATUTORY TRANSFER DISCLOSURE STATEMENT AND ENVIRONMENTAL DISCLOSURES WAS NOT A CONDITION PRECEDENT TO BUYER'S PERFORMANCE WHERE PURCHASE AGREEMENT CONTAINED NO EXPRESS CONDITIONAL LANGUAGE, AND SELLER'S REFUSAL TO ALLOW A PHASE II ASSESSMENT DID NOT EXCUSE OR INDEFINITELY SUSPEND BUYER'S PERFORMANCE GIVEN EXPRESS DISCLAIMER OF CONTINGENCY.

Nasey v. Fell Holdings LLC, 122 Cal. App. 5th 509, 347 Cal. Rptr. 3d 341 (1st Dist. 2026), review filed, (Sept. 18, 2026)

For a summary of this case see SPECIFIC CONTRACTS

>> *See Miller & Starr, California Real Estate 4th, Ch. 1, Contracts, § 1:104; Ch. 2, Specific Contracts, §§ 2:23, 2:26, 2:27, 2:28; Ch. 3, Agency, §§ 3:60, 3:62; Ch. 39, Haz-*

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ardous Substances, §§ 39:4, 39:5, 39:6, 39:18.

LAND USE

CITY'S DENIAL OF A "BUILDER'S REMEDY" PROJECT, WHICH PROPOSED RESIDENTIAL USES PROHIBITED BY THE LOCAL COASTAL PROGRAM, WAS PROPER BECAUSE THE PROJECT CONFLICTED WITH THE COASTAL ACT AND THE CITY FOUND THERE WAS NO FEASIBLE WAY TO COMPLY WHILE MEETING AFFORDABLE HOUSING REQUIREMENTS.

New Commune DTLA LLC v. City of Redondo Beach, 122 Cal. App. 5th 99, 347 Cal. Rptr. 3d 754 (2d Dist. 2026), review filed, (Sept. 8, 2026)

This case examines the intersection of the Housing Accountability Act (HAA) (Gov. Code, § 65589.5) and the California Coastal Act (Coastal Act) (Pub. Resources Code, §§ 30000 et seq.). The Coastal Act's primary goals are to protect the coastal zone, conserve its resources, maximize public access to the coast and recreational opportunities, and promote conservation principles and the constitutional rights of private property owners. It governs coastal development and authorizes the Coastal Commission to oversee that as well as plan for future development. It is meant to be construed liberally. Pub. Resources Code, § 30009; *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, 55 Cal. 4th 783, 793-794, 149 Cal. Rptr. 3d 383, 288 P.3d 717 (2012). The Coastal Commission and local governments share responsibility for coastal development, with local governments being required to submit local coastal programs (LCP) (the functional equivalent of a general plan for the coastal zone) to the Coastal Commission for approval. Only local governments with approved LCPs may issue coastal development permits (CDPs), which are required for coastal development. Pub. Resources Code, § 30519, subd. (a). The Coastal Act also recognizes the requirements of state and federal law relating to low- and moderate-income housing. Pub. Resources Code, § 30007.

As relevant here, the City of Redondo Beach had a certified LCP that designated three authorized uses of coastal property in the Coastal Commercial-4 (CC-4) zone: public access uses; coastal-related commercial-recreational facilities; and facilities that support pedestrian-related recreational boating and fishing. Redondo Beach Mun. Code, §§ 10-5.101, 10-5.102, 10-5.810,10-5.815, 10-5.2600. Residential uses were not permitted, even conditionally, in the CC-4 zone. In

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July 2022, developer New Commune DTLA LLC (New Commune) submitted to the City an application to build a 141,000-square-foot mixed-use project that included 30 residential condominiums, six of which would constitute affordable housing. New Commune asserted that despite the prohibition on residential uses in the CC-4 zone, its development must be approved as a "builder's remedy" project under the HAA.

The HAA requires local governments to adopt a general plan for long-term development, including a housing element that addresses their regional housing needs. See Gov. Code, §§ 65580, 65582. Failure to do so in a timely fashion results in restrictions on the local government's ability to reject "builder's remedy" projects that propose affordable housing, even if the project conflicts with local zoning or the general plan. See Gov. Code, § 65589.5, subds. (a)-(d); *Kalnel Gardens, LLC v. City of Los Angeles*, 3 Cal. App. 5th 927, 938-939, 208 Cal. Rptr. 3d 114 (2d Dist. 2016). In this context, disapproval is only allowed if the local government makes specific written findings, including that the denial "is required in order to comply with specific state or federal law, and there is no feasible method to comply without rendering the development unaffordable to low- and moderate-income households." Quoting Gov. Code, § 65589.5, subd. (d)(3). However, the HAA specifically disclaims that it should " 'be construed to relieve' a local government from complying with the Coastal Act." Quoting Gov. Code, § 65589.5, subd. (e).

Although the City did not have a substantially compliant housing element certified by the California Department of Housing and Community Development (HCD) at the time of New Commune's application, and therefore New Commune's project constituted a "builder's remedy" project under the HAA, the City nonetheless declined to process the application because its proposed uses were not permitted under its LCP. The City invited New Commune to apply for a general plan amendment, LCP land use plan amendment, or zoning amendment, which New Commune did not do. Instead, New Commune filed an unsuccessful administrative appeal, followed by a petition for writ of mandate compelling approval of its application under the HAA. The trial court denied the petition, finding that even though the HAA builder's remedy provisions were applicable, those provisions could not override the Coastal Act and the City's LCP. New Commune appealed.

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In its appeal, New Commune argued that local restrictions in the LCP could not override compulsory approval under the HAA. While it conceded that both it and the City were bound by the Coastal Act, New Commune argued the court should require the City to "approve any builder's remedy project in the coastal zone unless it makes written findings that disapproval is necessary to comply with specific, objective resource protection policies prescribed by Chapter 3 of the Coastal Act." The court of appeal characterized this "proposed harmonization" of the HAA and the Coastal Act as unworkable because none of the purportedly specific, objective policies on which disapproval could be based were actually objective.

For example, one policy restricting areas adjacent to environmentally sensitive habitat allows only uses that are "*compatible*" with continuance of such habitat areas, but the term " 'compatible' requires interpretation and subjective judgment." Quoting *California Renters Legal Advocacy & Education Fund v. City of San Mateo*, 68 Cal. App. 5th 820, 842, 283 Cal. Rptr. 3d 877 (1st Dist. 2021). Such subjective decisions are expressly delegated to the Coastal Commission. Pub. Resources Code, § 30330. The court commented that it "discern[ed] nothing in the Coastal Act delegating that responsibility (or expertise) to a local government driven by its own interests."

The court then assumed without deciding that the builder's remedy applied here and addressed whether denial of a project such as that proposed by New Commune was necessary to comply with the Coastal Act. Citing Gov. Code, § 65589.5, subd. (d)(3). A builder's remedy project may not be disapproved unless the local government makes written findings, supported by a preponderance of the evidence, that disapproval was required under state law *and* "no feasible method existed to comply with state law without rendering the proposed development unaffordable."

The court pointed out that an LCP "does not solely embody local standards"; instead, it includes the Coastal Commission's determination of the "kinds, location, and intensity of land uses" that conform with the Coastal Act's policies (Pub. Resources Code, §§ 30108.5, 30513, subd. (a)(1), (§ 30512.2, subds. (a), (b))), and the Coastal Commission must encourage "affordable housing and 'the provision of new affordable housing opportunities . . . in the coastal zone.' " Pub. Resources Code, § 30604, subd. (g). The Coastal Commission was required to determine whether local regulations facili-

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tated that determination, keeping in mind the fundamental Coastal Act goal of "ensur[ing] that state policies prevail over the concerns of local government." Quoting *Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles*, 55 Cal. 4th at 794.

Examining the City's "issuing" authority over CDP applications, the court found it to be limited in the sense that the City must issue CDPs for projects that are in conformity with the LCP. New Commune agreed with that proposition but argued that the Coastal Act did not require CDP *disapproval* for a project that did *not* conform. The court disagreed, finding that "[t]he Coastal Act does not grant local governments with Commission-certified LCPs the authority to approve unsanctioned uses of coastal land." Rather, the proper avenue would be an LCP amendment, which would need to go through the Commission certification process. New Commune's construction "would defeat this manifest requirement and render various LCP certification, amendment, and CDP approval procedures ineffective." Citing *Manufacturers Life Ins. Co. v. Superior Court*, 10 Cal. 4th 257, 274, 41 Cal. Rptr. 2d 220, 895 P.2d 56 (1995).

Other provisions of the Coastal Act supported the court's interpretation that authorization of "a use other than that designated in the LCP as a permitted use does require certification by the Commission (§ 30514, subd. (d))." Quoting *Yost v. Thomas*, 36 Cal. 3d 561, 573, fn. 9, 205 Cal. Rptr. 801, 685 P.2d 1152 (1984). Thus, after rejecting New Commune's extratextual evidence, the court held that "denial of a builder's remedy project may be required as a matter of state law." In so holding, the court recognized the friction between the Coastal Act and the HAA, as well as the "HAA's laudable goal of providing affordable housing," but found that New Commune's construction "would effectively repeal Coastal Act procedures mandating Commission oversight" (citing Gov. Code, § 65589.5, subd. (d)(3)), a decision for the Legislature, not the courts.

Lastly, the court assessed whether there was any feasible method to comply with the Coastal Act "without rendering the project unaffordable." It found the record to support the City's infeasibility finding because New Commune ignored the City's invitation to change the designation of the land to residential use, meaning that the City had no basis on which to determine the legal or economic viability of the project. Absent a record from which it could make such a determination, the court referred to cases interpreting the Cal-

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ifornia Environmental Quality Act, which addressed the same definition of "feasible" for project alternatives. See *California Native Plant Society v. City of Santa Cruz*, 177 Cal. App. 4th 957, 981-982, 99 Cal. Rptr. 3d 572 (6th Dist. 2009). The court reasoned that, without Commission approval, the City could not amend its LCP to allow residential uses, and its failure to include analysis of an infeasible alternative could not be considered inadequate. For that reason, the court found no abuse of discretion in the City's disapproval of New Commune's builder's remedy project application, and it affirmed the judgment.

>> *See Miller & Starr, California Real Estate 4th, Ch. 21, Land Use, §§ 21:3, 21:5, 21:10, 21:11, 21:12, 21:38, 21:41.*

ORDINANCE BANNING SHORT-TERM RENTALS BUT ALLOWING COMMON INTEREST DEVELOPMENTS TO OPT OUT OF RESTRICTION WAS NOT PREEMPTED BY THE DAVIS-STERLING ACT WHERE OPT-OUT PROVISION DID NOT REQUIRE AMENDMENT OF GOVERNING DOCUMENTS, AND THE CITY DID NOT ACT ARBITRARILY OR CAPRICIOUSLY WHERE ORDINANCE WAS RATIONALLY RELATED TO ADDRESSING CONCERNS REGARDING NUISANCES.

Parsons v. City of Indian Wells, 122 Cal. App. 5th 1077, 348 Cal. Rptr. 3d 129 (4th Dist. 2026), as modified, (Sept. 3, 2026) and as modified on denial of reh'g, (Sept. 22, 2026) and review filed, (Oct. 7, 2026)

For a summary of this case see COMMON INTEREST DEVELOPMENTS

>> *See Miller & Starr, California Real Estate 4th, Ch. 16, Covenants, § 16:42; Ch. 19, Landowners' Liability, §§ 19:7, 19:29; Ch. 21, Land Use, §§ 21:2, 21:41; Ch. 28, Common Interest Developments, §§ 28:72, 28:101, 28:109.*

LANDLORD AND TENANT

THREE-DAY NOTICE TO COMMERCIAL TENANT, WHICH DEMANDED UNPAID RENT THAT BECAME DUE MORE THAN ONE YEAR BEFORE THE NOTICE WAS SERVED, WAS VOID UNDER CIV. PROC. CODE, § 1161(2), AND LEASE PROVISION APPLYING RENT PAYMENTS TO OLDEST DEBT DID NOT SAVE THE NOTICE AS THAT WOULD UNDERMINE LEGISLATIVE INTENT.

Universal Shopping Plaza v. Hong, 123 Cal. App. 5th 104, 348 Cal. Rptr. 3d 414 (2d Dist. 2026)

This commercial unlawful detainer case relates to a five-year lease between restaurant owner Piong Bin

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Hong (Hong) and landlord Universal Shopping Plaza (Universal), the term of which was January 1, 2017 to December 31, 2021. The lease provided for a monthly rent of $30,625, with a yearly three percent increase beginning the second lease year. The "Application of Payments" portion of the lease provided: "All payments received by [Universal] from [Hong] . . . shall be applied to the oldest payment of obligation owed by [Hong] to [Universal]." When the lease expired, the parties agreed to a month-to-month tenancy. However, Hong believed, based on a conversation with Universal's leasing and office manager, that Universal had agreed to a COVID-19-related rent reduction for 2022. When that did not occur, Hong withheld the amount he thought he had overpaid, $65,989, from his January and February rent. Hong paid full rent monthly beginning March 2023 and for the next 23 months.

In February 2025, after Hong had paid that month's rent in full, Universal served him with a three-day notice to pay rent or quit demanding unpaid rent of $65,989. When Hong failed to pay, Universal filed an unlawful detainer action. Hong demurred on the basis that the three-day notice violated Civ. Proc. Code, § 1161(2) because it sought payment of rent more than one year after it became due. After the trial court overruled the demurrer, a trial commenced, with much of the testimony and evidence relating to the $65,989 withheld by Hong in January and February 2023. Universal argued that it did not agree to the rent reduction and it did, in fact, send Hong a notice in January 2023 that he was in breach of the lease. It also admitted at trial that once Hong fell behind on the rent, he was always about a month behind because each payment was applied to the oldest balance. Hong argued again that the three-day notice was defective because it did not indicate which month rent was owed for. The trial court found no effective modification of the lease to reflect the rent reduction and rejected that the three-day notice was defective, finding all it needed to do was state the amount of back rent. It also rejected that the missed payment was from more than one year prior, accepting Universal's position that applying payments to back rent meant that Hong was missing a current payment. Hong appealed.

The court of appeal began by stating that the Unlawful Detainer Act (Civ. Proc. Code, §§ 1159 et seq.) requires strict compliance with service, notice, and filing deadlines. Citing *Stancil v. Superior Court*, 11

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Cal. 5th 381, 394-395, 278 Cal. Rptr. 3d 27, 485 P.3d 446 (2021). When a tenant continues in possession after default, "service of a 'valid three-day notice to pay rent or quit is a prerequisite to an unlawful detainer action.' " Quoting *City of Alameda v. Sheehan*, 105 Cal. App. 5th 68, 75, 325 Cal. Rptr. 3d 438 (1st Dist. 2024). Under § 1161(2), the three-day notice must be served within one year of rent becoming due; a landlord who waits longer must bring a breach of contract action. Citing *Levitz Furniture Co. v. Wingtip Communications, Inc.*, 86 Cal. App. 4th 1035, 1042, 103 Cal. Rptr. 2d 656 (1st Dist. 2001). The legislative intent was to "prevent[] a landlord's sitting on his or her rights, when rent is unpaid at some point during the life of a lease, then using long-overdue rent (but no recently overdue rent) to effect an eviction." Quoting *Levitz Furniture Co. v. Wingtip Communications, Inc.*, 86 Cal. App. 4th at 1040. On this basis and based on the undisputed evidence at trial, the court of appeal agreed with Hong that Universal's three-day notice was invalid because it sought rent that was more than one year overdue. The overdue rent was from January and February 2023, after which Hong made timely payments every month through and including February 1, 2025.

The court rejected that the "Application of Payments" provision in the lease could save the three-day notice, commenting that the provision could affect the total amount owed and possibly the running of the limitations period for a breach of contract action, but not the date "rent becomes due" under the lease, "which is the triggering event for service of the three-day notice of an unlawful detainer action under section 1161(2)." The interpretation urged by Universal would undermine legislative intent as articulated in *Levitz* and allow a landlord to wait until prevailing market rates increase to evict a tenant for long-overdue rent. The court rejected that interpretation and reversed the judgment.

>> *See Miller & Starr, California Real Estate 4th, Ch. 34, Landlord and Tenant, §§ 34:181, 34:183, 34:184, 34:185, 34:191, 34:195, 34:202.*

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LANDOWNERS' LIABILITY

ORDINANCE BANNING SHORT-TERM RENTALS BUT ALLOWING COMMON INTEREST DEVELOPMENTS TO OPT OUT OF RESTRICTION WAS NOT PREEMPTED BY THE DAVIS-STERLING ACT WHERE OPT-OUT PROVISION DID NOT REQUIRE AMENDMENT OF GOVERNING DOCUMENTS, AND THE CITY DID NOT ACT ARBITRARILY OR CAPRICIOUSLY WHERE ORDINANCE WAS RATIONALLY RELATED TO ADDRESSING CONCERNS REGARDING NUISANCES.

Parsons v. City of Indian Wells, 122 Cal. App. 5th 1077, 348 Cal. Rptr. 3d 129 (4th Dist. 2026), as modified, (Sept. 3, 2026) and as modified on denial of reh'g, (Sept. 22, 2026) and review filed, (Oct. 7, 2026)

For a summary of this case see COMMON INTEREST DEVELOPMENTS

>> *See Miller & Starr, California Real Estate 4th, Ch. 16, Covenants, § 16:42; Ch. 19, Landowners' Liability, §§ 19:7, 19:29; Ch. 21, Land Use, §§ 21:2, 21:41; Ch. 28, Common Interest Developments, §§ 28:72, 28:101, 28:109.*

WHERE TENANT HIRED INDEPENDENT CONTRACTOR TO PERFORM WORK EXPRESSLY CONTEMPLATED UNDER LEASE AGREEMENT AND CONTRACTOR'S WORKER SUSTAINED INJURIES WHILE PERFORMING THAT WORK, LANDLORD WAS NOT LIABLE BECAUSE IT WAS IN THE "CHAIN OF DELEGATION" UNDER THE *PRIVETTE* DOCTRINE.

Schurman Family Company TIC v. Superior Court of Alameda County, 122 Cal. App. 5th 915, 348 Cal. Rptr. 3d 50 (1st Dist. 2026)

Schurman Family Company TIC (Schurman) owns a warehouse in Oakland, California, and leased a 12-foot by 12-foot portion of the roof and a 12-foot by 20-foot portion of the warehouse to GTE Mobilnet of California Limited Partnership (Verizon) for the installation, operation, and maintenance of communications equipment and antennas. The lease gave Verizon the non-exclusive right of ingress and egress in and through the building, and over and across the roof for installation, operation, and maintenance of its equipment. In March 2018, Verizon contracted with independent contractor L.D. Strobel (Strobel) for a cell site installation project at the property. The agreement gave Strobel " 'sole and exclusive' control over its workers, includ-

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ing responsibility for their 'health and safety,' " and made Strobel " 'solely responsible' for the 'means [and] methods' of construction."

In June 2022, Strobel sent its employee Phuokhao Bounxaysana to the warehouse to work on the project. A Verizon employee asked Bounxaysana and a coworker to go to the roof to retrieve serial numbers from radios in Verizon's roof enclosure. However, the access door was screwed shut and, not having the proper screwdriver and not wanting to return to ground level to retrieve one, Bounxaysana attempted a different route via a portion of the roof that was not leased to Verizon. There, he fell through a skylight and suffered serious injuries. Bounxaysana sued Verizon and Schurman for negligence and premises liability, and Schurman moved for summary judgment on the basis that the *Privette* doctrine precluded any liability against it. *Privette v. Superior Court*, 5 Cal. 4th 689, 702, 21 Cal. Rptr. 2d 72, 854 P.2d 721 (1993). The trial court denied the motion, ruling that *Privette* does not protect landlords like Schurman. At the same time, the trial court granted summary judgment for Verizon based on the *Privette* doctrine. Bounxaysana did not challenge that portion of the decision, but Schurman filed a petition for writ relief. After briefing, the court of appeal issued an order to show cause, and the parties treated their previously filed briefs as their respective return and reply.

Because it was undisputed that Verizon hired Strobel as an independent contractor, the court found, as a matter of law, that the duty of workplace safety had been "presumptively delegate[d]" to Strobel. The question, then, was whether *Privette* shielded Schurman from liability because it was "within the chain of delegation," or whether the doctrine was inapplicable absent a hiring relationship, which did not exist here. The trial court relied on *Ramirez v. PK I Plaza 580 SC LP*, 85 Cal. App. 5th 252, 265, 301 Cal. Rptr. 3d 193 (1st Dist. 2022). *Ramirez* held that *Privette* did not apply to a shopping center owner and operator who were sued by an independent contractor hired by a shopping center tenant. The majority found that "a 'bedrock presumption of the *Privette* doctrine [was] absent' because 'Kimco did not hire . . . Ramirez.' " One justice dissented, arguing "that a non-hiring landlord should be entitled to protection under the *Privette* doctrine where it 'is the first link in a "contracting chain" that contemplates, and results in, the hiring of an independent contractor to do the work.' " Quoting *Ramirez v. PK I*

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Plaza 580 SC LP, 85 Cal. App. 5th at 280 (Banke, J., dissenting).

While acknowledging the basic principle of stare decisis, the court stated it would not read a requirement of an unbroken sequence of hiring relationships into the *Privette* doctrine absent supporting California Supreme Court authority. Accordingly, the court examined California Supreme Court precedent and decisions from sister courts.

The court reviewed *Privette*'s origin and subsequent expansion, as well as judicially recognized exceptions to the doctrine. *Privette*'s holding—that an employee of an independent contractor could not sue the hiring property owner for work-related injuries under the peculiar risk doctrine—arose from the policy of recognizing workers' compensation as an employee's exclusive remedy for job-related injuries because it would be unfair for a landowner who hires an independent contractor to have greater liability toward that contractor's employees than the independent contractor itself. Citing *Toland v. Sunland Housing Group, Inc.*, 18 Cal. 4th 253, 256-257, 270, 74 Cal. Rptr. 2d 878, 955 P.2d 504 (1998).

Subsequent Supreme Court decisions expanded *Privette* to situations where the injured employee asserted an inherently dangerous activity and negligent hiring, again based on fairness concerns. The Court later recognized two cases that articulated exceptions to the *Privette* doctrine. The first was *Hooker v. Department of Transportation*, 27 Cal. 4th 198, 202, 115 Cal. Rptr. 2d 853, 38 P.3d 1081 (2002), which held "that a hirer is liable to an employee of a contractor insofar as a hirer's exercise of retained control *affirmatively contributed* to the employee's injuries." The second was *Kinsman v. Unocal Corp.*, 37 Cal. 4th 659, 664, 36 Cal. Rptr. 3d 495, 123 P.3d 931 (2005), which recognized landowner liability where: there was a pre-existing concealed hazard on the property of which the landowner knew or should have known; the contractor did not know, and could not reasonably have known, of the hazard; and the landowner did not warn the contractor of the hazard.

As the doctrine continued to evolve, the term "chain of delegation" was first used by the Supreme Court in *Tverberg* to reaffirm that "[h]aving assumed responsibility for workplace safety, an independent contractor may not hold a hiring party *vicariously* liable for injuries resulting from the contractor's own failure to effectively guard against risks inherent in the contracted work." Quoting *Tverberg v. Fillner*

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Construction, Inc., 49 Cal. 4th 518, 528, 529, 110 Cal. Rptr. 3d 665, 232 P.3d 656 (2010). Reasoning that the presumptive delegation of authority under *Privette* is based on an independent contractor's control of the means and manner in which their work is performed, the Court explained: "Once the delegation occurs through the hiring of an independent contractor, we can identify no basis for requiring a hiring relationship through every link in the 'chain of delegation.' " Quoting *Tverberg v. Fillner Construction, Inc.*, 49 Cal. 4th at 522. Thus, it did not matter whether the delegation of authority was directly to an independent contractor or indirectly through a contractor who then hired a subcontractor. See *SeaBright Ins. Co. v. US Airways, Inc.*, 52 Cal. 4th 590, 597, 129 Cal. Rptr. 3d 601, 258 P.3d 737 (2011) (finding that *Privette* recognizes "a presumptive delegation of responsibility for workplace safety from the hirer to the independent contractor"). *Gonzalez v. Mathis*, 12 Cal. 5th 29, 38, 50, 282 Cal. Rptr. 3d 658, 493 P.3d 212 (2021) further clarified *Privette* by holding that a hirer is not liable for a known hazard where no safety precautions could have avoided or minimized the hazard, because at that point the contractor has all necessary information to do the work. See also *Sandoval v. Qualcomm Incorporated*, 12 Cal. 5th 256, 269, 283 Cal. Rptr. 3d 519, 494 P.3d 487 (2021) (reaffirming delegation as the basis for the *Privette* doctrine).

From these cases, the court here discerned the following rule: "Once the presumptive delegation of authority to an independent contractor occurs, that contractor bears the duty of care for workplace safety, and—absent exceptions inapplicable here, e.g., retention and exercise of control (*Hooker*) or a concealed hazard (*Kinsman*)—the *Privette* doctrine shields all those in the 'chain of delegation' from liability." The court disagreed with Bounxaysana that a hiring relationship is a prerequisite throughout the chain of delegation, observing that the Supreme Court has never considered *Privette* outside the hiring context, but also noting the Supreme Court's use of the phrase "chain of delegation" rather than "chain of hiring." The court also noted that an initial delegation occurred here between Verizon and Strobel.

Next, the court discussed other California court opinions on chain of delegation and agreed with the majority of other districts that "the absence of a hiring relationship does not necessarily preclude *Privette's* application" and found that Schurman was shielded from liability under *Privette* because it fell within the

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chain of delegation. With respect to *Ramirez*, the court found "its holding increasingly stands alone," with more recent opinions expressly declining to follow it. See, e.g., *Collins v. Diamond Generating Corp.*, 107 Cal. App. 5th 1162, 1175, fn. 6, 328 Cal. Rptr. 3d 714 (4th Dist. 2024); *Andrews v. Wagner*, 116 Cal. App. 5th 766, 773, 339 Cal. Rptr. 3d 588 (2d Dist. 2025).

The court likened the situation here, where the Verizon-Schurman lease expressly allowed Verizon to install equipment and Verizon hired Strobel to do just that, to *Lopez v. University Partners*, 54 Cal. App. 4th 1117, 1120-1122, 63 Cal. Rptr. 2d 359 (4th Dist. 1997), where the university's lease to the hiring tenant put it in the chain of delegation. It also found that recognizing Schurman as being within the chain of delegation was consistent with both *Privette* and the weight of appellate authority. Further, it found fairness to dictate this result since "it would be anomalous and inequitable to impose greater liability for Bounxaysana's injuries upon Schurman, the lessor with no control over Bounxaysana's work, than could be imposed upon either Strobel or Verizon." Citing *Toland v. Sunland Housing Group, Inc.*, 18 Cal. 4th at 266, and distinguishing *Gordon v. ARC Manufacturing, Inc.*, 43 Cal. App. 5th 705, 713, 256 Cal. Rptr. 3d 820 (4th Dist. 2019) (building owner not in chain of delegation where injured roofer was hired by a prospective buyer, and property owner had not assigned the work); see also *Zuniga v. Cherry Avenue Auction, Inc.*, 61 Cal. App. 5th 980, 983-984, 276 Cal. Rptr. 3d 269 (5th Dist. 2021) (*Privette* inapplicable where there was no hiring of an independent contractor). The court found this case to be more like *Collins* and *Andrews* in terms of an "unbroken contractual chain." The court concluded that where a lease expressly contemplates hiring of an independent contractor who is then hired by the tenant, the lessor remains within the chain of delegation absent a recognized exception to *Privette*. Accordingly, it reversed the denial of summary judgment and ordered the trial court to enter summary judgment in favor of Schurman.

>> *See Miller & Starr, California Real Estate 4th, Ch. 19, Landowners' Liability, §§ 19:42, 19:50, 19:57, 19:58, 19:80.*

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RECORDING AND PRIORITIES

ORDER AUTHORIZING GUARDIAN AD LITEM TO RE-RECORD LIS PENDENS AGAINST FORMER TRUSTEE'S REAL PROPERTIES WAS NOT APPEALABLE UNDER CIV. PROC. CODE, § 405.39; ARGUMENT THAT THERE WAS NO UNDERLYING REAL PROPERTY CLAIM SHOULD HAVE BEEN MADE IN PETITION FOR WRIT OF MANDATE, WHICH WAS NOW UNTIMELY.

Grimberg v. Pour, 121 Cal. App. 5th 1061, 346 Cal. Rptr. 3d 295 (4th Dist. 2026), review filed, (Aug. 26, 2026)

Priel and Jacob Grimberg executed an irrevocable living trust agreement in 2017 (the Trust). Priel and Jacob were the trustees, with their son Arie Grimberg as the sole beneficiary upon their deaths and Sylvia R. as the successor trustee. The Trust's main assets were two residential units, one of which Priel and Jacob lived in, the other of which they rented out. Jacob died in July 2020. In 2021, Priel purportedly amended the Trust agreement to make her niece, Libby Pour, the successor trustee, then purportedly resigned as trustee, making Pour the trustee. In 2022, Arie filed a petition in probate court to determine the validity of the amendment and resignation. The petition alleged that Priel lacked capacity to execute the amendment and included a claim for financial elder abuse. It sought to impose a constructive trust over Trust assets in Pour's possession based on Pour allegedly diverting income from the rental unit, allowing the other unit to fall into foreclosure, and selling the rental unit for less than market value. Arie then filed a separate petition in probate court to remove Pour as trustee and to surcharge her.

Subsequently, the probate court appointed Kevin Kravets as Priel's guardian ad litem and appointed a professional fiduciary as trustee of the Trust. Kravets recommended surcharging Priel $229,000 for unexplained distributions from the trust, including $122,000 transferred directly to Pour. As security, Kravets requested that title on all properties owned by Pour be clouded to prevent those assets from being moved beyond the reach of creditors, including the Trust. Pour disputed the accuracy of Kravets' accounting, said she used trust assets for legitimate purposes, and argued that clouding title to her real property was premature. Nevertheless, the probate court granted Kravets' request, and Kravets recorded lis pendens against three of Pour's properties.

Simultaneously, Pour advised Kravets that she had filed for bank-

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ruptcy several months prior and the lis pendens violated the automatic bankruptcy stay. With the court's authorization, Kravets removed all three lis pendens. However, two months later, he sought to reinstate them after the bankruptcy court dismissed Pour's bankruptcy case and Kravets learned that Pour had filed for bankruptcy protection four times since 2022, meaning the bankruptcy stay had already expired. In her opposition, Pour asked the probate court to "make a ruling on the issue of whether no real property claim in the underlying matter prohibits the filing of lis pendens against [Pour's] properties." When the probate court granted Kravets' request and directed him to re-record the lis pendens, Pour appealed the order.

The court of appeal began with an overview of the lis pendens framework. A lis pendens "provides constructive notice of a pending lawsuit affecting the real property described in the notice" and may be filed when a lawsuit involves a "real property claim." Quoting *Shoker v. Superior Court*, 81 Cal. App. 5th at 275 (quoting Civ. Proc. Code, § 405.20). A property claim is one that "would, if meritorious, affect . . . 'title to, or the right to possession of, specific real property.' " Quoting § 405.4. Section 405.30 allows a property owner to expunge a lis pendens that was improperly recorded, including, but not limited to, where the underlying pleading does not contain a real property claim. "[A]n order granting or denying a motion to expunge a lis pendens is not an appealable order." Quoting *Woodridge Escondido Property Owners Assn. v. Nielsen*, 130 Cal. App. 4th 559, 577, fn. omitted, 30 Cal. Rptr. 3d 15 (4th Dist. 2005) (citing § 405.39). Rather, the only way to obtain review of such an order is by a petition for writ of mandate, "filed and served within 20 days of service of written notice of the [challenged] order." § 405.39.

Assessing the appealability of the trial court's order, the court of appeal noted that Prob. Code, § 1300 allows appeals from orders "[d]irecting, authorizing, approving, or confirming the sale, lease, encumbrance, grant of an option, purchase, conveyance, or exchange of property" and orders "[a]uthorizing, instructing, or directing a fiduciary, or approving or confirming the acts of a fiduciary." On the other hand, § 405.39 "expressly provides that '[n]o order or other action of the court under [chapter 3 of title 4.5 of part 2 of the Code of Civil Procedure, addressing expungement of lis pendens] shall be appealable.' " Pour argued that § 1300 allowed such an appeal because a lis pendens is an "encum-

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brance" and the order directed a fiduciary. Assuming without deciding that to be the case, the court disagreed that the more general Probate Code provisions prevailed over the more specific lis pendens provisions in the Code of Civil Procedure. In fact, it found that the Probate Code explicitly referred to the Code of Civil Procedure's rules regarding lis pendens.

The court acknowledged that § 405.39 deals with expungement rather than recordation of a lis pendens, but it still found the order here not to be appealable because if Pour had believed the lis pendens to be improper, she should have followed the correct procedure and filed a motion to expunge. The court declined to allow Pour to "manufacture appellate jurisdiction by failing to take a necessary step in the probate court that would unquestionably have resulted in a nonappealable order." Further, it found that Pour's interpretation would exempt challenges to lis pendens in probate court from the expedited writ review procedures of the Code of Civil Procedure—an inconsistent result the court doubted the Legislature intended. The court also pointed out that Pour opposed Kravets' request to record the lis pendens on the basis that they did not allege a real property claim. This argument should have been the basis of a motion to expunge the lis pendens. The court therefore found the challenged order to be nonappealable under § 405.39.

Finally, even if the court exercised its discretion to treat Pour's notice of appeal as a petition for writ of mandate under § 405.39, it would deny the petition as untimely because Pour filed it nearly 60 days after the order rather than within the required 20-day period. Accordingly, the appeal was dismissed.

>> *See Miller & Starr, California Real Estate 4th, Ch. 10, Recording and Priorities, §§ 10:148, 10:149, 10:150, 10:151, 10:153, 10:154, 10:156.*

REMEDIES

BECAUSE THERE IS NO STRICT LIABILITY FOR LOSS OF LATERAL SUPPORT UNDER THE COMMON LAW OR CIV. CODE, § 832 ABSENT EXCAVATION BY DEFENDANT, UPHILL NEIGHBORS' CLAIM AGAINST DOWNHILL NEIGHBORS ARISING FROM FAILED RETAINING WALL WAS PROPERLY DISMISSED WHERE THERE WAS NO EVIDENCE OF EXCAVATION.

Quinn v. Coulton, 121 Cal. App. 5th 1124, 346 Cal. Rptr. 3d 320 (1st Dist. 2026)

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For a summary of this case see ADJOINING LANDOWNERS

>> *See Miller & Starr, California Real Estate 4th, Ch. 17, Adjoining Landowners, §§ 17:19, 17:20, 17:23, 17:25, 17:26; Ch. 40, Remedies, §§ 40:36, 40:78, 40:79.*

SPECIFIC CONTRACTS

SELLER'S PROVISION OF A STATUTORY TRANSFER DISCLOSURE STATEMENT AND ENVIRONMENTAL DISCLOSURES WAS NOT A CONDITION PRECEDENT TO BUYER'S PERFORMANCE WHERE PURCHASE AGREEMENT CONTAINED NO EXPRESS CONDITIONAL LANGUAGE, AND SELLER'S REFUSAL TO ALLOW A PHASE II ASSESSMENT DID NOT EXCUSE OR INDEFINITELY SUSPEND BUYER'S PERFORMANCE GIVEN EXPRESS DISCLAIMER OF CONTINGENCY.

Nasey v. Fell Holdings LLC, 122 Cal. App. 5th 509, 347 Cal. Rptr. 3d 341 (1st Dist. 2026), review filed, (Sept. 18, 2026)

Lawrence Nasey owned two mixed-use properties in San Francisco: one on Fell Street and one on Stanyan Street. The Fell Street property included commercial space occupied by Nasey's towing company and residential space that most recently housed the same tenant for more than seven years. The commercial portion of the Stanyan Street property was occupied by Nasey's automotive company, and Nasey's son and daughter-in-law lived in the residential portion. In March 2020, Nasey lost both properties through nonjudicial foreclosure, and they were transferred to Fell Holdings LLC and Stanyan Holdings LLC.

After the foreclosures, Nasey negotiated with the new owners (Sellers) to re-purchase the properties and pay rent until the close of escrow. The purchase price was $10,500,000 in cash, and the purchase agreement required a $525,000 initial deposit, with close of escrow initially set to occur on or before May 31, 2021. Also in that agreement, Nasey represented that there was no loan contingency, property was accepted in as-is condition with buyer's right to conduct inspections, and Sellers would produce various reports and disclosures. The parties signed an addendum the same day as the purchase agreement stating, "This Purchase is not subject to any contingencies and is being sold in 'as is, where is' condition, with no seller representations," and noting that Sellers had never lived or operated in either of the properties. A later addendum reduced the initial deposit to $285,000 and provided that Sellers had no

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obligation to deliver any documents or make any disclosures, that Sellers had performed all of their obligations, and that the addendum would control over any other addendum or the purchase agreement.

Nasey repeatedly failed to close escrow on time, despite several extensions of the agreement. Sellers eventually filed a pair of unlawful detainer actions, which were followed by a civil suit for declaratory and injunctive relief filed by Nasey. The settlement of Nasey's suit reinstated the agreement and once again extended the close of escrow.

Meanwhile, Nasey obtained a Phase I environmental report as required by his lenders, who then required a Phase II assessment before they could fund or close escrow. Such an investigation required Sellers' prior written agreement, which they refused to provide. When Nasey again missed the escrow deadline, he filed another suit that (once amended) alleged four causes of action for declaratory relief. The first alleged that Sellers were obliged to comply with all statutory investigation and disclosure requirements, including the Transfer Disclosure Statement, and "that compliance with these disclosure requirements is a condition precedent to Nasey's duty to perform and extend the date for his close of escrow." The second was identical except it alleged Sellers were required to provide environmental disclosures pursuant to Health & Saf. Code, § 25359.7. The third alleged that Nasey was entitled to conduct the Phase II assessment and that Sellers' refusal constituted a breach that suspended Nasey's duty to perform. The fourth sought a declaration that Nasey was not in breach due to Sellers' refusal to allow the Phase II assessment. The trial court ultimately granted Sellers' motion for judgment on the pleadings, and Nasey appealed.

The court of appeal began with Civ. Code, § 1102, which requires the seller of a single-family property to deliver to the buyer a completed written statement of disclosures. This requirement cannot be waived but expressly does not apply to "property not constituting single-family residential property." Quoting Civ. Code, §§ 1102, subd. (c), 1102.2, subd. (k). Assuming without deciding that § 1102 applied to the residential portions of the properties here, the court disagreed with Nasey that such disclosure was a condition precedent to his performance under the agreement. "A condition precedent is one which is to be performed before some right dependent thereon accrues, or some act dependent thereon is performed." Quoting Civ. Code, § 1436. Whether something

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is a condition precedent depends on the intent of the parties, but the general rule is that "provisions of a contract will not be construed as conditions precedent in the absence of language plainly requiring such construction." Quoting *San Diego Const. Co. v. Mannix*, 175 Cal. 548, 556, 166 P. 325 (1917).

Here, the court found no conditional language in the agreement indicating that Nasey's obligation to close escrow was dependent on receiving any disclosure. And although the agreement required Sellers to make all disclosures required by law, the court found that "[b]y the agreement's plain terms, it is buyer's approval of the properties' condition that is the contingency, not any delivery by sellers of a transfer disclosure statement." Therefore, Nasey's remedy was cancellation of the agreement, not an extension of the time for inspection. The court further noted that the first addendum stated that the agreement was not subject to any contingencies, and the second addendum stated that Sellers had no obligation to deliver any documents or make any disclosures. In addition, Nasey acknowledged in the second addendum that Sellers had performed all of their obligations and were not in default under the agreement.

Although the court found all of this to be sufficient to reject Nasey's arguments, it went on to point out that under Nasey's interpretation, his duty to perform under the agreement would be extended indefinitely despite the fact that the required disclosures applied only to the residential portions of the property, which he himself had occupied for decades. Finding such a result to be absurd, the court found as a matter of law that this could not have been the parties' intent. Even assuming that waiver of the disclosures was void as against public policy, the parties clearly did not "intend that Nasey's entire performance would hinge on sellers fulfilling such requirement. . . ." The court rejected Nasey's contention that *Richman v. Hartley*, 224 Cal. App. 4th 1182, 169 Cal. Rptr. 3d 475 (2d Dist. 2014) and *Realmuto v. Gagnard*, 110 Cal. App. 4th 193, 1 Cal. Rptr. 3d 569 (4th Dist. 2003) required a different conclusion. In *Realmuto*, the contract expressly required the disclosure, and in *Richman*, the parties were merely disputing whether the transfer disclosure statement was a required disclosure under the agreement. By contrast, the parties' agreement here did the opposite.

The court came to a similar conclusion regarding Nasey's cause of action based on Health & Saf. Code,

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§ 25359.7, which provides that a seller of nonresidential real property "who knows, or has reasonable cause to believe" that there has been a release of hazardous substances at the property must give written notice to the buyer. The court found Nasey's claim failed to allege that Sellers knew of, or had reasonable cause to believe that there had been, any release of hazardous substances. While it is true that a seller that actively misrepresents the condition of the property engages in either affirmative or negative fraud, fraud must be pled with specificity. As the court observed, "Nasey has alleged no misrepresentation—not to mention no scienter, justifiable reliance, or damages—that would create a fraud claim outside the ambit of the agreement's 'as-is' provision." Citing *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 990, 22 Cal. Rptr. 3d 352, 102 P.3d 268 (2004).

Lastly, the court addressed Nasey's contention that he was entitled to conduct a Phase II assessment and that Sellers' refusal to allow it "was a breach of the agreement that suspended his obligation to perform under it" such that he was not in breach of the agreement. First, the court noted that Nasey never alleged Sellers had any duties or obligations under CERCLA, and it found the lenders' Phase II requirement to be irrelevant because Nasey expressly disclaimed any financing contingency in the agreement. Rather, Nasey agreed to an all-cash offer with Sellers' written consent required for any "invasive or destructive" investigations. The court found this to reflect the parties' express and unambiguous decision "that the consequences of those risks would be shouldered by Nasey alone." That those consequences came to pass was no excuse for Nasey's failure to perform. Accordingly, the court affirmed the judgment.

>> *See Miller & Starr, California Real Estate 4th, Ch. 1, Contracts, § 1:104; Ch. 2, Specific Contracts, §§ 2:23, 2:26, 2:27, 2:28; Ch. 3, Agency, §§ 3:60, 3:62; Ch. 39, Hazardous Substances, §§ 39:4, 39:5, 39:6, 39:18.*

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SUBJECT MATTER INDEX

CASE BRIEFS

ADJOINING LANDOWNERS

Because there is no strict liability for loss of lateral support under the common law or Civ. Code, § 832 absent excavation by defendant, uphill neighbors' claim against downhill neighbors arising from failed retaining wall was properly dismissed where there was no evidence of excavation. (p. 102)

AGENCY

Seller's provision of a statutory transfer disclosure statement and environmental disclosures was not a condition precedent to buyer's performance where purchase agreement contained no express conditional language, and seller's refusal to allow a Phase II assessment did not excuse or indefinitely suspend buyer's performance given express disclaimer of contingency. (p. 105)

Real estate broker and agent acting as dual agents in failed transaction did not breach their fiduciary duties where buyer was an experienced investor with a "team" of advisors, broker disclosed the dual agency in all agreements, which buyer signed, and there was no evidence disclosure of specific previous deals would have materially affected buyer's agreement. (p. 106)

BROKER COMPENSATION

Real estate broker and agent acting as dual agents in failed transaction did not breach their fiduciary duties where buyer was an experienced investor with a "team" of advisors, broker disclosed the dual agency in all agreements, which buyer signed, and there was no evidence disclosure of specific previous deals would have materially affected buyer's agreement. (p. 109)

BROKER REGULATION

Real estate broker and agent acting as dual agents in failed transaction did not breach their fiduciary duties where buyer was an experienced investor with a "team" of advisors, broker disclosed the dual agency in all agreements, which buyer signed, and there was no evidence disclosure of specific previous deals would have materially affected buyer's agreement. (p. 110)

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CEQA

Environmental impact report for geothermal power plant violated CEQA where it contained conflicting information about project's intended lifespan, speculated about sources of water necessary for project, failed to meaningfully discuss mitigation measures, and failed to address how the project's impact on water flow would affect air quality. (p. 110)

COMMON INTEREST DEVELOPMENTS

Ordinance banning short-term rentals but allowing common interest developments to opt out of restriction was not preempted by the Davis-Sterling Act where opt-out provision did not require amendment of governing documents, and the city did not act arbitrarily or capriciously where ordinance was rationally related to addressing concerns regarding nuisances. (p. 115)

CONTRACTS

Seller's provision of a statutory transfer disclosure statement and environmental disclosures was not a condition precedent to buyer's performance where purchase agreement contained no express conditional language, and seller's refusal to allow a Phase II assessment did not excuse or indefinitely suspend buyer's performance given express disclaimer of contingency. (p. 119)

Real estate broker and agent acting as dual agents in failed transaction did not breach their fiduciary duties where buyer was an experienced investor with a "team" of advisors, broker disclosed the dual agency in all agreements, which buyer signed, and there was no evidence disclosure of specific previous deals would have materially affected buyer's agreement. (p. 120)

COVENANTS

Ordinance banning short-term rentals but allowing common interest developments to opt out of restriction was not preempted by the Davis-Sterling Act where opt-out provision did not require amendment of governing documents, and the city did not act arbitrarily or capriciously where ordinance was rationally related to addressing concerns regarding nuisances. (p. 120)

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EMINENT DOMAIN

When considering privately owned public utility's objection to town's right to take in eminent domain proceeding, trial court must determine whether the utility owner rebutted the presumption that the statutory requirements were met by applying a preponderance of the evidence standard of review, rather than abuse of discretion. (p. 121)

HAZARDOUS SUBSTANCES

Seller's provision of a statutory transfer disclosure statement and environmental disclosures was not a condition precedent to buyer's performance where purchase agreement contained no express conditional language, and seller's refusal to allow a Phase II assessment did not excuse or indefinitely suspend buyer's performance given express disclaimer of contingency. (p. 125)

LAND USE

City's denial of a "builder's remedy" project, which proposed residential uses prohibited by the local coastal program, was proper because the project conflicted with the Coastal Act and the city found there was no feasible way to comply while meeting affordable housing requirements. (p. 126)

Ordinance banning short-term rentals but allowing common interest developments to opt out of restriction was not preempted by the Davis-Sterling Act where opt-out provision did not require amendment of governing documents, and the city did not act arbitrarily or capriciously where ordinance was rationally related to addressing concerns regarding nuisances. (p. 130)

LANDLORD AND TENANT

Three-day notice to commercial tenant, which demanded unpaid rent that became due more than one year before the notice was served, was void under Civ. Proc. Code, § 1161(2), and lease provision applying rent payments to oldest debt did not save the notice as that would undermine legislative intent. (p. 130)

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LANDOWNERS' LIABILITY

Ordinance banning short-term rentals but allowing common interest developments to opt out of restriction was not preempted by the Davis-Sterling Act where opt-out provision did not require amendment of governing documents, and the city did not act arbitrarily or capriciously where ordinance was rationally related to addressing concerns regarding nuisances. (p. 133)

Where tenant hired independent contractor to perform work expressly contemplated under lease agreement and contractor's worker sustained injuries while performing that work, landlord was not liable because it was in the "chain of delegation" under the Privette doctrine. (p. 133)

RECORDING AND PRIORITIES

Order authorizing guardian ad litem to re-record lis pendens against former trustee's real properties was not appealable under Civ. Proc. Code, § 405.39; argument that there was no underlying real property claim should have been made in petition for writ of mandate, which was now untimely. (p. 138)

REMEDIES

Because there is no strict liability for loss of lateral support under the common law or Civ. Code, § 832 absent excavation by defendant, uphill neighbors' claim against downhill neighbors arising from failed retaining wall was properly dismissed where there was no evidence of excavation. (p. 140)

SPECIFIC CONTRACTS

Seller's provision of a statutory transfer disclosure statement and environmental disclosures was not a condition precedent to buyer's performance where purchase agreement contained no express conditional language, and seller's refusal to allow a Phase II assessment did not excuse or indefinitely suspend buyer's performance given express disclaimer of contingency. (p. 141)

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